THE INDIAN DECISIONS, NEW SERIES.

MADRAS, Vol. VI.

THE

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(NEW SERIES)

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JUDGES OF THE HIGH COURT OF MADRAS DURING 1894-1896.

Chief Justice:

HON'BLE SIR ARTHUR J. H. COLLINS, KT., Q.C.

Puisne Judges:

HON'BLE SIR T. MUTTUSAMI AYYAR, K.C.I.E.
„ G. A. PARKER.
„ H. H. SHEPHARD
„ J. W. BEST.
„ S. SUBRAMANIA AYYAR, C.I.E.
„ J. A. DAVIES.
„ R S. BENSON.
„ H. T. BODDAM.

Advocate-General:

HON'BLE J. H. SPRING BRANSON.

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THE
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I.L.R., 17 MADRAS.

17 M. 1.

1892 APRIL 20.

APPEL-LATE CIVIL.

17 M. 1.

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr Justice Parker

SATTAPPA PILLAI (*Defendant*), *Appellant* v. RAMAN CHETTI AND ANOTHER (*Plaintiffs*), *Respondents* *

[20th April, 1892]

Rent Recovery Act (Madras)—Act VIII of 1865, *Section* 10—*Suit in Civil Court for enforcement of patta and other relief—Jurisdiction—Declaration as to enforceable stipulations—Rates of rent—Dry land converted into wet land*

In a suit brought in the Court of a District Munsif by a zemindar and his lessee against a cultivating tenant to enforce the exchange of patta and muchalka and for further and other relief :

Held, (1) *following Ramayyar* v *Vedachalla,* (14 M 441) that the Civil Court had jurisdiction, and that a decree should be passed containing a declaration as to the terms which the patta should contain,

(2) that a patta is enforceable which contains a stipulation that " if nunja " cultivation be made on punja land permanently converted into nunja with or " without water of the landlord's tank, nunja tirva according to the rate fixed " for such cultivation shall be paid," when such stipulation is in accordance with local custom

[F., 12 M.L.J 22 (23) ; Appr., 27 M. 332 (334) = 13 M L J. 429; R., 27 M 13 (15)]

SECOND appeal against the decree of H. T Ross, District Judge of Madura, in appeal suit No 377 of 1877, modifying the decree of T. Venkatramayya, District Munsif of Sivaganga, in original suit No 293 of 1886.

The plaintiffs, who were the zemindar of Naduvayal Palayapat and a lessee from him, sued to enforce acceptance of a patta and execution of a corresponding muchalka by the defendant, who was a cultivating raiyat within the limits of the zemindari The [2] plaint also contained a prayer for such other reliefs as the Court might think fit The defendant objected to the patta tendered as containing conditions which the landlord was not entitled to impose; the most important for the purposes of this report being a stipulation contained in paragraph 3 of the patta

*Second Appeals Nos. 20, 21 and others of 1891,

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to the effect that "if nanja cultivation be made on punja the tirva due "therefor should be included and paid." The third, fifth and seventh issues in the suit were framed as follows:—"Are the plaintiffs entitled "to recover nanja tirva for lands converted by defendant from punja to "nanja lands?" (5) "What is the proper patta to be tendered by plain- "tiffs to the defendant?" (7) "To what relief, if any, are the plaintiffs "entitled in the suit?"

The District Munsif held that the patta tendered by the plaintiffs required certain modifications indicated by him, and he passed a decree that the tenant should accept the patta as modified and execute a muchalka in accordance with it. With reference to the stipulation in paragraph 3 of the patta above referred to, he held that the defendant was bound to pay nanja tirva for achukattu nanja land and for punja land converted into nanja. On appeal the District Judge reversed the decree, dismissing the suit on the ground that the patta tendered was not one enforceable by the landlord. He said with regard to the above stipulation that in his view an implied contract to pay only dry rates for dry lands when wet crops are raised on them to which the landlord contributes nothing might be inferred from the previous pattas relating to a long series of years. Moreover he expressed the view that the liability sought to be imposed on the tenant was opposed to the policy of the Rent Recovery Act, 1865.

The plaintiffs preferred a second appeal to the High Court, which came on for hearing before MUTTUSAMI AYYAR and PARKAR, JJ., together with various other second appeals which arose out of other similar suits instituted by the plaintiffs against other tenants on the same zemindari, in which similar decrees had been passed. Their Lordships pointed out that under Rent Recovery Act of 1865, Section 10, it was incumbent on the Court, when it found that a proper patta had not been tendered to proceed to determine what patta ought to be offered and to direct the tenant to accept such patta and execute a muchalka in accordance with it. They held accordingly that the Judge was not right in dismissing the suit and they set aside his decree. With reference to the evidence [3] relating to the third issue, above stated, their Lordships called the attention of the District Judge to certain documentary evidence on the record and required him to record a revised finding on that issue as to which they made, among others, the following observations:—

"Passing on to the merits, the six clauses in the sample patta B to "which the tenants objected are set out by the District Munsif in para- "graph 6 of his judgment. He discussed them all and indicated how the "patta should be modified, and the Judge concurred in his opinion except "as to one condition relating to payment of nunja tirva when wet crops "are raised on dry lands. This provision, which is the only one now in "dispute, is entered together with some other stipulations in paragraph 3 "of patta B, which runs in these terms:—

"If more or less extent of land than is hereunder specified is cultivat- "ed, if an excess or deficiency should be found during settlement and "survey, if nunja cultivation be made on punja, and if trees, &c., *viz.*, "mango, tamarind, cocoanut, iluppai and jack trees become liable to "taxation, the tirva, &c., due therefor should also be included and paid."

"The appellants' case was that lands situated in Naduvayal Palaya- "pat are classified as (i) punja or dry, (ii) as achukattu punja (dry land "with ridges), (iii) as achukattu nanja and (iv) as nanja, and that when "superior dry crops are raised on dry land with the aid of the ridges, the

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"dry land is treated as achukattu punja, and when wet crops are "raised on such land, it is classified and assessed as achukattu nanja, and "that wet lands irrigated from the tank in the village are classified "simply as nanja. In the cases now before us there is no objection "taken to the classification of dry land into ordinary punja and achu-"kattu punja. The respondents contend, however, that all punja lands "ought to be assessed at punja rates only, although wet crops are raised, "unless such crops are raised with the aid of tank water The District "Munsif found that, according to the custom prevailing in Naduvayal "Palayapat and in the adjacent Palayapats of Kansapatti and Varapoor "and in the Zemindari of Sivaganga of which they are said to be offshoots, "nanja tirva is payable for punja converted into nanja and for punja "cultivated with wet crop. He relied in support of his finding on Exhibits "V series, F series, S series, Ga , H and on [4] several other documents "relating to villages in the adjacent palayapats and on the evidence on "record On appeal the Judge set aside the finding and held that "the landlord was not entitled to impose upon the tenant the sweeping "condition that if wet crops are raised on dry lands, no matter how, wet "rent must be paid He rests his decision on four grounds, *viz* , (i) that "the customary right proved is limited to classifying as wet and charging "wet rent upon dry lands permanently converted into wet by means "of tank water belonging to the zemindar; (ii) that a dispute as to "whether wet rent is payable is one relating to rate of rent and falling "under Section 2 of Act VIII of 1865, (iii) that for ten years at least the "landlord had only been charging dry rent on dry lands growing wet "crops by means of the tenants' own labour and improvements, and that "it is evidence of an implied contract within the meaning of that section, "and (iv) that the liability which the appellants now seek to impose is "opposed to the policy of that enactment Adverting to the lands now in "dispute, the Judge remarks that wet crops are raised, if at all, simply "by rain water falling on or draining into the dry lands or by hill rivulets "flowing on to them or by subsoil moisture oozing up into them, which "natural supply is secured on the lands by the labour of the tenants "in forming the ridges to prevent its escape, and that they are not wet "lands or lands permanently converted from dry into wet, but they are "dry lands on which the tenant takes the risk, if he likes, of trying the "wet crops It is contended in second appeal that the investigation in "the lower appellate Court is defective on several material points, and "that several groups of exhibits have not been sufficiently considered "and due effect given to them whilst coming to a finding as to the custom "set up by the appellants

"As already observed, the Judge considers that achukattu nanja lands "are dry lands not permanently cultivated with wet crops, but lands on "which tenants occasionally grow wet crops at their own risk The "District Munsif does not treat the classification as temporary and the "Judge refers to no evidence in support of his view The evidence of the "appellants' ninth witness, which explains how lands are classified and to "which we are referred by the appellants' pleader, as well as the fact "that lands are usually classified with reference to their ordinary [5] "capacity lend weight to the suggestion that dry lands are designated "as achukattu nanja only when wet crops are permanently grown upon "them and that the distinction between them and ordinary nanja consists "only in the latter being irrigated from the tank, whilst the former depend "for supply of water either upon a spring channel, a hill stream, subsoil "moisture or drainage of other wet lands in the palayapat. We are

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"not referred for the respondents to any exhibit which shows that land "once classified as achukattu nanja has again been treated as punja. "Nor is the reference to them in the plaint as dry lands with respect "to their original condition conclusive. The principle on which dry lands "are classified as achukattu nanja has a material bearing on the question "whether the tenant is bound to accept the classification and to pay the "customary wet rent for achukattu nanja. It is conceded for the appel-"lants before us that the classification has no reference to dry lands occa-"sionally cultivated with wet crops, and that they never intended to "claim wet rent for such crops. Again the Judge considers the source of "irrigation material, and that no dry land is liable for wet rent unless "it is irrigated from the zemindar's tank. It is urged before us that "the tank is not kept in repair by the zemindar, that though the tenants "keep it up, they admittedly pay wet rent, and that this circumstance "favours the view that the liability to pay wet rent is a customary inci-"dent of the tenure of the tenants' holding. The District Munsif refers "to the admission of the respondents' vakil that the source of supply is "immaterial and that it makes no difference whether lands are watered "from the tank or by percolation from the subsoil. The Judge has "apparently overlooked this admission, though several exhibits in the F "series, which specify the source of supply, support the opinion of the "District Munsif. If it has been the practice to treat the source of "irrigation as immaterial, whether it is a tank, a hill rivulet, or spring "channel or subsoil moisture or drainage water, it will have an important "bearing on the question of custom. If the source of supply is not "created either by the tenant or by the zemindar at his expense, and "if it is one already extant in the zemindari, it is by no means clear that "the formation of a ridge for retaining the supply would debar the zemindar "from demanding a share of the crop raised by utilizing such supply if "there is a [6] custom in favour of such demand. Furthermore, we find "that the documentary evidence relied on by the District Munsif has not "been sufficiently considered by the Judge."

The appeal having come on again before the District Judge, he held that the evidence established a custom which would justify the plaintiffs in inserting in the patta a stipulation that if nanja cultivation be made on punja land permanently converted into nanja with or without tank water, the nanja tirva according to the rate for such cultivation shall be paid, and he passed a decree accordingly. In his judgment he said as follows:

"(Paragraph 4.) On behalf of the landlord (plaintiffs) it is conceded "that where punja land is only temporarily converted into nanja by the "tenants making ridges to secure nature's supply of water and wet crops "are raised thereon without using tank water, nanja rates cannot be "charged. On behalf of the tenant (defendants) it is conceded that where "punja land is converted into nanja and wet crops are raised thereon "with the use of tank water, nanja rates must be paid. (Paragraph 11.) "The defendants' pleader in the course of the present argument stated the "willingness of defendants to pay nanja rate on any land which appeared "as achukattu nanja in any of their previous pattas. This is tantamount "to an admission that where land is once classified as achukattu nanja "wet rate is payable thereon. (Paragraph 12.) The custom being estab-"lished, plaintiffs are entitled to insert the clause, as reworded above in "the plaint pattas. (Paragraph 13.) This clause is only a contingent

"clause providing that if such permanent conversion and classification "into achukattu nanja takes place, nanja rate shall be paid. In some of "the present cases, there is admittedly no such land in defendants' hold- "ings as yet. In the remaining cases where items of achukattu nanja "are entered in the pattas and charged with wet rates, it is not the con- "tention of defendants that these are not, in fact, cases of permanent "conversion with nature's supply, but their contention all along has been "that they are not liable to pay wet rates because tank water was not "used."

1892 April 20. Appellate Civil. 17 M. 1.

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar and *Sundara Ayyar*, for appellants

Subramanya Ayyar and *Bhashyam Ayyangar*, for respondents.

JUDGMENT.

It is contended for the appellant that the Judge was in error in passing a decree in respondents' favour under [7] Section 10 of the Rent Recovery Act. Our order, dated 21st November 1889, directed him to determine what patta ought to be offered and to direct the tenant to execute a muchalka in accordance therewith The question whether a Civil Court is competent to act under that section has been since considered by a Full Bench in *Ramayyar* v *Vedachalla* (1). It was held by the majority of the Court that though it was not competent to a Civil Court to act under that section which conferred a special power on the Revenue Courts, yet it may declare what a proper patta is in a suit properly framed for that purpose It is argued that there was no prayer for a declaration as part of the substantive relief, and hence that this was not a proper suit for a declaratory decree The objection is merely formal and was not taken before; moreover the plaint contains a prayer for such other relief as the Court may think fit and a specific issue was raised in regard to it We see no objection to varying the form of the decree so as to give a declaration as to the proper patta.

We are not prepared to attach weight either to the contention that the Judge misconstrued our order in saying that he found it impossible to differ from the appreciation of the evidence set out therein, and that it was needless for him to reproduce the same. This only amounts to a finding upon the facts against the appellant.

The inference drawn in paragraph 11 of the judgment appears to be reasonable and not open to any legal objection. The finding is that punja may be converted into achukattu nanja, though it receives no supply from the tank in the zemindari, and we cannot accede to the contention that there is no finding in that matter Nor do we think that the decisions in *Ramayyar* v *Vedachalla* (1) and *Apparau* v *Narasanna* (2) are applicable in this case.

As regards the observation made by the Judge in paragraph 13 we do not consider that it is irregular to define in a patta the terms of tenancy with reference to a possible contingency which may arise in the course of the fasli for which the patta is tendered. The suggestion that the patta should contain no allusion to achukattu nanja unless such description of land actually existed at [8] the time the patta was tendered is not in our opinion entitled to weight.

Exhibit F series have been sufficiently considered by the Judge, and it does not appear that the appellant urged in the Court below that they

(1) 14 M. 441. (2) 15 M 47

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were collusively got up, or that the pattas were never acted upon. As regards Exhibit II series we observe that the District Munsif came to the conclusion that they were not genuine, and no specific objection appears to have been taken in the lower appellate Court.

This is clearly not a case of enhancement of rent by reason of additional value imparted to land by works of irrigation, and the decisions relating to lands irrigated from the Kistna channels is not in point. The question arising in this suit is whether when punja is converted into achukattu nanja the zemindar is entitled to demand wet rates according to local usage.

The contention that the measurements and names of fields is incorrect is not pressed.

We shall, therefore, vary the decree by directing that a declaration of the proper patta be substituted for the relief awarded under Section 10 of the Rent Recovery Act, and that the decree be confirmed with the modification ordered in *Raman Chetti* v. *Sattappa Pillai* (1). We make no order as to costs in the appeal.

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17 M. 9=3 M.L.J. 132.

[9] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VAITHYANATHAM (*Plaintiff*), *Petitioner v.* GANGARAZU (*Defendant*), *Respondent.** [20th and 25th April, 1893.]

Contract Act—Act IX of 1872, *Section* 23—*Marriage brokage contract—Public policy—Hindu law.*

An agreement to assist a Hindu for reward in procuring a wife, is void as being contrary to public policy.

[F., 2 O.C. 365 (366); R., 32 M. 185=18 M.L.J. 403=4 M.L.T. 1 (F.B.); 1 C.L.J. 261.]

PETITION under Provincial Small Cause Courts Act, 1887, Section 25, praying the High Court to revise the proceedings of C. Sury Ayyar, Subordinate Judge of Cocanada, in small cause suit No. 293 of 1891

Suit to recover Rs. 50. The plaintiff's case was stated in the plaint as follows:—

" Plaintiff agreed to go from place to place and select a girl for defend-" ant's wife. Defendant, therefore, agreed to pay plaintiff, on account of " plaintiff's wages in the said purpose, in the presence of certain mediators, " Rs. 50. Plaintiff accordingly selected a girl and got her married to him. " Defendant failed to pay plaintiff the said sum though demanded."

The Subordinate Judge held that the facts alleged were established by the evidence, but dismissed the suit on the ground that the contract sued on was void as being contrary to public policy.

The plaintiff preferred this petition.

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* Civil Revision Petition No. 485 of 1891.

(1) Second Appeal No. 111 of 1891 (not reported) where *Muttusami Ayyar* and *Parker*, JJ, having before them a similar patta in delivering judgment said : " We shall, " therefore, modify the decree and amend the patta by omitting from clause 3 the words " 'or if nanja cultivation be made on punja,' and adding at the end of the clause the " words 'if nanja cultivation be made on punja land permanently converted into nanja " 'with or without, tank water, nanja tirva according to the rate fixed for such cultiva- " tion shall be paid.' "

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17 M. 9=3 M. L. J. 132.

Subramanya Ayyar, for petitioner.
The counter-petitioner was not represented

JUDGMENT.

MUTTUSAMI AYYAR, J.—The question for determination in this case is whether the contract sued on is a marriage brokage contract, and if so, whether it is invalid There is no reason to think that the contract in question is not a contract as found by the Court below to assist the defendant for reward in procuring a wife The point to which the question then comes is whether the rule of public policy which invalidates marriage brokage con- [10] tracts in England is applicable to the case before us The reason of that rule, as stated in *Hall* v *Potter* (1), which went up to the House of Lords, is that it is conducive to public good that marriages should be procured and promoted by the mediation of relatives and friends and not by hirelings On principle this rule appears to be of general application and not of a special or conventional character Is there anything then in the usage of this country to preclude its operation? As far as I am aware there is nothing in the usage to the contrary; on the other hand, the interference of hirelings in bringing about marriages is regarded with disapproval. It is no doubt true that the Asura form of marriage, which involves a money payment, is valid according to Hindu law, and it was so held in *Visvanathan* v *Saminathan* (2) that a bond given to secure such payment was valid But the payment in that case was to be made to the father of the girl for giving her in marriage. Though this form of marriage is disapproved by text writers, yet it is upheld, as it is in accordance with established usage. It is also to be observed that the money received by the father is often applied in part to making jewels for the girl given in marriage and in part to meeting the other expenses of the marriage, and that this mode of applying the payment is also an argument in favour of the usage But the case is otherwise when hirelings are employed, and their employment tends as much to deceit on parents in India as in England It is true that there are child-marriages in India, but the prevalence of such marriages appears to me to require, rather than exclude, the operation of the rule designed to prevent the possibility of deceit on parents, as well as on either party to the marriage. In the absence of an established usage to the contrary, I see no good reason why an additional evil should be engrafted on this country by ignoring the rule of public policy and according a legal status to marriage brokers by a supposed analogy to Asura marriage. I would, therefore, rest my decision on two grounds, *viz* , that the justice of the rule of public policy is open to no question, and that no established usage precludes its application except in the case of a money payment agreed to be made to the father of the girl in the Asura form. I would dismiss this petition.

[11] BEST, J.—The question for decision is whether the Subordinate Judge is right in dismissing the suit as unsustainable on the ground that the consideration for the agreement being money promised to be paid for the negotiation of a marriage, the contract is against public policy and therefore void.

In *Visvanathan* v. *Saminathan* (2) it was held by Parker and Wilkinson, JJ., that a suit would lie to recover money under a bond executed to the father of a girl in consideration of his giving his daughter in marriage to the nephew of the defendant, the executant of the bond As remarked

(1) 3 Lev. 411 (2) 13 M. 83.

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by Wilkinson, J., in that case the principles on which the English Courts act in disallowing such contract as marriage brokage contracts are not altogether applicable to this country, in which the custom of infant marriages prevails, and when, it may be, that the consideration in such cases is often received by the father for the use and benefit of the child. The case *Ram Chand Sen* v. *Audaito Sen* (1) was also one in which the agreement was to pay money to the father of the child to be given in marriage.

The present case is distinguishable from the above in that the agreement here is with a stranger in consideration of his negotiating the marriage. A case more in point is *Pitamber Ratansi* v. *Jagjivan Hansraj* (2) in which it was held by *Scott*, J., that there was good reason for adhering to the English rule and declining to give to marriage brokers a legal status such as would enable them to enforce their contracts by law. Concurring in this opinion, I agree in dismissing this petition.

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17 M. 12=3 M.L.J. 176.

[12] APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Handley.

KHADIR MOIDEEN (*Defendant No. 5*), *Appellant v.* RAMA NAIK AND ANOTHER (*Plaintiffs Nos. 1 and 2*), *Respondents.**

[21st and 22nd November and 1st December, 1892.]

Limitation Act—Act XV of 1877, Section 22—Joint contractors—Civil Procedure Code—Act XIV of 1882, Section 32—A party to a contract joined as defendant and subsequently made a plaintiff.

Limitation Act, Section 22, is not applicable to cases where the Court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civil Procedure Code, Section 32.

[F., 27 C. 540 (544)=4 C.W.N. 459; 38 C. 342 (353)=13 C.L.J. 3=8 Ind. Cas. 837; R., 18 M. 189 (192); 11 C.W.N. 350; 19 M.L.J. 221=5 M.L.T. 209.]

SECOND appeal, against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 104 of 1890, affirming the decree of M. A. Tirumala Chariar, District Munsif of Kulitalai, in original suit No. 212 of 1889.

Suit to redeem a mortgage. The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge. This second appeal was preferred by defendant No. 5.

The facts of this case appear sufficiently for the purposes of this report from the following judgment.

Ramachandra Rau Saheb and *Narasimha Chariar*, for appellant.

Parthasaradhi Ayyangar, for respondents.

JUDGMENT.

The facts of the case are as follows. In October 1877 the first defendant, the father of defendants 2 and 3 and brother of fourth defendant, borrowed a sum of Rs. 200 from Subba Naik, the brother of the two plaintiffs and of sixth defendant, on the security of certain immoveable property of which fifth defendant has since become the purchaser. Subba Naik having died, the plaintiffs instituted the present suit to recover two-thirds of the amount due on the mortgage; as the other claimant,

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* Second Appeal No. 300 of 1892.

(1) 10 C. 1054. (2) 13 B. 131 (137).

1892 Dec. 1. — APPELLATE CIVIL. — 17 M. 12=3 M. L. J. 176.

sixth defendant, would not join, they made him sixth defendant and relinquished one-third of the amount due. During the progress of the suit, the sixth defendant was, by order of the Court, made third plaintiff, but at the time his right to recover was barred. Two contentions were raised by defendants 1—5: first, that the suit [13] was not maintainable, second, that the debt had been satisfied. Both were overruled and plaintiffs 1 and 2 obtained a decree. The fifth defendant appeals.

By Section 22 of the Limitation Act, it is provided that "when, after "the institution of a suit, a new plaintiff or defendant is substituted or "added, the suit shall, as regards him, be deemed to have been instituted "when he was so made a party." No doubt it has been held by both the High Courts of Bombay and of Calcutta that a suit by several persons, as to some of whom the right to sue is barred, is virtually a suit by the other plaintiff or plaintiffs alone, and that if a suit so framed will not lie, as it will not in the case of a joint cause of action, there can be no other course than to dismiss the claim, but in the cases so decided, *Ramsebuk* v *Ramlall Koondoo* (1) and *Kalidas Kevaldas* v *Nathu Bhagvan* (2), the suit was brought by only one of the joint contractors, the other joint contractors not being parties to the suit. But in the present case the absence of the sixth defendant is satisfactorily accounted for. He was unwilling to join his brothers in the suit. They had therefore no option but to make him a defendant and to relinquish his share of the claim. There is no authority for holding that Section 22 of the Limitation Act applies when the Court of its own motion acts under Section 32, Civil Procedure Code, and orders that a defendant be made a plaintiff. All that was held in *Krishna* v *Mekamperuma* (3) was that "the procedure of the "District Judge in transforming certain defendants into plaintiffs was "under the circumstances of the case irregular." No doubt the whole of the mortgage debt is due to the persons claiming under the original mortgage jointly and not severally and a person entitled to a moiety of the mortgage debt cannot demand to be paid that moiety (*Bishan Dial* v. *Manni Ram* (4),) but that ruling does not apply to a case like the present, where all the parties are before the Court and the matter can be finally dealt with by the decree in the suit.

On the merits also the second appeal must fail. The Judge has found as a fact that the debt was not discharged, and it is not contended that he has misconstrued the evidence.

The second appeal therefore fails and is dismissed with costs.

(1) 6 C. 815 (2) 7 B. 217 (219). (3) 10 M 44 (4) 1 A. 207.

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[14] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

MANASING AND OTHERS (*Plaintiffs*), *Appellants v.* AMAD KUNHI AND ANOTHER (*Defendants*), *Respondents.**

[11th March and 23rd April, 1892.]

Succession Certificate Act—Act VII of 1889, *ss.* 4, 17—*Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India.*

A suit in British India by the executors of the will of a native of Cutch was dismissed, on its appearing that the plaintiffs were furnished only with probate issued from a Native Court, of which they produced a copy certified by the Political Agent of Cutch, and since stamped in accordance with the Court Fees Act, 1870.

Held, that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India under Act V of 1881 or a certificate under Act VII of 1889, but instead of dismissing the suit, the Court should have allowed time for the plaintiffs to have so completed their title to sue.

SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suits Nos. 109 to 113, confirming the decrees of A. N. Anantha Rama Ayyar, Additional District Munsif of Calicut, in original suits Nos. 54 and 77 of 1889 and Nos. 300, 349 and 350 of 1890.

Suits brought by the plaintiffs claiming to represent the estate of one Singjo Rayasi Sait, deceased, to recover debts due by the defendants to that estate.

The testator was a native of Cutch, but the District Munsif found that he carried on business and left property within the jurisdiction of the District Court of South Malabar.

The plaintiffs were the executors appointed under his will and had obtained probate of the will in the Native Court of Bhuj, and they now produced and filed as Exhibit E, a true copy of the probate signed and sealed by the Political Agent at Cutch. The plaintiffs had presented this document to the District Court of South Malabar and paid stamp fees to the amount of Rs. 1,032 upon it Both the lower Courts held that Exhibit E did not [15] establish the plaintiffs' right to maintain the suits, which they accordingly dismissed.

The plaintiffs preferred these second appeals.

The Advocate-General (Hon. Mr. *Spring Branson*) and *Rama Rau*, for appellants.

Bhashyam Ayyangar, *Sankaran Nayar* and *Govinda Menon*, for respondents.

JUDGMENT.

The plaintiffs (appellants 1 to 5) are the executors of the will of one Singjo Rayasi, a native of Cutch, and they sue through their agent Purushottaman Amarasi Sett to recover a debt due to the estate of the deceased.

By Section 4 of Act VII of 1889 it is enacted that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, except on the production, by the person so claiming of (i) a probate or letters of administration evidencing the grant to him of administration to the

* Second Appeals Nos. 1219 to 1223 of 1891.

estate of the deceased or (ii) a certificate granted under this Act and having the debt specified therein

The lower Courts have found that the plaintiffs are not entitled to sue, inasmuch as they have produced neither probate nor letters of administration, nor a certificate granted under Act VII of 1889.

It is contended by the learned Advocate-General that the executors having obtained probate of the will and letters of administration granted by the Judge of Varisht Court of Bhuj, and being unable to claim probate in India, are entitled, on proof of the will and of their status as executors of such will, to recover debts due to the estate of the deceased

The Court of the District Judge of South Malabar having been, by the notification published at page 253 of the *Fort St George Gazette*, dated 30th April 1889, authorized to receive applications for probate or letters of administration under Act V of 1881, it was open to the plaintiffs (appellants) to obtain under Section 5 of the Act letters of administration with a copy of the will annexed

" In regard to the title of executors and administrators," says Story (Conflict of Laws, 8th Edn , § 512) " derived from a grant of administration in the country of the domicile of the deceased, it is to be considered that that title cannot, *de jure*, [16] extend, as a matter of right, beyond the territory of the government which grants it. It has hence become a general doctrine of the common law that no suit can be brought or maintained by an executor or administrator in his official capacity in the Courts of any other country except that from which he derives his authority to act, in virtue of the probate and letters testamentary or the letters of administration there granted to him If he desires to maintain a suit in any foreign country, he must obtain new letters of administration and give new security according to the rules of law prescribed in that country before the suit is brought "

The probate or letters of administration referred to in Section 4, Clause (i) of Act VII of 1889, must be probate or letters of administration granted under Act V of 1881, and as the plaintiffs have not obtained such, they were not entitled to a decree Then it is argued that the provisions of Act VII of 1889 have been substantially complied with, as a certificate in the form, as nearly as circumstances admit, of the second schedule, has been granted to the plaintiffs 1 to 5 by the Political Agent of Cutch, and such certificate has been stamped in accordance with the provisions of the Court Fees Act of 1870.

We think the lower Courts were right in holding that the copy of probate produced by plaintiffs and marked Exhibit E is not a certificate granted by a British representative in a foreign state within the meaning of Section 17 of Act VII of 1889. There is nothing to show that the Political Agent when he affixed his signature to the true copy of the probate intended to grant such a certificate as is required by Act VII of 1889 If he had no such intention, but merely affixed his signature with reference to the provisions of Section 86 of the Evidence Act, the payment of the Court fees required by the Court Fees Act, 1870, although it proves the *bona fides* of the plaintiffs, will not validate the grant of letters of administration as a certificate.

We think, therefore, that the lower Courts were right in holding that plaintiffs were not entitled to a decree, but were wrong in dismissing their suit They should have allowed time for the plaintiffs to take out

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probate or letters of administration or to produce such a certificate as is required by the Act.

We set aside the decrees of the Courts below and remand the suit to the Court of first instance, which will grant the plaintiffs [17] a reasonable time within which to comply with the provisions of Act VII of 1889, failing which the suit must be dismissed.

All questions of costs must stand over until a final decision is given.

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17 M. 17.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

KRISHNAN (*Plaintiff*), *Appellant v.* CHADAYAN KUTTI HAJI AND OTHERS (*Defendants*), *Respondents.**
[12th March and 25th April, 1892.]

Transfer of Property Act—Act IV of 1882, *s.* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Civil Procedure Code—Act XIV of* 1882, *ss.* 278-283—*Mortgage decree —Claim in execution to mortgage premises.*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:

Held, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

[R., 23 A. 1 (3); 10 Ind. Cas. 83=14 Ind. Cas. 449 (452)=22 M.L.J. 129 (135)=10 M. L.T. 544 (547); 21 M.L.J. 213=9 M.L.T. 431=(1911) 1 M.W.N. 165 (177); L.B.R. (1893—1900) 509.]

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 472 of 1887, reversing the decree of J. A. de Rozario, District Munsif of Pynad, in original suit No. 178 of 1886.

Suit instituted in April 1886 to recover certain land with mesne profits.

In original suit No. 124 of 1875, one Koyotti obtained a decree for the redemption of a kanom on the land now in question. To enable him to effect the redemption, he borrowed Rs. 3,000 from [18] the present plaintiff in 1879, and to secure this amount, executed in his favour a mortgage of the same land, undertaking to hand over possession, but possession was not delivered. Koyotti having redeemed the kanom mortgaged portions of the land as security for various loans to defendant No. 1 and four others, and placed them respectively in possession. The plaintiff brought a suit (original suit No. 18 of 1883) against his mortgagor to recover the amount due on the mortgage and obtained a decree for the

* Second Appeal No. 234 of 1891.

amount sued for and for sale of the mortgage premises. The subsequent mortgagees were not joined as parties to that suit. They intervened in execution and orders were made recognising the priority of the plaintiff's mortgage, but giving them the opportunity of discharging it. The plaintiff's mortgage, however, remained undischarged, and the land was brought to sale in execution of the decree and purchased by the plaintiff on 11th December 1884. The order made on the intervention of the present first defendant was dated October 1884, and no steps were taken by him to have this order vacated or the sale cancelled.

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The District Munsif passed a decree for ejectment as prayed, holding, *inter alia*, that the claim of defendant No. 1 was barred by limitation. The Subordinate Judge on appeal reversed this decree on the ground that defendant No. 1 should have been made a party to the suit of 1883, holding that Civil Procedure Code, Sections 278 and 283 were inapplicable to the case on the authority of *Deefholts* v. *Peters* (1), and that the omission to join him in the suit of 1883 was fatal to the present case on the authority of *Venkata* v. *Kannam* (2).

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Govinda Menon*, for appellant.

Ryru Nambiar, for respondent No. 1.

JUDGMENT

There are two questions for determination in this second appeal, first, whether the provisions of Sections 278—283 of the Code are applicable to the case, and, secondly, whether the failure of plaintiff to make first defendant, the puisne mortgagee, a party to his suit No. 18 of 1883 is fatal to his present suit.

The facts are as follows:—In July 1879 plaintiff advanced Rs. 3,000 to one Koyotti to enable him to pay off the kanom and [19] value of improvements which, by the decree in original suit No. 124 of 1875, he had been ordered to pay to the tenants in possession. As security Koyotti, executed in favour of the plaintiff a mortgage-deed of the land, agreeing to pay interest at 12 per cent. until he put plaintiff in possession. Although Koyotti, in execution of his decree in original suit No. 124 of 1875, obtained possession early in 1880, he failed to put plaintiff in possession and mortgaged the lands with possession to first defendant and others. In 1883 plaintiff instituted a suit against Koyotti for the recovery of the Rs. 3,000 with interest from Koyotti personally and by sale of the property in the schedule. He obtained a decree and attached the properties. Thereupon the defendant No. 1 and the other subsequent encumbrancers advanced their claim to hold the land, alleging that they had enabled Koyotti to pay off the amount of the decree in original suit No. 124 of 1875 and that they had made improvements.

The Subordinate Judge allowed their claim for improvements, but refused to reserve their mortgage right on the ground that the plaintiff's mortgage being prior in date must prevail. The property was then put up for sale and purchased by plaintiff, who now sues for possession.

The case relied on by the Subordinate Judge (*Deefholts* v. *Peters* (1)) is not in point. There a decree had been obtained under Sections 86—88 of the Transfer of Property Act and the Court held that proceedings by way of claim under Section 278 only applied in cases of money decrees where the property of the judgment-debtor had been attached. But original suit

(1) 14 C. 631. (2) 5 M. 184.

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No. 18 of 1883 was a suit brought by plaintiff under Section 68 of the Transfer of Property Act to recover the money due to him by Koyotti who had failed to deliver the property to him. He obtained a decree for money recoverable either from Koyotti or by sale of the property in schedule. Koyotti having failed to satisfy the decree, plaintiff attached the land and a proclamation of sale was issued. Thereupon defendant No. 1 preferred a claim on the ground that the property was not liable to attachment, as he held it on mortgage. His claim was, after due inquiry, rejected under Section 281, and that order not having been questioned in a regular suit, defendant No. 1 is now estopped from [**20**] setting up the same claim in the present suit—*Velayuthan* v. *Lakshmana* (1).

With reference to the second question, we do not think the case of *Venkata* v. *Kannam* (2) is an authority for holding that because defendant No. 1 was not a party to original suit No. 13 of 1883, plaintiff's suit must be dismissed. As he was no party to the decree obtained by the plaintiff, he is not bound by it. But all that he can ask as puisne mortgagee is that he shall be allowed an opportunity of redeeming—*Radha Pershad Misser* v. *Monohur Das* (3), *Naru* v. *Gulabsing* (4), and *Radhabai* v. *Shamrav Vinayak* (5). The first defendant's later-created right was subject to the right of the plaintiff, the prior mortgagee. The plaintiff had a right to maintain a suit for the sale of the land to satisfy his mortgage, but having notice of the first defendant's possession as mortgagee ought to have made him a party to the suit. It was competent to Koyotti to deal with the interest remaining in him after the mortgage to plaintiff and the result of the transfer to first defendant was that first defendant acquired as against plaintiff the rights of the mortgagor, in other words the right of redemption. As defendant No. 1 was no party to plaintiff's suit for sale, he would have been entitled to be afforded an opportunity to redeem had not his right been barred by his having taken no steps to set aside the order passed on his claim petition.

The decree of the Subordinate Judge must be reversed and the appeal remanded for the decision of the appeal on its merits. The appellant is entitled to his costs in this Court, and the costs in the lower appellate Court will abide and follow the result.

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[21] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ROWLANDSON (*Appellant*) v. CHAMPION AND ANOTHER (*Respondents*).*
[16th August and 7th September, 1893.]

Insolvent Act—11 and 12 Vic., cap. 21, Section 7—Uncertificated insolvent—After acquired landed property—Mortgage by insolvent—Rights of Official Assignee.

The Official Assignee applied under Insolvent Act, Section 36, for the delivery up to him of a house and furniture of which the occupants were in possession under a mortgage from an insolvent, dated December 1891. It appeared that the insolvent has been adjudicated in 1888 and had received her personal discharge in 1890 and had obtained the house in question under a deed of gift in April 1891, and had died intestate in May 1892, having never obtained a discharge under

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* Original Side Appeal No. 35 of 1892.

(1) 8 M. 506. (2) 5 M. 184. (3) 6 C. 317. (4) 4 B. 83. (5) 8 B. 168.

Section 59 The mortgagees took their mortgage with notice of the insolvency of the mortgagor The Official Assignee did not become aware that the insolvent had acquired the property in question till September 1892 when he intervened and claimed the property free from the mortgage 1893 Sep. 7.

Held, that the Official Assignee was entitled to the mortgaged property free from the mortgage APPEL-LATE CIVIL

[R., 30 M 145 (149)=17 M L.J 14, 5 Bom L R 454 (459), 7 Bom L.R 316; 7 Bom L R 337; 2 C.W N 372 (375), 17 Ind Cas 14 (15)=12 M L T 215] 17 M. 21.

APPEAL against the judgment of COLLINS, C J, as Commissioner of the Insolvent Court, in insolvent case No 21 of 1888

Application by the Official Assignee under Insolvent Act, Section 26, that a certain house and the furniture therein be delivered up to him as constituting part of the estate of an insolvent who had died without obtaining a final discharge The house had been conveyed to the insolvent after she had obtained her personal discharge and was now in the possession of mortgagees under a mortgage from her which comprised also the furniture in the house.

Mr *K Brown*, for Official Assignee.

Mr *R F. Grant*, for the mortgagees

COLLINS, C J —This was an application by Mr *Kenworthy Brown* on behalf of the Official Assignee under Section 26 of 11 Vic, cap 21, for an order directing Messrs Champion and Short, Attorneys of the High Court, to deliver over to the Official Assignee certain property alleged to be the property of one [22] Annie Smith, an insolvent debtor The facts of the case are as follows —

Annie Smith, in February 1888, filed a petition in the Insolvent Court and was duly adjudged an insolvent She received a personal discharge in February 1890, but no final discharge was granted No assets were realized under the estate by the Official Assignee

On the 3rd day of April 1891 one McLintock, by a deed of gift, conveyed to Annie Smith a certain house and land situated in the district of Chingleput and called River Ville The deed of gift to Annie Smith was duly registered Annie Smith was also possessed of certain articles of furniture in and about the said house In December 1891 Annie Smith executed a deed of mortgage to Messrs Champion and Short, Solicitors of Madras, mortgaging the said house and land and furniture for the sum of Rs. 3,500 The mortgage-deed contained a power to sell the "said mortgaged property upon giving to the said mortgagor, her "heirs, executors, administrators or assigns, or leaving on the said "premises a notice in writing to pay off the said mortgage, and if default "shall have been made in such payment for three calendar months after "such notice" It is stated that Annie Smith died on the 31st day of May 1892 intestate The Administrator-General was cited to appear on this application, but took no part in the argument, and makes no claim to the property, and no administration appears to have been taken out to the estate of the said Annie Smith. It appears that Messrs Champion and Short on the 1st June 1892 took possession of the said house, premises and furniture, and have, since June, let the house for short periods to tenants There is no evidence before me under what authority they so took possession, or that they have given at any time to the said Annie Smith, her heirs, executors, administrators or assigns, or left on the premises the notice in writing referred to in the mortgage-deed.

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Mr. *Kenworthy Brown* contends that as Annie Smith had not received her final discharge from the Insolvent Court, any property that she might have acquired subsequent to her insolvency by Section 7 of 11 Vic., cap. 21, vested in the Official Assignee absolutely, and any mortgage or other encumbrance on such property executed by the said Annie Smith was void against the Official Assignee. It is further contended that Messrs. [23] Champion and Short were aware of Annie Smith's insolvency and knew that she had not obtained her final discharge. In support of the former proposition *Kerakoose* v. *Brooks* (1) is relied on. Mr. *Robert Grant* for Messrs. Champion and Short submits that a summary order under Section 26 of the Act should not be made, but that the Official Assignee should be referred to regular suit (*Umbica Nundun Biswas in re* (2)), and he contends that after-acquired property of an insolvent may be dealt with by such insolvent until the Official Assignee intervenes, and if such transaction be *bona fide* and for value, the Official Assignee is bound by such transaction, and he cites *Kristocomul Mitter* v. *Suresh Chunder Deb* (3), *Fatima Bibi* v. *Fatima Bibi* (4), *Herbert* v. *Sayer* (5), *Cohen* v. *Mitchell* (6).

I find the following facts to be proved:—that Annie Smith was duly adjudicated an insolvent in 1888 and had not received her final discharge from the Insolvent Court. That on the 3rd day of April 1891 an absolute deed of gift of the property in question was made to Annie Smith. That in December 1891 a mortgage of the property in question was executed by Annie Smith to Messrs. Champion and Short, that such mortgage was executed *bona fide* and for valuable consideration. That Messrs. Champion and Short were aware that Annie Smith had been adjudicated an insolvent and had reasonable means of knowing that she had not obtained her final discharge from such Court. That the Official Assignee did not intervene in any manner until 8th September 1892.

Upon these facts the question arises what are the respective rights of the Official Assignee and the mortgagees to the property in question. I agree with the observation of Garth, C. J., in *Umbica Nundun Biswas in re* (2) that a case in which difficult questions of law and fact are involved, should not be summarily decided by an Insolvency Commissioner under Section 26 of the Insolvent Act, but the questions should be decided in a regular suit. It appears to me, however, that in this case the facts are simple, and the question of law is one that an Insolvent Commissioner should decide, more especially as his decision is subject to an appeal to a Division Bench.

[24] *Kerakoose* v. *Brooks* (1) is not in point; the only question there decided was that an insolvent's after-acquired property was, under the circumstances of that case, subject to the lien of the person who had advanced to the insolvent money to purchase that property; and the judgment of Lord *Kingsdown* as to the rights of an Official Assignee to after-acquired property of insolvents cannot be said to be exhaustive on the subject, I agree with Wilson, J., that that case is, however, clear authority that the Indian statute, 11 Vic., cap. 21, is to be construed on the same principles as those contained in the various English decisions as to the rights and claims of the Official Assignee to insolvent's after-acquired property—*Krishtocomul Mitter* v. *Suresh Chunder Deb* (3).

(1) 8 M. I. A. 339. (2) 3 C. 434. (3) 8 C. 556.
(4) 16 B. 452. (5) 5 Q. B. 965. (6) L. R. 25 Q. B. D. 262.

The cases reported in the Indian Law Reports on this subject are few, and the only cases referred to at the Bar are decisions of single Judges. In *Kristocomul Mitter* v. *Suresh Chunder Deb* (1) Wilson, J., held that, subject to the right and claim of the Official Assignee, and so long as he does not interfere, an insolvent who has not obtained his final discharge has power, with respect to after-acquired property, to do all acts which he could have done before his insolvency, and in *Fatima Bibi* v. *Fatima Bibi* (2) Farran, J., does not dissent from the Calcutta case. It will be necessary to examine the English decisions on this question It has always, since 5 Geo 11, cap. 30 been held that after-acquired property passes to the Assignee in bankruptcy, and that no new assignment was necessary (*Kitchen* v *Bartsch* (3),) yet it has also always been held that after-acquired property continued in the bankrupt until the Assignees interfered to claim it, and a bankrupt could, for valuable consideration, part with his after-acquired property so as to give a good title to his alienee. see *Drayton* v. *Dale* (4) The case relied on by the counsel for the Official Assignee (*Meggy* v. *Imperial Discount Company* (5) is the decision of a single Judge sitting at *nisi prius*, and that case in the opinion of Lord Esher, M.R., does not touch the point in question. In *Cohen* v *Mitchell* the Court of Appeal reviewed the principal authorities on the respective rights of an Official Assignee and bankrupt over after-acquired property, and decided that until [26] the Trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of his bankruptcy, are valid against the trustee.

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I hold, therefore, that the English decisions are applicable to cases arising under 11 Vic , Cap. 21 (see *Kerakoose* v. *Brooks* (6),) and I agree with the judgment of the Master of the Rolls and the Lords Justices in *Cohen* v *Mitchell* (7) I, therefore, order that Messrs, Champion and Short do deliver up to the Official Assignee as being part of the estate and effects of the insolvent Annie Smith, upon payment to them of their mortgage debt amounting to Rs. 3,500 and interest to the 8th September 1892 amounting to Rs 301-12-10 and a further sum of Rs. 37 agreed to be paid by the Official Assignee, the hereditaments and premises and other property mentioned in the mortgage deed of the 17th December 1891, and I do further order that Messrs. Champion and Short pay to the said Official Assignee the sum of Rs 103-8-0, rents and profits of the said premises received by them up to the 8th September 1892.

I make no order at present as to costs

The Official Assignee preferred this appeal.

Mr *K. Brown*, for appellant.

Mr *R. F. Grant*, for respondents.

JUDGMENT.

BEST, J.—The question for decision in this appeal is whether the mortgage of a house and land made by an adjudicated insolvent with regard to whose property a vesting order had been passed under Section 7 of the Insolvent Act, 11 and 12 Vic , cap 21, prior to the acquisition of the property by the insolvent, is binding on the Official Assignee so that the latter can only get possession of the property (under Section 26 of the Act) on paying to the mortgagees the mortgage amount with interest.

(1) 8 C 556. (2) 16 B. 452. (3) 7 East 53. (4) 2 B. & C 293
(5) L. R. 3 Q. B. D. 711. (6) 8 M. I. A 339. (7) L. R. 25 Q B D 262

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The findings are that one Annie Smith was duly adjudicated an insolvent in 1888 and had not received a final discharge (under Section 57 of the Act) up to the time of her death (which is said to have taken place in or about May 1892); that on the 3rd April 1891 she acquired the property in question under an absolute deed of gift; that in December 1891 she mortgaged the [26] same to the respondents; that such mortgage was executed *bona fide* and for valuable consideration; but that the respondents were aware that their mortgagor had been adjudicated an insolvent, and had reasonable means of knowing that she had not obtained her final discharge.

The learned Commissioner of the Insolvent Court has, on the above findings held the mortgage to be valid as against the Official Assignee. He has so held on the authority of the English Court of Appeal in *Cohen* v. *Mitchell* (1), in which the following proposition was laid down and adopted, *viz.*, "Until the trustee intervenes, all transactions by a bankrupt "after his bankruptcy with any person dealing with him *bona fide* and "for value in respect of his after-acquired property, whether with or "without knowledge of the bankruptcy, are valid against the trustee." Our attention has, however, been called by appellant's counsel to a more recent English case *in re New Land Development Association and Gray* (2), in which the Court of Appeal concurred with Chitty, J., in thinking the proposition laid down in *Cohen* v. *Mitchell* (1) to be inapplicable to real estate. However this may be, the proposition as laid down in *Cohen* v. *Mitchell* (1) is admittedly in terms "wider than appears to have been laid down "before." *See per* Lord Esher, M.R. In fact in *Herbert* v. *Sayer* (3), which is cited in support of the above proposition, it was merely held that the bankrupt "acquires property, and contracts for the "assignees, who may, whenever they please, disaffirm his act; but until "they do so, his acts are all valid."

As observed by Fry, L.J., in the proposition as laid down in *Cohen* v. *Mitchell* (1) the word 'intervene' is substituted for the words 'disaffirm his acts' in the rule as stated in *Herbert* v. *Sayer* (3), the object of the alteration being admittedly to deprive the trustee who intervenes of the "power retrospectively to disaffirm what has otherwise been validly done "by the bankrupt."

The facts of *Cohen* v. *Mitchell* (1) were as follows:—One Arthur Cohen became bankrupt, and subsequently, and before he obtained his discharge, carried on business in buying and selling agricultural machines, and, to enable him to do so, obtained advances of several sums of money from Hyam Cohen. One [27] Foale seized some of the machines, and the bankrupt brought an action against him for a wrongful conversion of the machines so seized. The bankrupt, having no money with which to carry on the action, assigned the cause of action to Hyam Cohen in consideration of the money already due to him and the further sum necessary to carry on the action. The action resulted in a verdict for the plaintiff. The trustee in bankruptcy of Arthur Cohen then intervened and demanded the money of Foale as part of the property of the bankrupt. Hyam Cohen also claimed the amount under an assignment. Foale consequently interpleaded and paid the money into Court, whereupon the issue was tried between Hyam Cohen as plaintiff and the trustee as defendant. It was with reference to these circumstances that the Court of Appeal laid

(1) L. R. 25 Q. B. D. 262. (2) [1892] L. R. 2 Ch. 138. (3) 5 Q. B. 965.

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down the proposition quoted above " in terms wider than it had been laid " down before " in order to preclude the trustee from disaffirming retrospectively what had " otherwise been validly done by the bankrupt."

It was held by the Privy Council in *Kerakoose* v. *Brooks* (1) with reference to the property acquired by an insolvent subsequent to his adjudication as an insolvent and prior to his final discharge that the assignee's right under 11 & 12 Vic., cap. 21, is subject to the following two qualifications: (i) property acquired subject to liens and obligations remains subject to those charges and equities even when taken by the assignee; and (ii) if the insolvent carries on trade with the assent of the assignee, the property acquired in such trade will be subject to the charge of the creditors in that trade in priority to the claim of the Official Assignee.

The second of these qualifications requires that the trade shall have been carried on " with the assent of the assignee." It was the want of this assent, I imagine, in *Cohen* v. *Mitchell* (2) that necessitated the adoption of the proposition there laid down, the object being to prevent an " otherwise valid " claim being defeated, and as remarked by Chitty, J , in the more recent case " it is a fair observation to make on all *dicta* of " this kind that they are enunciated with reference to the particular question " then before the Court " The reason for the rule as recognized in *Herbert* v *Sayer* (3) is stated by the Lord Chief Justice of the Common Pleas [28] to be that " otherwise there would be no protection to persons " dealing with an uncertificated bankrupt; not only would they acquire " no title by purchases from him, but payments for such purchases and " for all other debts due to the uncertificated bankrupt would be " invalidated "

The question for decision in *Herbert* v. *Sayer* (3) was merely as to the right of the bankrupt to maintain a suit as indorsee of a bill of exchange, and all that was then decided was that he had such right " except as against the assignees ", and this is all that was decided in *Fowler* v. *Down* (4) and the other cases cited in *Herbert* v. *Sayer* (3). So also in *Drayton* v *Dale* referred to by the learned Commissioner and in *Fatima Bibi* v. *Fatima Bibi* (5) As remarked by Kay, L J., in the recent case of *in re New Land Development Association and Gray* (6)—the rule was only applied in *Cohen* v. *Mitchell* (2); for the purpose of protecting persons who had been " trading with the bankrupt and dealing with personal " estate."

The only case brought to our notice in which the rule has been applied to real estate is *Kristocamul Mitter* v. *Suresh Chunder Deb* (7), in which Wilson, J , upheld as against a subsequent purchaser from the Official Assignee the claim of a prior purchaser from an undischarged insolvent, of the latter's share in family property which presumably was or at least included real property. This decision purports to proceed on the authority of *Herbert* v *Sayer* (3), but, as already observed, the only question in that case was the right of the bankrupt to maintain a suit in the absence of the trustee. It was, however, expressly held in *Herbert* v. *Sayer* (3) that all acquisitions and contracts made by an adjudicated bankrupt were made for the trustee and subject to disaffirmance by the trustee.

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(1) 8 M. I. A. 339. (2) L. R. 25 Q. B. D. 262 (3) 5 Q B. 965
(4) 1 Bos. & Pul. 44. (5) 16 B. 452.
(7) 8 C. 556.

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On a consideration of the various cases that we have been referred to, the conclusion at which I arrive is that in order to be binding on the Official Assignee a charge on after-acquired property created by an adjudicated insolvent, who has not obtained his final discharge, must come within the scope of one or other of the two qualifications stated in *Kerakoose* v. *Brooks* (1), and that [29] *Cohen* v. *Mitchell* (2) is merely authority for the proposition that when an insolvent is allowed to carry on trade or other business, the Official Assignee's assent thereto (required under the second of the two qualifications mentioned in *Kerakoose* v. *Brooks* (1) will be presumed up to such time as he may intervene.

As the mortgage to the respondents in the present case does not come within either of these qualifications, I would allow this appeal and set aside so much of the order of the learned Commissioner of the Insolvent Court as directs the Official Assignee to pay to the respondents the mortgage amount and interest thereon.

Respondents must pay the Official Assignee's costs both in this Court and in the Court below.

Muttusami Ayyar, J.—I come to the same conclusion, though not upon the same ground. The facts of the case are shortly these:—In February 1888 Annie Smith was declared an insolvent and a vesting order was made under 11 and 12 Vic., cap. 21, Section 7. In April 1891 she obtained under a deed of gift a house and land called River Ville and she was also possessed of certain articles of furniture in and about the house. In December 1891 she mortgaged the said property to Messrs. Champion and Short for a sum of Rs. 3,500 with a power of sale. In May 1892 Annie Smith died intestate, and she had never obtained her final discharge under Section 59 of the Insolvency Act. In June 1892 Messrs. Champion and Short took possession of the house, land and furniture, and they have since let the house from time to time to tenants for short periods. The learned Commissioner has found that the mortgagees were aware that Annie Smith had been adjudicated an insolvent and had reasonable means of knowing that she had not obtained her final discharge. The Official Assignee stated in his petition that on the 7th September 1892 he saw a notice in the *Madras Times* whereby the house in question was advertised for sale as the property of the late Mrs. Annie Smith. On the 8th September 1892 he intervened and claimed the property free of the mortgage. The question arising for determination upon these facts was whether the mortgage was binding on the Official Assignee, and the learned Commissioner determined it in the affirmative, the ground of decision [30] being that the decisions on a similar question arising under the English Bankruptcy Acts are applicable to cases arising under 11 and 12 Vic., cap. 21, that according to those decisions the after-acquired property continued in the insolvent until the Assignee interfered to claim it, and that meanwhile the insolvent could, for valuable consideration, part with it so as to give a good title to his alienee. Hence this appeal.

For the appellant it is contended (i) that the English decisions relied on by the learned Commissioner do not apply to cases arising under the Indian Insolvency Act; (ii) that assuming that they are applicable, the decision under appeal is at variance with the case of *re New Land Development Association and Gray* (3), and (iii) that according to the true construction of 11 and 12 Vic., cap. 21, Section 7, and to the decision of the

(1) 8 M. I. A. 339. (2) L. R. 25 Q. B. D. 262. (3) [1892] L. R. 2 Ch. 138.

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Privy Council in *Kerakoose* v *Brooks* (1) property acquired by the insolvent subsequent to the vesting order and prior to his final discharge vests at once in the Official Assignee, whether he intervenes or not, and that it is not competent to the insolvent to mortgage or otherwise alienate it.

The main question for decision is, what is the true interpretation of 11 and 12 Vic, cap. 21, Section 7, as regards the mode of vesting in the Official Assignee of property acquired by the insolvent subsequent to the vesting order and prior to his final discharge. The language of the section throws no light on the point beyond the fact that the word 'vest' is used both with reference to property already in existence and to after-acquired property. There is no doubt that property which is in existence when the insolvent files his petition vests at once in the Official Assignee, and no one but the Assignee is since competent to alienate it In the case of subsequently-acquired property however there is this peculiarity The insolvent being the acquirer, it must vest in him at least for an instant and then vest in the Official Assignee The exact point for consideration is, as stated by the learned Chief Justice of the Common Pleas, this — "Is it the intention of the Legislature that such property should vest in "the insolvent as acquirer but for an instant and then vest in the Official "Assignee, or is it the intention that the Official Assignee should have "the beneficial interest and the insolvent should acquire such property for "his benefit in the capacity of an agent [31] so as to be competent to "deal with it subject to the intervention of the Official Assignee?"

The latter is declared to be the real intention of the Legislature in cases decided under the English Bankruptcy Acts. *Herbert* v *Sayer* (2) and *Cohen* v. *Mitchell* (3) are the leading cases on the subject The reasons for adopting the latter intention as the real intention are lucidly explained in the first-mentioned case by the learned Chief Justice of the Court of Common Pleas in the following terms —"The effect of the statutory "enactments may be either to transfer immediately such property or con-"tracts from the bankrupt to the assignees, vesting the property in the "bankrupt for an instant only, or to give the assignees the beneficial "interest and to make the bankrupt acquire property or contract for their "benefit only in the nature of an agent. The cases accord with the latter "construction of the statute, and it is most consistent with convenience; "for, otherwise, there would be no protection to persons dealing with an "uncertificated bankrupt Not only would they acquire no title by "purchases from him, but payments for such purchases, and for all "debts due to the uncertificated bankrupt would be invalidated. The "Legislature, by several statutes, have protected all such payments by "and to, and all dealings and transactions with, the bankrupt *bona fide* "made or entered into without notice of the act of bankruptcy before the "fiat; but there is no provision by the statute law for such payments, "dealings or transactions, after the fiat; and the only way by which they "can be rendered valid and great confusion, inconvenience and hardship "prevented, is by adopting the latter construction, and holding that the "bankrupt acquires the property, and contracts, for the assignees, who "may, whenever they please, disaffirm his act, but until, they do so, his "acts are all valid." It is thus clear that the English cases deal with the question as one of reasonable construction, and it appears to me that the whole of the reasoning is applicable under the Indian Insolvency Act. I see no substantial difference on the point now before us between the Indian

(1) 8 M. I. A. 339 (2) 5 Q. B. 965 (3) L. R 25 Q. B D. 262

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Insolvency Act and the English Bankruptcy Acts, *viz.*, 6 Geo. IV, cap. 16, Sections 63 and 127, 1 & 2 Will. IV, cap. 56, Section 25, and the Bankruptcy Act, 1883, Sections 44, 58 and 118. The provisions as to vesting are similar. [32] I agree with the learned Chief Justice that they are applicable under 11 & 12 Vic., cap. 21, especially as the question is one of reasonable construction to be put on similar provisions. I also agree in the opinion that the decision of the Privy Council in *Kerakoose* v. *Brooks* (1) is not an authority against their applicability,, and that, on the other hand, it is a clear authority in favour of their applicability. In that case, the uncertificated Insolvent borrowed money for the purpose of purchasing goods to carry on a business; and in order to secure the advances, gave a bond and agreed in writing to execute a mortgage of the goods so purchased to the lender to secure repayment. He afterwards executed an assignment of the goods for that purpose. The business was carried on with the knowledge of, and without any objection by, the Official Assignee. The lender had never possession of the goods assigned to him by the insolvent and the same remained in possession of the insolvent until his death. The Privy Council held that the insolvent's after-acquired property was subject to the lien of the lender and that such lien was paramount to any claim of the Official Assignee under the insolvency. In their judgment the Lords of the Privy Council said:—" The Assignee's right to the subsequently-acquired pro-" perty is subject to two qualifications. In the first place, if the insolvent " has acquired property subject to liens and obligations, then any property " taken by the assignee under that state of things is taken subject to those " charges and equities which affect the property in the hands of the insol-" vent. The second qualification is this, that if the insolvent carries on " trade at a subsequent period with the assent of the assignee of the estate " under the Act, in the first instance the property which is acquired in the " subsequent trade will be subject in equity to the charge of the creditors " in that trade, in priority to the claim of the assignee under the first " insolvency." These qualifications are enunciated with reference to the particular facts of the case, and I agree in the opinion of the learned Commissioner that they are not exhaustive.

The substantial question is whether according to the recent case of the *New Land Development Association and Gray* (2), the rule laid down in *Herbert* v. *Sayer* (3) and *Cohen* v. *Mitchell* (4) [33] is applicable to immoveable or real property and is not limited in its scope to moveable property.

This case was decided in April 1892 and does not appear to have been cited before the learned Commissioner. The facts of that case were that a testatrix devised her real estate to her nephews, William Shurley and Joseph Shurley, as tenants in common. The nephews purported to convey the estate to a land company, who, in May 1891, entered into a contract for its sale to a purchaser. The purchaser discovered before completion that in 1888 William Shurley had been adjudicated bankrupt and that he was still undischarged. The trustee in bankruptcy then intervened and claimed to be entitled to a moiety of the estate. The question for decision was whether an undischarged bankrupt could, even before the intervention of the trustee in bankruptcy, convey real estate acquired after the bankruptcy, to a *bona fide* purchaser for value, so as to give a good title to the purchaser as against the trustee. Whether the rule laid down in *Cohen* v. *Mitchell* (4) was not limited to goods was

(1) 8 M. I. A. 339.
(2) [1892] L. R. 2 Ch. 138.
(3) 5 Q. B. 965.
(4) L. R. 25 Q. B. D. 262.

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considered by Chitty, J, and by the Lords Justices on appeal. They all held that it was so limited. Chitty, J, referring to the argument that after-acquired real estate vests in the bankrupt and remains vested in him till the trustee intervenes and claims it, said.—" I see no justification in " the statute or the authorities for holding that the legal estate will first " vest in the bankrupt and then shift to the trustee when he intervenes "

On appeal the Lords Justices expressed the same opinion Lord Justice Kay considered that " where a bankrupt is carrying on business " and dealing with personal property, such dealing will to some extent " consume it And if the trustee looks on and does not intervene, then " the consumption of the property goes on as a consequence of the carrying " on of the business by the bankrupt " He thought that it had nothing to do with real estate Lord Justice Lindley said, " there is some sense in " the doctrine as to personal estate But I have never heard it suggested " by any body that it had the slightest application to real estate which " passes by conveyance and not by delivery." The case clearly limits the rule in *Herbert* v *Sayer* (1) and *Cohen* v *Mitchell* (2) to personal estate Though there was also another ground on which [34] the decision was supported, I feel myself bound to adopt the proposition laid down in that case by the Court of Appeal, even assuming that it was in the nature of a *dictum*

The property in the case before us being what is known to English law as real property, I concur in the order proposed by my learned colleague

17 M. 34=3 M.L.J. 250.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Shephard

KOOLAPPA NAIK (*Plaintiff*), *Appellant* v KOOLAPPA NAIK AND OTHERS (*Defendants*), *Respondents* * [25th, 26th and 27th July and 8th August 1893]

Limitation—Adverse possession—Hindu Law.

The holder of an impartible zemindari died in 1822, leaving two widows and a daughter The widows entered on the estate and having successfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great-grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered. She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest then surviving sapinda of the last male holder. The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zemindari from him.

Held, that the suit was barred by limitation

[R., 41 P.R 1903]

APPEAL against the decree of T Narayanasami Ayyar, Subordinate Judge of Madura, West, in original suit No 26 of 1891

Suit for possession of an estate.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Desika Chariar*, for appellant

Subramanya Ayyar, for respondents Nos 1, 4, 5 and 6.

Rajagopala Ayyar, for respondents Nos 2 and 3

* Appeal No 61 of 1892

(1) 5 Q. B 965

(2) L R 25 Q B D 262

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APPELLATE CIVIL.

17 M. 34=3 M. L. J. 250.

JUDGMENT.

The question in this appeal is whether the suit is barred by limitation. Vijayagopal, the last undisputed male [35] holder of the impartible zemindari of Sundayur, died in 1822, leaving no sons, but only two widows and a daughter. His rightful successor in the enjoyment of the zemindari was Kuppayasami Koolappa and, in 1824, he brought a suit against the two widows Ettakkammal and Krishnammal, but without success, and so the zemindari remined in the possession of the widows and the survivor of them till the death of Ettakkammal in 1870. The plaintiff is the great-grandson of Kuppayasami and, in 1891, claims in virtue of the same right as was asserted by him in 1824. His suit having been dismissed, it is now contended in appeal that the suit is not barred by limitation, and that, although otherwise it would so be barred, the circumstances under which the defendants came into possession give the plaintiff a right of action against them. This latter point may be disposed of first. It is said that the defendant who belongs to the same branch of the family with the plaintiff, being his father's younger brother, recovered the zemindari after the death of Vijayagopal's daughter in 1882 as a member of the undivided family and for the family. Having recovered it on this footing, he is bound, it is contended, to deliver it up to the plaintiff, who, as the son of an elder brother of the defendant, has the preferential claim. It is true that if the zemindari had descended in the ordinary course and had not been usurped by the widows of Vijayagopal, the plaintiff is the member of the family who would be entitled to hold it; but assuming that the law of limitation does not allow the plaintiff to put forward this claim on its own merits his Vakil relies on the alleged conduct of the defendant. The claim does not appear to have been put on this footing in the plaint, and there is, in fact, no foundation for it. The defendant's claim to the zemindari was based on the fact of his being the nearest sapinda entitled after the death of Ettakkammal's step-daughter, and there is no evidence to show that he assumed possession as trustee for the family or otherwise than in his title of heir.*

Apart from this contention, it is argued that the suit is not barred by limitation, because in 1870, when Ettakkammal died, the right of the other branch was not barred, and since that date the zemindari has not been held adversely by any one person or by persons claiming in succession to each other for more than twelve years. The fact is that since Ettakkammal's death the zemindari has been in the enjoyment, first, of her step-daughter [36] till 1882 and subsequently of the defendant. The respondents' Vakil relies on the case of *Vijayasami* v. *Periasami* (1) and contends that the suit is barred by limitation, time having begun to run in 1822, and nothing having since occurred to revive the plaintiff's right of suit. In the case cited the Zemindar Gouri Vallabba Tevar died in 1829, and thereupon, according to the plaintiff's case, his father ought to have succeeded. The latter's claim was, however ignored, there was litigation between other claimants in which Kathama Nachiar, a daughter of the late zemindar, was victorious; she was in possession till her death in 1877, and since that date the defendant, the son of her elder sister. It was held that the suit brought against him in 1881 was barred by limitation, because time began to run

* [See Exhibit VI, p. 43, Exhibit X, p. 49.—ED.]

(1) 7 M. 242.

in 1829 and continued to run without interruption as against the descendants of the zemindar by his alleged wife the plaintiff's mother. An attempt is made to distinguish this case from the present by pointing out that, whereas Kathama Nachiar died in 1877 after the Limitation Act of 1871 came into force, Ettakkammal died in 1870 before the Legislature had laid down, in express terms, the rule which is contained in Section 29 of the Act of 1871. The judgment in the reported case does not, however, rest on this circumstance and does not refer to Section 29 or the principle embodied in it. Nor do we understand how the supposed alteration of the law in 1871 could affect the rights of the parties either in this case or in the reported case. The difficulty of the plaintiff's position is to explain how, when time once began to run against his lineal ancestors and their right of suit had become barred, it can be said that time has ceased to run or the right of suit been revived. No question of the plaintiff's right to be restored to his original title arises, because he has not succeeded in recovering possession. It is hardly necessary, therefore, for us to express an opinion with regard to the view held in Bengal with reference to the question whether under the Act of 1859 the right was extinguished by an adverse possession exceeding twelve years; see *Gossain Dass Chunder* v. *Issur Chunder Nath* (1), *Gunga Gobind Mundul* v *The Collector of the Twenty-four Pergunnahs* (2), and cases cited in *Radhabai* v *Anantrav Bhagvant Deshpande* (3). In our opinion, the case cannot be distinguished from *Vijayasami* v. *Periasami* (4). The plaintiff's claim [37] cannot, like the defendants' title, be reconciled with the lawfulness of Ettakkammal's possession. Her holding of the zemindari was adverse to the plaintiff's ancestor, and from the date of its commencement when his cause of action arose, time began to run, and it has continued to run without intermission. The appeal is dismissed with costs.

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17 M. 37=3 M.L.J. 276.

APPELLATE CIVIL.

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr. Justice Shephard.

RANGANAYAKULU AND OTHERS (*Plaintiffs Nos. 1 and 4 and Representative of plaintiff No. 3*), *Appellants v.* PRENDERGAST (*Defendant*), *Respondent* * [10th and 11th August and 10th September, 1893.]

Police Act (Madras)—Act XXIV of 1859, Sections 21, 49—Procession likely to cause breach of the peace—Powers of police—Removal of banners from persons in the procession.

A procession of Hindus carried certain banners and the Superintendent of Police was of opinion that a breach of the peace would be occasioned if these banners continued to be displayed, and in good faith, for the purpose of preventing such breach of the peace, he took away the banners from certain persons in the procession.

Held, that the action of the Superintendent of Police was not justified by Madras Police Act, 1859, Sections 21, 49, and that he was accordingly liable for the trespass.

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* Second Appeal No. 1679 of 1892.

(1) 3 C 224. (2) 11 M. I. A. 345. (3) 9 B 198 (228). (4) 7 M 242.

1893 Sep. 19. APPELLATE CIVIL. 17 M. 37=3 M. L. J. 274

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 1167 of 1892, modifying the decree of O. V. Nanjundayyar, District Munsif of Masulipatam, in original suit No. 19 of 1890.

The facts of the case were stated in paragraphs 2 and 3 of the District Judge's judgment as follows:—

"This is a suit by four Hindu residents of Masulipatam town "against the Superintendent of Police of the Kistna district, who interfered with a procession in the streets of Masulipatam on October "3rd, 1889. Plaintiffs ask for a declaration that they may pass in "procession through the streets 'with dress, music, symbols and other "accompaniments,' and they claim Rs. 100 as damages [38] for "the interference. The District Munsif gave plaintiffs a declaratory "decree, but refused to give any damages. The District Munsif, at the "same time, ordered the Superintendent of Police to bear all the costs "of the suit. Against this decision the defendant appeals, and an objection memorandum is lodged on behalf of respondents claiming the "damages that were asked for in the suit and asking that the declaratory "decree be made more definite.

"The facts in this case are few and simple. Certain Muhammadans "of Masulipatam informed the Superintendent of Police that there was a "bad feeling among some Muhammadans in the town, because of an idea "that the Hindus in the procession at the Hindu festival caricatured "Muhammadan emblems: an anonymous petition to the same effect was "sent to the District Magistrate, and he sent this petition to the Superintendent of Police with the following note:—'I suppose you are keeping "your eye on the Dasara performances to prevent any differences with "the Muhammadans, *vide* the enclosed.' On this paper the Superintendent wrote an order to the Town Inspector, directing him to give notice "by beat of tom-tom that persons were not to imitate Muhammadan disguises without a license from the Superintendent. On the same day a "Hindu procession was stopped in the streets by the Town Inspector and "Station Officer. They sent word to the Superintendent, and he at once "came to the spot. The Town Magistrate, a Brahman, was also present. "The Superintendent inspected the *Sivamandiram* and decided that it did "not resemble a Muhammadan taboot and, therefore, let it pass. He "caused a flag to be unrolled on its staff, so that it should no longer resemble a Muhammadan 'pir.' He took possession of two banners which bore "on one side the device of the crescent and the star. He turned out "of the procession some singers who were clad in tinsel caps and robes. "He then permitted the procession to proceed. On the following day "he refused to reconsider his decision and to grant licenses to plaintiff "except on conditions."

The District Judge held that the defendant had acted *bona fide*.

The District Munsif passed a decree as follows:—

"It is decreed that the plaintiffs' right to celebrate in the public "streets of Bandar town the festivals with jundas (flags) and Ramabajana "*as it was done in the year* 1889 is established, [39] that the said festival "be allowed to be celebrated on proper occasions and in a proper manner "without causing obstruction either to the worship of people of other religions or to the festivals relating to them *and that the defendant or his* "*subordinates do refrain from causing obstruction at any time except when* "*there may be breach of peace.*"

The District Judge modified this decree by striking out the words which are printed above in italics. 1893 SEP. 19.

The plaintiffs preferred this second appeal.

Pattabhirama Ayyar and *Sriramulu Sastri*, for appellants. APPELLATE CIVIL.

The Acting Government Pleader (*Subramanya Ayyar*), for respondent.

JUDGMENT.

COLLINS, C J.—This was a suit brought by four Hindus against a Police Superintendent of the Kistna district, asking for a declaration that they have a right to celebrate a festival in the public streets of Masulipatam with such music, garments, ensigns, &c., as the plaintiffs may like, for an injunction restraining defendant and his subordinates from interfering with such procession and for damages for taking possession of certain banners and removing certain caps, &c., from some of the processionists. Both the Lower Courts agreed in granting the plaintiffs a declaration that they had a right to celebrate in the public streets a certain festival, but an injunction was refused and no damages awarded for taking possession of the banners. 17 M. 37 = 3 M. L. J. 276.

The only point that was argued in second appeal was that the plaintiffs were entitled in all events to nominal damages for the wrongful act of the Police Superintendent in taking away the plaintiffs' banners. It was not disputed that the banners were taken away by the orders of the defendant, but it was contended that the defendant acted in good faith, that he was justified in so doing, as he believed these particular banners were obnoxious to the Muhammadans, and if carried, would produce a breach of the peace

It is not disputed by the Government Pleader that the plaintiffs had a right to pass in procession through the streets of Masulipatam, and the only question that arises is, was the defendant justified in taking possession of the banners which undoubtedly he removed from the procession. I carefully guard myself in this judgment by stating that it is the powers of the police in this district alone that I am dealing with, and both Mr Patta-[40] bhirama Ayyar, the Vakil for the appellants, and the Government Pleader admit that the powers of the police over processions are defined by the Madras Police Act XXIV of 1859 Section 49 of that Act defines the powers of the police—they may *direct the conduct* of all assemblies and processions in the public streets, prescribe the routes by which and the time at which such processions may pass, keep order in the public streets and prevent obstructions; they may also regulate the use of music in the streets on the occasion of native festivals and may direct crowds of twelve or more persons to disperse when they have reason to apprehend any breach of the peace. The powers thus given to the police are large and set out with particularity, but I fail to see that the Superintendent of police has any power to remove from the procession any banners belonging to the processionists and to order those banners to be taken to the police station. I am of opinion, therefore, that the respondent in taking possession of the banners committed in law a tortious act, but under the circumstances I give only nominal damages, *viz.*, one rupee: in fact only nominal damages has been asked for. The decree must be modified accordingly, and in other respects I would dismiss the appeal.

It is also alleged that the defendant turned out of the procession certain persons wearing tinsel caps and robes Whatever right of action these persons may have against the defendant, it is impossible to say that the

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plaintiffs are entitled to damages. The action was really brought for a declaration and also an injunction against the defendant. The plaintiffs have succeeded in obtaining a declaration against the Superintendent of Police, and no question was raised before us whether such a declaration was a proper one or whether the four plaintiffs could jointly bring such an action. The District Munsif has found that the plaintiffs preferred a seriously false allegation that their procession was entirely stopped, and taking into consideration all the circumstances of the case, I would direct that each party bear his and their own costs throughout.

SHEPHARD, J.—As is observed by the District Judge, this case is really a simple one. It has been unnecessarily complicated by the nature of the relief asked for and by the defence set up by the defendant. The simple question is whether the plaintiffs have suffered any wrong at the hands of the defendant, and, if so, to [41] what damages they are entitled. That is the only question that ought to have been tried, for the case is not one in which a declaration or injunction is either necessary or proper. On the contrary, such relief is obviously futile, for it could bind only the defendant personally. There is, however, no appeal filed on his behalf, and it is only necessary to mention it as a reason for dismissing the appeal so far as it seeks to obtain any relief of that character for the plaintiffs.

We must take the finding of fact as recorded by the District Judge in paragraph 3 of his judgment. There it is found that the defendant took possession of two banners, and that he turned out of the procession some singers, and then permitted the procession to proceed. It is of these acts that the plaintiffs complained in the 9th paragraph of the plaint. It is not explained how the plaintiffs come to treat these acts of the defendant as torts for which they have a joint right of action. No objection, however, was taken on that ground. The District Judge holds that the defendant was justified in doing what he did, because there was danger of breach of the peace and the action was taken in good faith to prevent it. It is this ruling which is questioned in the appeal before us.

Prima facie the act of the defendant in taking away banners from the hands of the plaintiffs and keeping them is wrongful. That is the only act of which the plaintiffs personally complain. Such an act constitutes a trespass, and however laudable the motive may have been, the injured person is entitled to damages. The defendant can only be excused from liability if it is shown that, as a Superintendent of Police, he was by law justified in doing what otherwise would have been wrongful.

The 49th Section of the Madras Police Act gives the Superintendent power, as occasion requires, to direct the conduct of all assemblies and processions and prescribe the routes by which they may pass. It also gives him power to regulate the use of music in the streets on the occasion of festivals and ceremonies, and lastly to direct all crowds of twelve or more persons to disperse when he has reason to apprehend any breach of the peace.

Section 21 of the same Act declares the general duties of police officers including that of using their best endeavours to preserve the peace. It is argued on behalf of the respondent that these provisions of the Act justified him in taking away the banners [42] from the plaintiffs, and that, although an express power to do such acts is not given by the

Act, it must be taken to be included in the larger powers which are conferred. It may not unreasonably be said that on occasions serious inconvenience and risk of disturbance is likely to occur if the police does not possess the power of depriving persons of banners, emblems or other objects which are calculated to provoke a breach of the peace on the part of persons to whom they are obnoxious. We must, however, see whether such a power is conferred by the legislature With regard to processions express provisions are made of particular character, and under certain conditions power is given to disperse crowds The latter provision does not, in my opinion, relate to processions. With regard to processions the Superintendent may, as occasion requires, do certain things, but the Act does not say he may take away flags or obnoxious devices carried by members of the procession, and I do not see on what principle it can be said that the legislature intended to give this power by implication. On the contrary, the mention of specific things which may be done is unfavourable to any inference in favour of measures which are not mentioned.

In my opinion, the respondent has failed to show that his acts are rendered legal by the provision of the Police Act, and it is not said that there is any other statute under which he can claim immunity. Chapter XIII of the Criminal Procedure Code gives the police certain powers in the way of preventive action, but the present case cannot be brought within its provisions. It follows that the District Judge was wrong in refusing to give damages, but having regard to the other findings of the District Judge and the finding of the District Munsif on the question of damages, I think that nominal damages only should be awarded.

I would modify the decree of the District Judge by giving the plaintiffs one rupee damages. In other respects I would dismiss the appeal, and I would direct each party to bear his own costs, throughout.

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17 M. 43=3 M.L.J. 207.

[43] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best

SIRIPARAPU RAMANNA (*Plaintiff*), *Appellant v.*
MALLIKARJUNA PRASADA NAYUDU (*Defendant*), *Respondent.**
[20th March and 26th April, 1893.]

Rent Recovery Act (Madras)—Act VIII of 1865, Sections 4, 7, 11—Enhanced rent on irrigated land—Customary contribution to a temple—Implied contract.

A zemindar tendered to raiyats on his estate pattas providing (*inter alia*) for the payment of (1) certain fees to a Hindu temple, (2) rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut There was nothing to show that the former of these items constituted a charge on the land and the later had not been sanctioned by the Collector under Rent Recovery Act, Section 11, but it was found that both had been paid by the raiyats for many years The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay both items:

Held (1) that the temple fee was *prima facie* voluntary and should not be treated as a payment which the zemindar could compel a raiyat to make and consequently that the patta tendered to him was an improper patta;

* Second Appeal No. 557 of 1891.

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(2) that the finding as to the existence of an implied contract to pay the second of the above items was a finding of fact and must, therefore, be accepted on second appeal; and was a correct finding, in accordance with the ruling in *Venkatagopal* v. *Rangappa* (7 M. 365).

The first proviso to Rent Recovery Act, Section 11, is not restricted in its application to rates of original rent as contradistinguished from its enhancement on account of improvements.

[F., 27 M. 332 (337)=13 M.L.J. 429; 28 M. 427 (432); 30 M. 498 (499)=17 M.L.J. 433=3 M.L.T. 17; 9 Ind. Cas. 41=9 M.L.T. 191=(1911) 1 M.W.N. 6; 9 Ind. Cas. 169=21 M.L.J. 156=9 M.L.T. 329 (331); 13 M.L.T. 351 (356).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 176 of 1889, reversing the decision of S. H. Habibuddin, Special Assistant Collector of Kistna, in summary suit No. 2 of 1889.

Suit by a tenant to set aside a distraint.

The facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court.

The plaintiff preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

[44] This is a second appeal from the decree of the District Judge of Kistna, disallowing appellant's claim with costs. Respondent is the zemindar of Devarakota and appellant is a *jirayati* raiyat in his zemindari. A *patta* was tendered for fasli 1297 by the former, but the latter refused to accept it. The zemindar then distrained the raiyat's property for arrears of rent which he claimed for 1297 and the tenant sued to set aside the distraint as being illegal. The question for determination was whether the *patta* tendered, Exhibit I, was one which appellant was bound to accept and the requirement of Section 7, Act VIII of 1865, was thereby complied with. Appellant objected to two items in Exhibit I *viz.*, the rate of Rs. 9 8-0 *per* acre charged on dry land irrigated under the Kistna anicut, and the fee entered as payable to a temple at Sivaganga. The Special Assistant Collector considered that the consolidated wet assessment of Rs. 9-8-0 *per* acre was too high and that the usual dry rate of Rs. 2-2-0 *plus* a water rate of Rs. 4 *per* acre was the proper charge.

As to the contribution claimed for the Sivaganga goddess, he thought its inclusion in the patta to be unobjectionable, as he found it to be a charge warranted by established usuage. On the former ground he held that appellant's refusal to accept the *patta* was justifiable and decreed his claim with costs. On appeal, however, the District Judge found that the *patta* tendered for 1297 was similar to *pattas* tendered in previous faslis, that they all contained the fee payable to the Sivaganga temple and imposed a consolidated wet rate Rs. 9-8-0 *per* acre on lands irrigated with Kistna water, and that the consolidated rate and fee had been paid for twelve years or more. He concluded that payment of rent at a particular rate and of a fee for a series of years created a presumption of a contract and that the tenant did not rebut the presumption. Adverting to the evidence that appellant had twice asked the zemindar to reduce the rate, the Judge observed that it was not sufficient that the raiyat murmured against the rate now and then, but that it was incumbent upon him to get it lowered by the Revenue Courts. In the result he reversed the decree of the Special Assistant Collector and dismissed respondent's suit with costs. Hence this second appeal.

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17 M. 43 = 3 M. L. J. 207.

For the appellant, it is contended (1) that the Collector's sanction not having been obtained for enhancing the rent, the *patta* tendered was not a proper *patta*, (2) that in the circumstances of [45] this case there was no presumtive evidence of a contract to which Courts can give effect, and (3) that the fee entered in the *patta* for the Sivaganga goddess was unauthorized. As regards the fee payable to the temple at Sivaganga, it can only be included in the *patta* under Section 4 of Act VIII of 1865 on the ground that it is payable with rent according to established usage or law. A duty to contribute to the expense of a temple is not an ordinary incident of the relation of landlord and tenant, nor has it any connection with the *jirayati* tenure on which the raiyat holds his land. *Prima facie*, the contribution is voluntary and unless the fee is shown to be a charge on the land, it cannot be treated as a payment which the zemindar can legally compel the raiyat to make. Suppose the raiyat to be a Muhammadan or a Christian it is obvious that in no sense would he be bound to make it Moreover a tenant may, at his pleasure, discontinue a voluntary payment although he may have made it for several years, and there is nothing in this case to show that the fee is a charge on the land We do not agree in the opinion of the Judge that appellant was under a contractual obligation to pay the fee claimed for the goddess at Sivaganga

As regards the consolidated wet rate on land irrigated with Kistna water, there can be no doubt that before imposing it on the tenant against his will, the zemindar ought to obtain the sanction of the Collector under the first *proviso* of Section 11 of Act VIII of 1865 That section provides that nothing contained in it shall affect the right of any landholder, with the sanction of the Collector, to raise the rent upon any land in consequence of additional value imparted to it by works of irrigation or other improvements executed at his own expense or constructed at the expense of Government and for which an additional revenue is levied from him *Ramesam* v *Bhanappa* (1) and *Narasimha Naidu* v *Ramasami* (2) are authorities for the proposition that the addition of water-cess to land assessment is an enhancement of rent within the meaning of the *proviso* and that the addition, in whatever form it is made, whether as a consolidated wet rate or as water rate in addition to the prior rent, requires the sanction of the Collector The principle is that land assessment and water-tax are designated revenue when they are paid to the Government, whilst they are [46] called rent when paid to the zemindar In the case before us, it is conceded that no such sanction has been obtained and the real question therefore is whether a contract can be inferred from the facts found to pay a consolidated wet rate for the future In this connection two subsidiary questions arise for consideration, *viz.*, (1) whether the first *proviso* in Section 11 is restricted in its application to rates of original rent as contradistinguished from its enhancement on account of improvements, and (2) whether in the circumstances of this case, the Judge properly inferred a contract to pay the consolidated wet rate. As to the first, we see no reason why a contract between the landlord and tenant should not bind them in the case of enhancement of rent, whilst it is binding when it relates to the original rent. Having regard to the words of the *proviso* " Nothing herein contained shall affect the right to raise the rent," &c , we think the intention was not to preclude the parties from regulating the enhancement as well as the original rent by contract, by to constitute the Collector's sanction as conclusive evidence that the enhancement is proper in cases

(1) 7 M. 182. (2) 14 M. 44

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in which there is no contract. Further the sanction of the Collector is prescribed for protecting the tenant against undue or excessive enhancement, and when there is a binding contract the tenant needs no such protection as he is a party to the contract.

The second question is whether upon the facts found a contract can be lawfully implied. Those facts are (1) that the tenant has paid the consolidated wet rate for twelve years or more, (2) that he has accepted *pattas* in the previous faslis providing for payment at that rate and that though the raiyat asked the zemindar to reduce the rate twice without success, he has taken no action in the Revenue Courts in order to get the rate lowered during the long interval of twelve years or more. It is also in evidence that the sharing system was in force in this village till fasli 1278, that fixed money rents were introduced in fasli 1279, and that the raiyat since paid the rates mentioned in the *patta* tendered up to fasli 1296. On the other hand, the usual dry rate is Rs. 2-2-0 *per* acre and if Rs. 4 are added to it for water rate, the total charge would amount to Rs. 6-2-0 *per* acre, whereas the consolidated water rate is Rs. 9-8-0, Rs. 3-6-0 in excess of the revenue which raiyats have to pay in Government villages. The Judge's finding amounts in substance to this, *viz.*, when a [47] consolidated rate had been paid for seventeen years, a contract to pay at the same rate in future years may be reasonably inferred and such contract precludes an enquiry how far that rate is excessive in comparision with the rates paid by raiyats in Government villages. Again, the question whether there was an implied contract or not is one of fact and we are bound to accept the finding. In the Full Bench case (*Venkatagopal* v. *Rangappa* (1),) it was held that a contract was properly implied from payment of the same rate of money rent for a period of fourteen years. In that case the history of rent law as to rates of rent was considered by the Full Court, and it was pointed out in what cases a contract to pay a particular rate may be presumed and how the presumption may be rebutted. In the case before us no change of circumstances and no special causes are shown which may be accepted as rebutting the presumption of an implied contract. The decision of the Judge that there was a contract to pay the consolidated wet rate entered in the *patta* is correct.

We are, however, constrained to hold that the *patta* tendered was not a proper *patta*, as it contained the fee payable to the temple at Sivaganga, and reversing the decree of the District Court, we set aside the distraint.

As the appeal has failed in regard to the consolidated rent, which is the most important item in dispute, we direct that each party bear his own costs throughout.

(1) 7 M. 365.

17 M. 48.

[48] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

MALLA REDDI AND ANOTHER (*Defendants Nos.* 2 *and* 1), *Appellants* v PADMAMMA AND ANOTHER (*Plaintiffs Nos* 1 *and* 2), *Respondents.** [15th November, 1892 and 24th July, 1893]

Hindu law—Illatom son-in-law—Inheritance—Survivorship

The father since deceased of the second defendant took into his family an illatom son-in-law, who died, leaving a son After the death of the son, one of his two daughters (who were his only children) sued to recover a one-fourth share of the property left by the second defendant's father ·

Held, that the plaintiff was entitled to recover, in the absence of proof of a custom by which the rights of the plaintiff's father should have passed by survivorship to the second defendant

SECOND appeal against the decree of C Ramachandra Ayyar, Acting District Judge of Nellore, in appeal suit No 62 of 1889, confirming the decree of T Ramachandra Rau, District Munsif of Nellore, in original suit No 282 of 1887.

The first plaintiff was mother of the second plaintiff and sister of the first defendant, and they were the sole descendants of the illatom son-in-law (deceased) of the second defendant's father. The second defendant was the husband of the first defendant, and he was in possession of the property left by his father. The present suit was brought to recover a one-fourth share of the property.

The second defendant claimed to have become entitled to the whole estate, as the last surviving member of a Hindu coparcenary, on the death, without male issue, of the first plaintiff's father, the son of the illatom son-in-law above referred to

The Lower Courts held that the first plaintiff and the first defendant were jointly entitled to a moiety of the property in question and passed decrees as prayed.

[49] The defendants preferred this second appeal.

Seshagiri Ayyar, for appellants.

Ramachandra Rau Saheb, for respondents.

ORDER —The father of Lakshmi Narasa Reddi (grandfather of the first plaintiff and the first defendant) was taken into the family of the second defendant's father as illatom son-in-law. Lakshmi Narasa Reddi died without male issue, leaving two daughters, the first plaintiff and the first defendant The first plaintiff and her son claimed both by virtue of wills said to have been executed by Lakshmi Narasa Reddi and his wife and also by Hindu law.

As no evidence was adduced on either side, the claim so far as it was based upon the alleged wills failed, and the only question now is whether the first plaintiff is entitled to one-fourth, *i.e.*, half of the half-share of her late father. Both Courts have decreed in her favour and defendants have appealed.

For the purposes of the present appeal it may be taken that the property was the property of the second defendant's father's family in

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* Second Appeal No. 1945 of 1891.

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which plaintiff's grandfather was an illatom son-in-law. He was, therefore, entitled to equal rights therein with the second defendant's father, and the question is whether, on the death of Lakshmi Narasa Reddi, these rights passed by survivorship to the second defendant. Ordinarily under Hindu Law the relation of coparcenary, of which the right of survivorship is an incident, is only possible between descendants of a common paternal ancestor. In *Hanumantamma* v. *Rami Reddi* (1) it was considered unsafe (p. 283) to infer that the affiliation by illatom is analogous to adoption in any other respect save in the circumstance that the illatom son-in-law is regarded for purposes of interitance as a member of the family into which he is admitted. In *Chenchamma* v. *Subbaya* (2) an issue was sent as to whether there can be coparcenary between an adopted son and an illatom son-in-law, but no evidence being produced it was held that in the absence of proof that the right of survivorship is an incident of custom it cannot be treated as such. The decision of Scotland, C. J., and Innes J., in *Mopur Ademma* v *Dhamavarapu Subba Reddi* (3) is [50] no doubt in conflict with the later decisions, but no evidence was taken in that case, and it was inferred that there was coparcenary, because the illatom custom was a mode of affiliation.

We think it is not safe to attach to the usage all the incidents of adoption without specific evidence. We shall, therefore, ask the District Judge to try the following issue:—

" Whether according to illatom Custom the second defendant excluded " the daughters of Lakshmi Narasa Reddi from succession, and whether " their father's undivided interest survived to the second defendant?"

The finding is to be returned within two months from the date of the receipt of this order; and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

The finding of the District Judge was as follows:—

" I am of opinion that the evidence adduced is not sufficient to find " upon the issue sent down by the High Court for the second defendant."

This second appeal having come on again for final hearing, the Court delivered judgment as follows:—

JUDGMENT.

We accept the finding and dismiss the appeal.

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17 M. 50=3 M.L.J. 247.

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MALLIKARJUNA PRASADA NAYUDU (*Plaintiff*), *Appellant* v. LAKSHMINARAYANA (*Defendant*), *Respondent*.*

[20th March and 26th April, 1893.]

Rent Recovery Act (Madras)—Act VIII of 1865, Sections 9, 11—Sanction by Collector of enhanced rates of rent—Implied contract to pay rent at a certain rate.

In a suit brought by the Collector of a district, as receiver of a zamindari, against a tenant on the estate to enforce the exchange of patta and muchalka, it appeared that the rent demanded was assessed at an enhanced rate, and comprised a consolidated wet rate imposed on account of irrigation. To the enhancement of

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* Second Appeal No. 1695 of 1891.

(1) 4 M. 272. (2) 9 M. 114 (3) Appeal No. 103 of 1868, unreported

the rent by the addition of the water rate the sanction of the Collector required by the Rent Recovery Act, Section 11, first proviso, had not been obtained · 1893 APRIL 26.

Held, that such sanction could not be implied from the fact that the Collector, as [51] such receiver, had caused the provision in question to be inserted in the patta, and now sought to enforce it by suit

Upon the question whether from the fact that the tenant, had paid the water rate in question for some years previously an implied contract to pay it for the future could be inferred, *held* upon the facts of the present case that no such contract could be inferred. APPELLATE CIVIL.

With reference to the Full Bench decision in *Venkatagopal* v *Rangappa* (1), the Court stated what was the principle to be kept in view in considering whether an implied contract to pay enhanced rent could be inferred 17 M. 50 = 3 M. L. J. 247.

[R., 4 Ind. Cas 1136 (1137) = 5 M L.T 264, 9 Ind. Cas. 169 = 21 M L J 156 = 9 M L T. 329 (331)]

SECOND appeal against the decree of G T Mackenzie, District Judge of Kistna, in appeal suit No 762 of 1890, modifying the decision of C Venkata Jagga Rau, Assistant Collector of Kistna, in summary suit No 107 of 1890

Suit to enforce the exchange of patta and muchalka.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court

Plaintiff preferred this second appeal

Pattabhirama Ayyar, for appellant

Parthasaradhi Ayyangar, for respondent

JUDGMENT

These second appeals arise from suits brought by the receiver of the Devarkota estate to enforce the acceptance of pattas for fasli 1298 by raiyats in the Jirayati village of Nidumole The raiyats objected to three items in the pattas tendered to them, *viz* , Nayaffvadi fees, tax on palmyra trees, and consolidated wet rates imposed on lands irrigated by the anicut channels from the Kistna As regards the first two items, both the Courts below decided in favour of the zemindar, and the raiyats have not appealed from their decision As for the wet rate, it is conceded no sanction has been obtained from the Collector as required by the first proviso to Section 11, Act VIII of 1865, but it is contended that such sanction was not necessary, and that, even if necessary, it must be taken to have been accorded, the wet rates being inserted in the pattas under the orders of the Collector, who was the receiver The first proviso to Section 11 expressly prescribes the sanction of the Collector as a condition precedent to a valid enhancement of rent on account of improvements, and the intention is to protect the raiyats against excessive rates by requiring sanction by an officer competent to hold the balance even between the zamindar and the raiyats Nor do we consider the institution of these summary suits by the Collector in the [52] capacity of receiver to be equivalant to such sanction, the sanction contemplated by Sanction 11 being one judicially accorded upon consideration of the rights of both parties to what is deemed a fair and equitable rate. In *Ramesam* v *Bhanappa* (2), it has been held that the addition of water-cess to the prior rent is an enhancement of rent within the meaning of the section We consider, therefore, that the Judge was right in holding that, in the absence of a contract, the sanction of the Collector was

(1) 7 M 365 (2) 7 M 182.

1893 APRIL 26. — APPELLATE CIVIL. — 17 M. 50=3 M.L.J. 247.

indispensable, and that no such sanction, as is contemplated by Act VIII of 1865, has been given in the cases before us.

The next contention is that the Judge was in error in refusing to infer from the facts found a contract to pay the wet rate, and we do not think that it is tenable. The leading case on the subject is *Venkatagopal* v. *Rangappa* (1). The general rule laid down in that case is that payment of rent in a particular form, or at a certain rate for a number of years, is presumptive evidence of a contract to pay rent in that form or at that rate for future years so long as the relation of landlord and tenant may continue. It was also there held that the presumption may be repelled by proof (1) that the rate in question was paid under a mistake, (2) that it was intended to be paid only for a certain term of years, and that, on the expiration of that term, the parties meant to revert to their original rights, (3) that there has been a diminution in the extent of the holding, (4) that its value has diminished by the deterioration of irrigation or other works which the landlord was bound to maintain, and (5) that there was some change of circumstances which would entitle the parties to the agreement to an alteration in its terms without necessarily putting an end to the relation of landlord and tenant. The Court also observed that when there is no proof of such special cause for alteration of the terms heretofore subsisting between the parties, it must be decided that so long as the tenant elects to retain the holding, he is liable to the obligations in respect of rent which, it is to be inferred, from his past conduct that he has accepted. With reference to the general rule, the Judge considers that it is vague so far as it does not mention a specific number of years as sufficient to raise the inference of a contract and draws attention to *Narasimha* v. *Ramasami* (2), wherein it was held that no contract as to future years [53] could be inferred from a single lease extending over the brief period of five years. Again, in *Apparau* v. *Narasanna* (3), it was considered that the fact that the tenant paid rent at a certain rate for six years was not sufficient to establish an implied covenant to continue to do so for the future. The Judge appears to have ruled in some cases that a period of three years was sufficient as under the Bengal Tenancy Act, and observes that he is inclined to hold in the cases now under consideration that nothing less than seven years will be long enough to satisfy the principle laid down in *Venkatagopal* v. *Rangappa* (1). In the case last mentioned, which was a Full Bench case, a contract was implied, as money rent was found to have been paid for not less than fourteen years. We do not think that, in the absence of an express enactment applicable to this Presidency, the Judge is right in fixing three or seven years as the period contemplated by the Full Bench case. The decision whether a contract can be implied must depend on the circumstances of each case. The principle, which ought to be kept in view, is that the distinction between an express and an implied contract consists only in the mode of proof, and that the circumstances from which a contract may lawfully be implied must be such as will satisfy a reasonable mind that the real intention of the parties was that the particular rate in question should be the rate in future years so long as the relation of landlord and tenant may subsist between the parties, unless there is some special circumstance, such as is indicated in the Full Bench case rebutting the presumption. It may be that payment of rent at the rate in dispute for five or six years is not

(1) 7 M. 365. (2) 14 M. 44. (3) 15 M. 47.

sufficient where such payment is the only fact in evidence It may also be that even when a particular rate has been paid for a longer period, there may be other circumstances which repel the presumption In the cases now before us, however, there is no sufficient reason to doubt that the judge has arrived at a correct finding Apart from the fact that the wet rate in dispute has been paid in no case for more than seven years, in many cases for four or five years only, and in some even for one and three years, it is found that the raiyats paid the rate with reluctance and much protest It is found, further, that the areas over which it has been paid are in many cases small and have varried from year to year Moreover, [54] it does not appear that the zamindar has incurred any expenditure in connection with works of irrigation

1893 April 26. — Appellate Civil. — 17 M. 50 = 3 M. L. J 247.

We are unable, therefore, to uphold the contention that the Judge was in error in holding that it was not the intention of the raiyats that they should continue to pay the wet rate in dispute in all future years

The appeals fail, and we dismiss them with costs

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17 M. 54.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

BHUPATHI (*Defendant*), *Appellant* v RAJAH RANGAYYA APPA RAU (*Plaintiff*), *Respondent* * [20th and 21st March and 21st April, 1893]

Rent Recovery Act (Madras)—Act VIII of 1865, Sections 1, 11—Sanction granted by Head Assistant Collector—Procedure—Customary rent—Restraint on building

A Head Assistant Collector is competent to grant a sanction for the enhancement of rent under Rent Recovery Act, Section 11

The granting of such sanction is a judicial and not a merely administrative act and such sanction should not be granted without first giving notice to both the landlord and the tenant, and hearing, and considering the contentions of both parties

In a suit by the landlord to enforce the exchange of a patta and muchalka, the tenant objected to the rate of rent imposed on part of the land, which was dry land converted into wet *Held* that the finding of the lower appellate Court that there was an implied contract to pay rent at such rate was not open to any legal objection

It appeared that the patta tendered contained a stipulation for the payment of rent at a special rate for garden (jarib) lands watered by wells which had been constructed by the raiyat at his own cost, and also comprised a stipulation that the raiyat should not build on his holding The Court of first appeal held that the special rate of rent above referred to was customary and had been followed for many years

Held, that there was no ground for interference on second appeal with the lower appellate Court's decision regarding the former of the stipulations above referred to, but that the latter should be so modified as to prevent the raiyat only from raising any building incompatible with an agricultural holding

[R., 24 M. 47 (54), 26 M 252 (254), 27 M 332 (337) = 13 M L J 429, 30 M. 155 (156) = 17 M L J 64 = 2 M L T 25; 9 Ind Cas 41 = 9 M L T. 191 = (1911) 1 M W N 6, Com., 28 M 427 (433)]

SECOND appeal against the decree of G T Mackenzie. District Judge of Kistna, in appeal suit No 520 of 1888, modifying the [55] decision of L. M. Wynch, Head Assistant Collector of Kistna, in summary suit No. 761 of 1887

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* Second Appeal No 681 of 1891

1893 APRIL 21. APPELLATE CIVIL. 17 M. 54.

Suit by the landlord to enforce the exchange of patta and muchalka.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The defendant preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Subramanya Ayyar, for respondent.

JUDGMENT.

Plaintiff, respondent, is the zemindar of Nuzvid and appellants are raiyats in the *Jeroyati* village of Mantena comprised in his zamindari. The contest between them is whether the *pattas* tendered for Fasli 1296 were such as the raiyats were bound to accept. The first objection urged by them was that the land taken up for excavating Uppaleru drainage channel was not deducted from their holdings on the ground that the Government had paid no compensation for the land so taken up to the zamindar. Both the Courts below allowed this objection, and the zamindar has not appealed from their decision.

The next *item* to which the raiyats object is the rate *per* acre imposed on dry land converted into wet. The rate claimed by the zamindar was Rs. 9-2-8 *per* acre, and the raiyats contended that the proper rate was the rate which had prevailed at the time of permanent settlement in 1802. The Head Assistant Collector and the Judge inferred, from the facts which they accepted as proved, a contract to pay every year Rupees 9-2-8 *per* acre The contention on appellants' behalf is that no contract can be lawfully implied, the rate of Rs. 9-2-8 having been paid not voluntarily, but under protest and with remonstrance.

The finding that there was an implied contract being one of fact, the question we have to consider on second appeal is whether it is open to any legal objection. The Judge considers it proved that there has been a continuous payment of Rs. 9-2-8 *per* acre from the years 1871 to 1885, and in the Full Bench case of *Venkatagopal* v. *Rangappa* (1) in which it was held that there was an implied contract, the same rate had been paid for fourteen years. It is then argued that the management of the Nuzvid estate has always been oppressive and that the raiyats [56] protested against the rate of Rs. 9-2-8 in 1871 and 1880. We think that the expression of discontent now and then was not sufficient and that the omission to resort to the Revenue Courts for redress for so long a period is significant. Again, the Judge observes that the same rate had been paid down to 1885 and subsequent to the dates of the alleged remonstrance, and that the reasonable inference is that the matter was settled between the parties. In this there is no error of law to justify our interference with the finding Moreover, there was a similar question raised with reference to the *pattas* tendered for the previous *fasli*, *viz.*, 1295, and it was also decided against appellants. Further, the Judge observes, and we think, very properly, that if it is reasonable for the raiyats to seek to revert to the *faisal* rate which prevailed in 1802, the zamindar may as reasonably go back to the sharing system which is not agreeable to them. We are of opinion that the objection to the inference of a contract to pay at the rate of Rs. 9-2-8 cannot be supported.

The next question is whether the Judge was right in treating as valid the sanction given by the Head Assistant Collector, Ramachandra Rau, for enhancing the rate to Rs. 9-2-8 for Fasli 1296 in the cases from which

(1) 7 M. 365 (373).

second appeals Nos 681 and 682 of 1891 arise In connection with the *patta* tendered for 1295, appellants in those cases objected to the rate and contended that, as they had excavated a distribution channel at a cost of Rs 115, the zamindar was not at liberty to enhance the rent without the sanction of the Collector The Head Assistant Collector upheld their objection and directed in his judgment that the cost of excavating the sub-channel be deducted from the *sist* payable to the zamindar After this deduction had been made, the zamindar applied for sanction to raise the rent to Rs 9-2-8 *per* acre on lands under the channel, and on 23rd June 1887 the Head Assistant Collector granted the sanction, but without sending notice to the raiyats and calling upon them to show cause why sanction should not be granted Appellants in second appeals, Nos 681 and 682 of 1891 questioned the validity of the sanction on three grounds, *viz* , (1) that the Head Assistant Collector was not competent to grant the sanction, (2) that the increase sanctioned was unreasonable, and (3) that the sanction was given without notice to them, but the Judge disallowed these grounds of objection The term Collector as defined in Section 1, [57] Act VIII of 1865, includes the Head Assistant Collector and the first objection therefore is entitled to no weight As regards the omission to give notice, it was clearly an irregularity, for the act of giving sanction is a judicial act intended on the one hand to protect the raiyat against excessive enhancement and on the other to secure to the zamindar what may be considered a fair and an equitable increase A sound decision can, therefore, only be arrived at after hearing both parties and considering what is urged in the interest of each The sanction prescribed by the *proviso* in Section 11 has the force of a binding contract not only for any particular *fasli*, but also for future years, and the power to give such sanction is vested in the Collector as the officer competent to hold the balance evenly between the zamindar and the raiyat In our judgment, it can only be properly exercised after hearing both sides and after consideration of the rights of both parties under Act VIII of 1865. We are unable to accede to the contention on behalf of the zamindar that the granting of sanction under Section 11 is an administrative act and not defective by reason of the raiyats not having been heard We agree, however, with the Judge that in the present case the irregularity was not material since the Head Assistant Collector had heard what the raiyats had to say in the suit of *fasli* 1295 There is the further fact that the cost of excavating the distribution channel has been deducted from the *sist* payable by the raiyats to the zamindar, and that the rate charged in the case of those raiyats, who had incurred no similar expenditure was Rs 9-2-8 *per* acre

Another *item* to which exception is taken in all the second appeals is the rate charged for garden lands watered by wells sunk by the raiyats at their own expense The Head Assistant Collector found that the *jarib* rates now claimed were customary and that they had been paid for a long series of years, and the Judge has accepted the finding In the case of *Venkatagiri Raja* v *Pitchana* (1), it was held that while in the case of lands watered by wells newly constructed by a tenant at his own expense he cannot be deprived of the benefit of the improvements made at his own expense, he cannot, on the other hand, insist on a reduction of the assessment in the case of old garden lands which had paid a [58] *mamul* garden rate There are no grounds for interference in second appeal

(1) 9 M 30

1893 APRIL 21. — APPELLATE CIVIL. — 17 M. 54.

The next objection taken by the raiyats is as to the stipulation that the raiyats shall not build houses on the land, and the Judge has allowed the stipulation to stand. The question whether a tenant can build on his lands was discussed in *Ramanadhan* v. *Zamindar of Ramnad* (1), and the decision arrived at in that case was that the tenant was not at liberty to turn land originally let for cultivation into a house site without the consent of the zamindar, and that he is only entitled to raise such buildings as are not incompatible with the character of his holding as an agricultural holding. The stipulation in the *patta* should be so modified as to prevent the raiyat from raising any building incompatible with an agricultural holding.

The last objection taken is as to the tenant's right to cut down trees, and on this point the Judge has decided in accordance with the decision of this Court in *Appa Rau* v. *Ratnam* (2).

We modify the decrees of the District Judge so far as they relate to building on the land as indicated above and confirm them in other respects. The appeals having substantially failed, appellants will pay respondent's costs in second appeals Nos. 681 and 682 The respondent not being represented in the other appeals, we make no order as to costs.

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17 M. 58=3 M.L.J. 211.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RANGASAMI CHETTI (*Plaintiff*), *Appellant v.* PERIASAMI MUDALI (*Defendant*), *Respondent.** [31st January and 1st February, 1893.]

Civil Procedure Code—Act XIV of 1882, *Section* 273—*Dismissal of an application for execution—Attachment of a decree—Execution of attached decree.*

The holder of a decree dated 1885 applied to execute it, but his application was dismissed in March 1887 on the ground that "no further steps had been taken." [59] It did not appear that any notice was given to him before the order of dismissal was made. Nevertheless the decree-holder proceeded to execute a decree of the judgment-debtor attached by him and brought to sale certain property which was in question in the present suit, and it was purchased *bona fide* by the present defendant who obtained a sale certificate from the Court. The present plaintiff claimed as assignee from the holder of the attached decree to execute it against the same land and now sued for a declaration that it was liable to be brought to sale by him and that the defendant's purchase was void as against him :

Held, (1) that under the circumstances of the case the attachment in execution of the decree of 1885 was subsisting at the time of the purchase by the defendant,

(2) that a judgment-creditor who attaches a decree is competent to execute it.

[R., 19 M. 219 (222).]

SECOND appeal against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in appeal suit No. 382 of 1891, confirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbaconam, in original suit No. 198 of 1890.

In June 1887, the father (since deceased) of the plaintiff became the assignee of a decree passed by the District Munsif of Kumbaconam in 1881,

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* Second Appeal No. 555 of 1892.

(1) 16 M. 407.

(2) 13 M. 249.

and in execution he attached certain land as property of the judgment-debtor. The present defendant objected that the land was his property. The plaintiff now sued for a declaration that the land in question was not the property of the defendant and was liable to be attached in execution of the decree of 1881.

It appeared that a suit was brought in, 1885 against the assignor of the above-mentioned decree and that the plaintiff therein obtained against him a decree which was subsequently assigned to one Ramachandra Rau. In execution of the last-mentioned decree Ramachandra Rau attached the decree of 1881 under Civil Procedure Code, Section 273, and having proceeded to execute it he brought to sale the land in question in this suit and the present defendant became the purchaser and obtained a sale certificate in 1888.

Ramachandra Rau's application to execute the decree of 1885 was dismissed by an order made on the 19th March 1887 on the ground that "no further steps had been taken," but it did not appear that any previous notice had been given to the execution-creditor before that order was made, and it was found that the defendant was a *bona fide* purchaser.

The plaintiff contended that the order of 19th March 1887 put an end to the attachment and that for that reason the defendant acquired no title by his purchase at the subsequent Court-sale. [60] Both of the lower Courts overruled this contention and the suit was dismissed.

The plaintiff preferred this appeal.

Sankaran Nair and *Panchapagesa Sastriar*, for appellant.

Sankara Narayana Sastri, for respondent.

JUDGMENT

We think the order appealed against is right. Both Courts considered that the attachment in execution of the decree in original suit No. 75 of 1885 of the decree in original suit No. 252 of 1881 was subsisting at the date of the purchase by defendant at the Court-sale on 5th July 1888. It is contended that an order was made on 19th March 1887 to the effect that the application for execution of the decree in original suit No. 75 of 1885 was dismissed on the ground that no further steps had been taken and that this order put an end to the attachment, whether the attachment ceased at the date of this order or continued to subsist is a matter to be decided with reference to the circumstances of each case as observed by the Privy Council in *Puddomonee Dossee* v *Roy Muthooranath Chowdhry* (1).

We observe that up to 16th March 1887 some steps had been taken and the application was dismissed on 19th March, and it does not appear that any previous notice was given to the execution-creditor before the order of 19th March was made. Moreover, defendant was a *bona fide* purchaser at a Court-sale of the lands in question, and any irregularity in the proceedings which led to the sale cannot be relied on as a ground for setting aside the sale after it had been confirmed and a certificate issued. See *Rewa Mahton* v. *Ram Kishen Singh* (2) and *Mothura Mohun Ghose Mondul* v *Akhoy Kumar Mitter* (3). Another contention for appellant is that under Section 273 of the Civil Procedure Code the decree-holder in original suit No. 75 of 1885 was not competent to execute the decree in original suit No. 252 of 1881 attached by him. Section 273 expressly authorizes the Court in such a case to apply the proceeds of the decree

(1) 12 B L R. 411=20 W R. 133 (2) 14 C. 18. (3) 15 C 557.

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attached in satisfaction of the decree sought to be executed. This direction clearly implies that the attaching decree-holder is entitled to take all steps necessary for the realization of the proceeds of the attached decree by the Court. The same view is taken by the Calcutta [61] High Court in *Peary Mohun Chowdhry* v. *Romesh Chunder Nundy* (1). In the view of the case which we take, it is not necessary to consider whether Article 12 or 11 of the Second Schedule to the Limitation Act governs the case.

The second appeal fails and is dismissed with costs.

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17 M. 61.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

GNANASAMMANDA PANDARAM (*Plaintiff*), *Petitioner* v. PALANIYANDI PILLAI (*Defendant*), *Respondent*.*
[11th September, 1893.]

Limitation Act—Act XV of 1877, Section 25—Date from which time runs

A registered lease provided that the rent should be paid on 30th Masi Tharana The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885 A suit to recover the rent was filed on 12th March 1891 : *Held*, that the suit was not barred by limitation.

[R., 24 C. 382 (384).]

PETITION under Provincial Small Cause Courts Act, 1887, Section 25, praying the High Court to revise the proceedings of T M. Ranga Chari, District Munsil of Trichinopoly, in small cause suit No. 538 of 1891

Suit for rent. The District Munsif dismissed the suit as barred by limitation. He said.—" The rent sued on was payable within 30th Masi " Tharana according to the rent deed. Now, there was no such day as " 30th Masi in the year Tharana, the month having ended with 29th Masi. " Therefore time began to run from 29th Masi Tharana, equivalent to 11th " March 1884. See on this point *Migotti* v. *Colvill* (2), quoted in Mitra's " Limitation, 2nd Edition. The rent deed being registered, plaintiff had " six years from 11th March 1885. Plaintiff should have launched this " suit on 11th March 1891, whereas the plaint was put into Court only on " the succeeding day, namely, 12th March 1881. The suit is then time- " barred. On this ground the suit is dismissed with costs."

[62] Plaintiff preferred this petition.

Krishnasawmi Ayyar, for petitioner.

Parthasaradhi Ayyangar and *Srirangachariar*, for respondent.

JUDGMENT.

The question is whether the claim is barred by limitation. If there had been thirty days in Masi of the year Tharana, the suit would not be barred; but in the year Tharana there happened to have been only twenty-nine days in Masi. Following the decision in *Almas Banee* v. *Mahomed Ruja* (3), we hold that the suit brought on the 12th March 1891 is not barred. The decision in *Migotti* v. *Colvill* (2), referred to by the

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* Civil Revision Petition No. 257 of 1892.

(1) 15 C. 371. (2) L. R. 4 C. P. D. 233. (2) 6 C. 239.

District Munsif, relates to computation of a sentence on a prisoner and is not in point

We set aside the decree of the District Munsif and remand the suit for disposal on merits.

The costs hitherto will abide and follow the result

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17 M. 62=4 M.L.J. 17.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

NARAYANASAMI NAIDU (*Defendant No 3*), *Appellant v* NARAYANA RAU (*Plaintiff*), *Respondent* *
[17th April and 13th September, 1893]

Mortgage—Extinguishment of incumbrances—Suit by puisne incumbrancer—Decree for sale—Contract Act—Act IX of 1872, *s* 74—*Penal sum*

In March 1881 A purchased certain land and, in the same month, mortgaged it to B In June the land was attached in execution of a decree In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan

In 1882, B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him C was not a party to this suit In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C C now sued A and D to enforce his hypothecation

Held, that C was entitled to a decree for sale

[63] A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent on a certain date, the interest shall be at 18 per cent from the date of the bond is not unenforceable

[**N.F.**, 8 C P L R 77 (78), **Appr.**, 6 A L J 549 (561), **R.**, 18 M 175 (178), 25 M 343 (346)=11 M L J 421, 34 M 119 (121)=6 Ind. Cas 781=20 M L J 380=8 M L T 132, 36 M 229 (263)=24 M L J 135=13 M L T 20, 2 C L J 288, 11 C P L R 75 (77); **D.**, 24 M 171=10 M L J 347 (349), 26 M 537 (539)]

SECOND appeal against the decree of C Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No 69 of 1891, modifying the decree of T Ramasami Ayyar, District Munsif of Tiruttaraipundi, in original suit No 219 of 1889

Suit to recover principal and interest due on a hypothecation bond The instrument sued on was dated 29th August 1881, and it provided for the repayment of the amount secured " with interest at Re 1 per cent " per mensem within 30th August 1883 and in default with interest at " Rs 1-8-0 per cent per mensem from the date of the bond "

The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court

The District Munsif passed a personal decree only The Subordinate Judge on appeal passed a decree for sale of the property hypothecated

Defendant No 3 preferred this second appeal.

Bhashyam Ayyangar, Desika Chariar and *Tiruvenkata Chariar*, for appellant

Subramanya Ayyar, for respondent.

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* Second Appeal No 338 of 1892

1893 Sep. 13.

APPELLATE CIVIL.

17 M. 62=4 M. L. J. 17.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The parties to this appeal are prior and subsequent mortgagees of the land in dispute, which is 17 maws and odd in extent. The land in question originally belonged to Saminatha Bosalai and his co-parceners. On the 10th March 1881 they sold it, together with other property, to first defendant for Rs. 1,500 (Exhibit J). The purchaser mortgaged it and other property to one Vengusami for Rs. 3,000 under Exhibit I, dated the 19th March 1881. The mortgagee instituted original suit No. 84 of 1882 and obtained a mortgage decree, in execution of which he purchased the seven velies mortgaged to him (including the land in dispute) and other land obtained possession of the same on the 2nd October 1885. On the 20th January 1886, the purchaser at the execution sale sold the lands to appellant's father for Rs. 3,750 by Exhibit H. This document recites that out of the purchase-money *viz.*, Rs. 3,750, Rs. 760 were retained by the purchaser for payment of prior encumbrances. Thus appellant's claim as the purchaser at the Court-sale in original suit No. 84 of 1882 has to be traced to the mortgage executed to [64] Vengusami on the 19th March 1881. The plaintiff respondent's hypothecation bond A was executed by the first defendant in plaintiff's favour on the 29th August 1881 about five months subsequently to the mortgage in favour of Vengusami. This hypothecation was executed to pay off the debt under the decree in original suit No. 185 of 1872 on the file of the Additional Munsif of Tanjore, in execution of which the land now in dispute and other lands were under attachment since the 7th June 1881. Thus, respondent's claim is derived from the mortgage of the 29th August 1881. To original suit No. 84 of 1882 the plaintiff-respondent was not made a party, and he is not, therefore, debarred from enforcing his charge. Upon these facts the Lower Appellate Court held that respondent had a right to redeem the prior mortgage or to bring the mortgaged property to sale, and decreed, *inter alia*, that unless appellant paid the sum due to respondent and redeemed the mortgage in six months, the mortgaged property be sold in satisfaction of respondent's claim. For appellant it is contended that there ought to be no decree for sale, and that a puisne encumbrancer's remedy as against a prior encumbrancer is limited to a right to redeem and does not include a right to bring the property to sale. I do not consider this contention to be tenable. That a second mortgagee has a right to redeem a prior mortgage is not disputed, the real question being whether he can also claim a direction that the property be sold so as to throw the burden of redemption on the prior instead of the subsequent mortgagee. He is certainly entitled to say that the mortgage property is sufficient for payment of both debts, that if sold on account of them there will be a surplus after satisfying the prior mortgage, and that that surplus should be appropriated in payment of the second mortgage. The only ground on which the prior mortgagee could resist such demand is that the property in question was not sufficient to satisfy both mortgages, and that it was exhausted in satisfying the first mortgage, which has a priority of claim to payment. Upon the finding that Rs. 760 was reserved out of the purchase-money for payment of prior encumbrances, this defence is not available to the appellant. In *Perumal* v. *Kaveri* (1) no portion of the purchase-money was reserved for paying off the prior encumbrances, and there was no [65] undertaking to pay the second mortgage as in this case. Moreover, the second trans-

(1) 16 M. 121.

action in this case was a hypothecation which created a charge on the property, and there is no reason why the charge should not be satisfied when a portion of the purchase-money was retained for meeting prior encumbrances As regards interest, the Subordinate Judge's decree is in accordance with the decision in *Basavayya* v *Subbarazu* (1).

I would dismiss this appeal with costs.

BEST, J.— The finding of the Subordinate Judge is that the third and fourth defendants (it should be third defendant's father and fourth defendant) undertook to pay plaintiff's debt, " and retained money for " that purpose " On this finding there can be no question as to the propriety of the decree, which makes the debt a charge on the property mortgaged of which third defendant is now the sole owner.

The case is distinguishable from *Gokuldoss Gopaldoss* v *Rambux Seochand* (2) because, according to the Subordinate Judge's finding, the appellant's father when purchasing from Vengusami bound himself to pay off the plaint debt and retained Rs. 760 of the purchase-money for the purpose of paying off the debt For the same reason this case is also distinguishable from *Perumal* v *Kaveri* (3) to which our attention was called by the appellant's vakil

As to the contention that Exhibit M has been misconstrued by the Subordinate Judge, it appears from M that third defendant's father and fourth defendant then ignored Subbammal's debt and expressly denied the liability of the plaint property for that debt, whereas their present plea is that the Rs 760 were retained for the payment of that very debt

The only other objection urged on behalf of appellant is as to the interest awarded at 18 per cent It is objected that this is a penal rate and therefore not enforceable. The bond, which is dated 29th August 1881, stipulates for payment of the principal amount on the 30th August 1883 with interest at 12 per cent per annum, and provides that in default of payment on the above date, the interest shall be at the enhanced rate of 18 per cent *from the date of the bond* The question has recently been considered by a Full Bench of the Allahabad High Court in *Banke* [66] *Behari* v *Sundar Lal* (4) and the conclusion arrived at is that such stipulations in contracts substituting in a given state of circumstances a higher for a lower rate of interest cannot be treated as penalties, but must be interpreted—as other parts of a written contract should be interpreted —according to the expressed intention of the parties To the same effect also is the decision of this Court in *Appa Rau* v *Suryanarayana* (5), where the true principle of decision is stated to be that a Court " should " not interfere to protect persons who, with their eyes open, choose " knowingly to enter into even somewhat extortionate bargains, but that " it is only when a person has entered into such a bargain in ignorance of " the unfair nature of the transaction, advantage having been taken of " youth, ignorance or credulity, that a Court of Equity is justified in inter-" fering " See also *Basavayya* v *Subbarasu* (1) and the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh* (6)

As observed by the Privy Council in *Dimech* v *Corlett* (7) " the hinge " on which the decision in every particular case turns is the intention of " the parties collected from the language they have used " In the present case the language is clear enough, and there is no reason for supposing that

(1) 11 M 294 (2) 11 I A 126 (3) 16 M 121
(4) 15 A. 232 (5) 10 M. 203 (6) 10 C. 305
(7) 12 Moo, P. C C, 229.

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the executant of the bond when he expressly stated that in default of paying the principal with interest at 12 per cent. on the date agreed upon for the payment, the interest should be payable " from the date of the bond " at the higher rate of 18 per cent. did not understand or intend what he said.

I would, therefore, uphold the Subordinate Judge's decree in its entirety and dismiss this appeal with costs.

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17 M. 67.

[67] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

SATTAPPA CHETTI AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Appellants v.* JOGI SOORAPPA (*Plaintiff*), *Respondent.**
[9th February, 1893.]

Civil Procedure Code—Act XIV of 1882, *Sections* 53, 245, 647—*Amendment of execution petition—Appeal—Limitation*

One, being entitled under a decree of 1809 to a share in the income of a zemindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zemindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of First Instance·

Held, that under the circumstances of the case the amendment should have been allowed to be made.

[R., 9 Ind. Cas. 760=9 M.L.T. 347=(1911) 1 M.W.N. 181 (182); 10 Ind. Cas. 218 (220)=21 M.L.J. 475=9 M.L T. 499.]

APPEAL against the order of T. Weir, District Judge of Madura, in civil miscellaneous appeal No. 34 of 1891, reversing the order of P. Narayanasami Ayyar, Subordinate Judge of Madura, West, made on execution petition No. 94 of 1891.

Petition for execution of a decree. The petitoner was entitled to a share of the income of a certain zemindari under the terms of a compromise entered into in a suit of 1809. The respondents purchased the zemindari in 1885 and resisted the claim of the petitioner, who accordingly brought a suit against them in 1887. In that suit a decree was passed declaring the right of the present petitioner to a charge on the zemindari in respect of his claim and awarding to him payment on account of one year and also costs. By the present petition execution was sought in respect of the payments due for five years and for costs. The petition was made in the suit of 1887 only. It was objected that the relief sought could not be obtained under the decree in that suit, and the [68] Subordinate Judge upheld this objection and refused an application to amend the petition by inserting a reference to the decree of 1809. On appeal the District Judge allowed this amendment to be made, and directed the Subordinate Judge " to restore the application to the file and pro" ceed to dispose of it according to law."

The judgment-debtors preferred this appeal.

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* Appeal against Appellate Order No. 76 of 1891.

Desikacharıar, for appellants
Subramanya Ayyar and *Sundara Ayyar*, for respondent.

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APPELLATE CIVIL.

17. M. 67.

JUDGMENT

The application for execution was certainly defective, the error being not merely one of form So far as respondent's claim to one-fourth of the future profits of the zemindari was concerned, the decree in original suit No 16 of 1887 was only declaratory and therefore incapable of execution, except for the mesne profits for Fasli 1295 The decree that was capable of execution, as regards the mesne profits for other faslis claimed in the proceedings the subject of this appeal, was the compromise in the suit of 1809, which has been treated as a decree from its date. This, therefore, was the decree which should have been mentioned in the application as the decree sought to be executed as regards the faslis subsequent to 1295 The substantial question is whether, in the peculiar circumstances of this case, the amendment ought to have been allowed

We cannot agree with the contention of appellant's pleader that Section 245 of the Civil Procedure Code is a bar to the amendment That section is, in our opinion, analogous to the provisions of Section 53, which directs the Court to return plaints before filing for amendment in certain particulars It does not, therefore, take away the power of the Court under Section 647, by analogy to Section 53, to amend the application for execution at any time before disposal

The next contention is that the amendment ought not to be allowed, because at the date it was applied for the right to profits for some of the faslis—the subject of the original application—was barred No doubt the ordinary rule is that an amendment should be allowed only if it can be without prejudice to the rights of the opposite parties as existing at the time of the application for amendment But this principle is to be applied with reference to [69] the special circumstances of each case See *Weldon* v *Neal* (1) In the present case we are of opinion that there are peculiar circumstances which take it out of the ordinary rule The object of the application was perfectly clear, although there was an error in the reference to the decree, an error not unnatural considering the complicated nature of the previous proceedings We also observe that even execution for Fasli 1295 to which respondent was clearly entitled on his application as it stood was not granted by the Subordinate Judge Four objection petitions were presented by appellants, and it was not until the last of them was presented, nearly a year after the application for execution was first made, that the present objection was taken We are of opinion that the general principle laid down by the Privy Council in *Bissessur Lall Sahoo* v *Maharaja Luchmessur Singh* (2) should be followed unless its application is precluded by express provisions of the legislature Looking, therefore, at the substance of the application and the prior proceedings which are of a complicated character, we think that the decision of the District Judge was right, and we dismiss this appeal, but under the circumstances each party will bear his own costs

(1) L R 19 Q B D 395 (2) 6 I A 233.

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17 M. 69=4 M.L.J. 14.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

ILLIKKA PAKRAMAR AND OTHERS (*Plaintiffs Nos. 1 and 3 to 13*). *Appellants v.* KUTTI KUNHAMED AND OTHERS (*Defendants Nos. 1 and 3 to 9*), *Respondents.** [3rd August and 15th September, 1893.]

Civil Procedure Code—Act XIV of 1882, *Section* 566—*Remand for trial of a new issue —Malabar law—Mapillas.*

The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The [70] parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly; (ii) that their mother was not governed by Marukkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad :

Held, that the order of remand was not one which should have been made under Civil Procedure Code, Section 566, and the proceedings taken under it were irregular.

Observations as to the law applicable to Mapillas.

[R., 27 M. 77 (78)=14 M.L.J. 137; 17 Ind. Cas. 769 (773)=24 M.L.J. 240=13 M.L.T. 166.]

SECOND appeal, against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 359 of 1891, confirming the decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No. 329 of 1890.

The plaintiff sued as karnavan of a Mapilla tarwad in North Malabar to recover property acquired by his late sister and now in the possession of her children.

The further facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Ryru Nambiar, for appellants.

Sankaran Nayar, for respondents Nos. 2 to 5.

JUDGMENT.

The suit is brought by the karnavan of a tarwad, alleged by him to follow Marumakkatayam law, to recover property acquired by the plaintiffs' late sister Mamotti. The defendants, who include the children of Mamotti, raise, among other defences, two pleas, either of which is a complete answer to the plaintiffs' claim. They say that Mamotti did not follow Marumakkatayam law, and that it was not to her only, but to her and her children that the property sought to be recovered was given. On the latter plea the defendants succeeded on the trial of the suit by the District Munsif, though he also found that the family was governed by Marumakkatayam law. There was, as he observed, no evidence to the contrary. Against the District Munsif's decree dismissing the suit, the

* Second Appeal No. 1586 of 1892.

plaintiff appealed, and he was successful in obtaining a reversal of the finding as to the title of Mainotti The District Judge found on the first issue in the plaintiff's favour, and that finding we are bound to accept Instead, however, of proceeding to consider the other issue and expressing [71] his agreement or disagreement with the District Munsif thereon, the district Judge—whether on his own motion or at the instance of the defendants does not appear—framed a new issue and directed the District Munsif to take fresh evidence and return a finding thereon The issue so framed was as follows —Whether in Marumakkatayam Mapilla families in North Malabar the devolution of self-acquired property is governed by ordinary Muhammadan law, or whether on the death of the acquirer it lapses to the tarwad?

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If this issue had been one of mere fact, the procedure of the District Judge might not have been open to exception, it would have been a question whether the issue was raised by the pleadings, and whether the District Judge had exercised a wise discretion in giving an opening for a fresh inquiry, certainly his reasons for allowing a new case to be set up are not satisfactory But the issue raised by the District Judge was not a mere issue of fact It was not even a question as to the custom prevailing in a particular family, but as he himself says, a question as to what is the ordinary customary law in Mapilla families The cases *Vishnu* v *Krishna* (1) and *Vayidinada* v *Appu* (2) are authorities for the proposition that such an inquiry is allowable under certain circumstances In those cases too, among others, the tests and the standard to which the evidence adduced to support an alleged usage should conform are given. In the present case, however, it does not appear that the Judge had before him a particle of evidence (excepting the opinions of two text writers) to justify an inquiry into the law regulating Mapilla families In our opinion, therefore, the order of remand is one which ought not to have been passed under section 566 of the Code, and the proceedings taken under it are wholly irregular Mr Sankara Nayar has referred us to decisions of this Court in support of his contention that the conclusion at which the Judge has arrived is the right one In *Panangatt Unda Pakramar* v *Vadakkel Suppi* (3) this same question, *viz*, as to the descent of self-acquired property in a Mapilla family was raised There was an inquiry, and it was found that Mapillas are governed in that respect by the ordinary Marumakkatayam law as declared in *Kallati Kunju Menon* v *Palat Erracha Menon* (4) That finding was accepted by the [72] High Court In 1886 *Kunhi Pathumma* v *Mama* (5), the question was raised again, an inquiry was again directed, and the finding was this time in favour of the deviation from Marumakkatayam law The High Court accepted that finding so far as it concerned the particular family, holding that there was, as regards it, sufficient evidence of a special custom As far as we are aware, the question has not been raised since in this Court, although there have been cases in which the contention now made would be relevant In *Kunhacha Umma* v *Kutti Mammi Hajee* (6), the question referred to a Full Bench was as to the nature of the interest taken by a Mapilla woman and her children in a gift made to them If, by the ordinary law of inheritance, the children, and not the tarwad generally, would succeed to the mother, the

(1) 7 M 3
(2) 9 M 44
(3) Second Appeal No 576 of 1883, unreported
(4) 2 M H C R 162.
(5) Appeal No 125 of 1885, unreported
(6) 16 M. 201

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probability is that the gift would be made simply to her; but however that may be, the fact that such was the rule would have been strong to indicate that the tarwad took no interest under the gift. The evidence taken in the present case, so far as it is discussed in the judgments, certainly does not convince us of the existence of the alleged custom. The District Munsif gives good reasons for holding it to be vague and uncertain, and the District Judge overruling that finding does not explain how evidence almost exclusively composed of recent documents can suffice to prove an ancient custom nor indeed does he profess to hold that it is of a character to prove a custom in the manner required by a series of decided cases. Being of opinion that the order of remand was improperly made, and seeing that both the defences set up by the defendants have failed, we must hold that the plaintiff is entitled to judgment. We must accordingly reverse the decrees of the Courts below and remand the case to the Court of first instance for trial on the seventh issue.

Respondents to pay costs of this appeal: other costs to be provided for in the revised decree.

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17 M. 73.

[73] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

LAKSHMANNA (*Defendant*), *Appellant* v APPA RAU (*Plaintiff*), *Respondent*.* [21st March and 26th April, 1893.]

Rent Recovery Act—Madras Act VIII of 1865, Section 11—Implied contract as to rates of rent—Customary fees—Prohibition of buildings

In order to support the inference of a contract under the Rent Recovery Act, Madras, Section 11, from payment of the same rent for a given number of years, the intention that the same rent is payable in future years must be clear and unequivocal: it is unsafe to imply such a contract from a single lease for five years.

A patta is not unenforceable by reason of its providing for the payment of fees to village artisans in a case when such fees are customary, or by reason of its prohibiting the tenant from erecting buildings on his holding, if such prohibition is limited to erections not compatible with the agricultural character of the holding.

[D., 22 M. 39 (41).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 405 of 1890, modifying the decision of L. M. Wynch, Acting Head Assistant Collector of Kistna.

Suit by a zemindar against a tenant on his estate to enforce acceptance of a patta. The Head Assistant Collector directed certain alterations to be made in the patta tendered and his decision was modified by the District Judge.

The further facts of the case appear sufficiently for purposes of this report from the judgment of the High Court.

The defendant preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Subramanya Ayyar, for respondent.

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* Second Appeal No. 683 of 1891.

1893 APRIL 26.

APPELLATE CIVIL.

17 M. 73.

JUDGMENT

These second appeals relate to suits brought by the zemindar of Nuzvid to compel the raiyats in the village of Kuyur to accept pattas for fasli 1297 The raiyats are the appellants and the zemindar is the respondent before us The items in the pattas to which appellants object in second appeal are (i) the consolidated wet rate; (ii) the fees to village artisans, (iii) the tax on trees, (iv) the condition that no land should be cultivated without first obtaining a patta, (v) that no building [74] should be erected on lands in appellant's possession, (vi) that no remissions are to be allowed, and (vii) that interest shall be paid on instalments of rent from the dates on which they fall due according to the kistbundi

The first item is the most important and the history of the rates which prevailed in the village from fasli 1265 is given by the Head Assistant Collector in his judgment It will be observed that the sharing system was in force till fasli 1264, that the money rates varied from faslis 1265 to 1292, and that from faslis 1292 to 1296 the raiyats accepted a five-years' lease The rates mentioned in the patta tendered are those for which five-years' leases were accepted, but the appellants objected to those rates on the ground that they had executed the leases upon respondent's promise to repair certain channels and that the promise had not been kept Their contention was that they should revert to the rates which prevailed at earlier periods, even as far back as the date of the permanent settlement But it was in evidence that the rates paid from faslis 1285 to 1291 were Rs 2-11-4 for dry land, Rs 10 for mamul or old wet, and Rs 8 for dry converted into wet, whereas from faslis 1292 to 1295 they were raised to Rs 3 for dry land, Rs 9, including water-tax, for dry converted into wet, and Rs 10 for mamul wet land Though appellants denied that there was any mamul wet land in the village, the Head Assistant Collector found, and the Judge agreed in the finding, that their allegation was not true, and that the mamul wet as entered in the pattas from faslis 1285 to 1291 extended to acres 358 32 The Head Assistant Collector refused to infer a contract from the five-years' lease and considered that Rs 10 per acre from mamul wet, Rs 2-11-4 for dry land and Rs 2-11-4 *plus* the water-rate of Rs 4 an acre for dry converted into wet were the proper rates to be inserted in the pattas On appeal, the Judge inferred a contract from the five-years' lease, and rejected as not trustworthy the evidence produced by appellants to show that they took the lease for five years because the zemindar promised to excavate the channels The Judge also expressed it as his opinion with reference to appellant's wish to revert to the rates which prevailed at the permanent settlement, that the rates paid from faslis 1285 to 1291 were at all events binding upon appellants if not the rates mentioned in the five-years' lease The contention before us on appellant's behalf is that no contract can be lawfully implied [75] from the facts found that no sanction was obtained from the Collector under the first proviso of Section 11, Act VIII of 1865, for enhancing the rates, and that the lower appellate Court acted illegally in enhancing the rates, in these cases in which no memoranda of objections were filed by the zemindar

We are of opinion that the decision of the Judge that there was an implied contract cannot be supported. In order to sustain the inference of a contract from payment of the same rate for a given number of years, the intention that the same rate is payable in future years, must be clear and unequivocal. Neither should the period be very short, nor should

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there be any other circumstance in the case inconsistent with such intention. The presumption is a matter of positive law under the Bengal Tenancy Act but under Act VIII of 1865 it is one of fact. In *Apparau* v. *Narasanna* (1) it was pronounced to be unsafe to imply a contract from a single lease extending to five years. It appears from later cases decided by the Judge that he considered nothing less than seven years was long enough to support the presumption. In the Full Bench case, there had been a continuous payment of the same rate for a period of not less than fourteen years. Again, the presumption arising from the duration of payment should also be tested by the other circumstances in evidence. In *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu* (2) we have pointed out that in the absence of a contract, the sanction of the Collector is indispensable. The decision of the Judge must be set aside and that of the Head Assistant Collector restored in so far as it relates to the rates.

As regards the fees to village artisans the Judge finds that they are customary and there are no grounds for interference in second appeal. As regards the condition about building, the tenant is clearly not entitled to build a house except for purposes not incompatible with the character of the holding as an agricultural holding. With respect to the other considerations the Judge has followed the decision of the High Court in the *Mustabad Mantena suits*, dated the 29th October 1889 and 3rd March 1890.

The decree of the Judge will be set aside so far as it relates to rates of rent and that of the Head Assistant Collector restored, [76] and as regards the prohibition to build, the words " except for purposes not incompatible with the character of the holding as an agricultural holding " will be inserted, and in other respects the decree of the Judge is confirmed. The appeal has succeeded in part and failed in part, and we direct each party to bear his own costs.

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17 M. 76=4 M.L.J. 8.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAMIA PILLAI (*Defendant No. 2*), *Appellant v.* CHOCKALINGA CHETTIAR AND ANOTHER (*Plaintiffs*), *Respondents.**
[18th October, 1893.]

Limitation Act—Act XV of 1877, *Schedule* 11. *Article* 179—*Step in aid of execution—Defect in application for execution.*

Where there has been in fact an application for execution made by party entitled to make it, it is to be regarded as a step in aid of execution within the meaning of the Limitation Act, Article 179, although by mistake a deceased judgment-debtor is named as the person against whom execution is sought.

F., 35 C. 1047 (1049); 31 M. 68 (70)=17 M.L.J. 596=3 M.L.T. 254; **R.**, 5 N.L.R. 8; **D.**, 28 C. 180 (185).]

APPEAL against the order of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in civil miscellaneous petition No. 628 of 1891.

This was an application made on the 20th August 1891 for execution of a decree obtained by the petitioner in original suit No. 30 of 1883 against

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* Appeal against Order No. 84 of 1892.

(1) 15 M. 47.

(2) See 17 M. 43.

three defendants. In February 1891 a petition was filed praying for execution of the decree against defendant No. 1, who was then in fact dead. The Subordinate Judge held that the petitioners were at that time aware of the death of defendant No. 1 and that his name was inserted in the petition through a *bona fide* mistake. In this view he held that that petition should be treated as a step taken in aid of execution for the purposes of limitation, and he accordingly directed that execution should issue

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APPELLATE CIVIL.

17 M. 76=4 M.L.J. 8.

[77] The judgment-debtor preferred this appeal

Parthasaradhi Ayyangar, for appellant

Rama Rau, for respondents

JUDGMENT

The question for decision in this case is whether the last application for execution made on the 6th February 1891 was in accordance with law within the meaning of Section 179 of Schedule II of the Limitation Act so as to amount to a step in aid of execution sufficient to prevent the present application being time barred.

That the application was presented by the party entitled to execute the decree and in order to obtain execution is not denied, but it is contended that as first defendant who was dead at the time was named as the party against whom execution was sought, the application must be treated as a nullity and consequently the present application held to be time barred

The Subordinate Judge observes that the mention of the deceased first defendant's name in column 9 of the application was probably a mistake made by the Vakil's gumastah It was no doubt a *bona fide* mistake. Where there has been in fact an application for execution made by the party entitled to make it, the mere fact of a mistake having been made in giving the particulars required by Section 235 of the Code of Civil Procedure cannot, we think, have the effect of rendering the application a nullity. This is also the view adopted in *Ramanadan* v *Peria tambi* (1) and *Fuzloor Ruhman* v *Altaf Hossen* (2) In this view the application of 6th February 1891 is sufficient to save limitation both against first defendant's legal representatives and also against his joint judgment-debtors

We dismiss this appeal with costs

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17 M. 78=3 M.L.J. 272.

[78] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

LAKSHMANA AYYAN (*Defendant*), *Appellant* v. RANGASAMI AYYAN (*Plaintiff*), *Respondent* *

[26th July and 19th September, 1893]

Contribution, suit for—Joint tort-feasor—Adjustment of a loss arising from an illegal contract

A deed of partition between A and B, members of an undivided Hindu, family, provided that A, who took over all the debts due to the family, should bear the loss if any incurred in the appeal then pending in a suit brought by the family on a bond The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs The decree for costs was executed against B

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* Second Appeal No 1414 of 1892

(1) 6 M. 250.

(2) 10 C 541.

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APPELLATE CIVIL.

17 M. 78=3 M. L. J. 272.

and satisfied by him; he now sued the son of A (deceased) to recover the amount paid by him:

Held that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors.

SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 350 of 1891, modifying the decree of T. M. Audinarayana Chettiyar, District Munsif of Mannargudi, in original suit No. 169 of 1890.

The plaintiff and the father of the defendant were undivided brothers, and, in 1884, they brought a suit to recover Rs. 6,000 on the footing of a hypothecation bond. This suit was dismissed, and an appeal was preferred to the High Court. During the pendency of the appeal they entered into a partition, by which it was provided, *inter alia*, that the defendant's father should take over the debts due to the family and should bear alone the cost of the litigation above referred to. The appeal to the High Court was dismissed with costs on the ground that the bond in suit was supported by no consideration The decree for recosts was executed against the present plaintiff, and having satisfied the decree he now sued the infant son of his brother, since deceased, to recover, with interest, the amount so paid by him. The District Munsif passed a decree, as prayed, and this decree was upheld except as to the rate of interest by the Subordinate Judge.

[79] The defendant preferred this second appeal

Mr. *R. F. Grant*, for appellant.

Krishnasami Ayyar, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—Appellant and respondent are the sons of two brothers. On the 25th October 1587 the latter and the father of the former entered into a partition. An appeal was then pending in the High Court from the decision of the Subordinate Court of Negapatam in original suit No. 63 of 1884, which had been brought by them on a hypothecation bond executed in their favour by one Chokkammal Annee of Kulikarai. The partition deed provided, *inter alia*, that appellant's father should take for his share all the debts due to the joint family including the amount of the hypothecation bond, and that, if the appeal then pending was decided against them, appellant's father should pay all the costs of that litigation both in the original and appellate Courts. The appeal was dismissed in January 1889, and both the appellant's father and respondent were directed to pay Chokkammal's costs One of her judgment-creditors took out execution against the judgment-debtors in original suit No 63 of 1884, and recovered the costs from the respondent. The respondent's case was that he was entitled to recover the money paid by him from the appellant, and both the Courts below decreed the claim. It is urged in second appeal that the decree for contribution recognizes a claim contrary to public policy, and that the present suit is in the nature of a suit for contribution brought by one wrong doer against another. Original suit No. 63 of 1884 was dismissed on the ground that the hypothecation bond was executed without consideration, and that it evidenced a fraudulent transaction. It is no doubt a clear proposition of law that one tort-feasor cannot recover contribution from another, but it is subject to this important qualification, *viz.*, that where the loss arising from the illegal contract is adjusted, so that the adjustment

is equivalent to a payment, the adjustment cannot be disturbed It was so held in *Owens* v *Denton* (1) In that case, the price due for malt illegally sold by plaintiff was included in an account stated and settled between the parties, and it was held by Lord Abinger that the adjustment was equivalent to payment in cash, and that it came within the rule that money paid in pursuance of [80] an illegal contract shall not be claimed back again No contribution is allowed between joint tort-feasors because the community of wrong between them is the foundation of the action, but the same community of wrong precludes the defendant from recovering what he has paid in consequence of the illegal act If the loss arising from the wrongful act is adjusted by an account stated between the parties or by a partition deed, as in this case, it is equivalent to payment since it is no longer necessary for the plaintiff to rely on the community of wrong in support of his claim

The same community of wrong that would prevent the plaintiff from claiming contribution if there were no adjustment by partition likewise prevents the defendant from disturbing the adjustment which is equivalent to payment The loss arising from the decision in original suit No. 63 of 1884 was a loss which devolved on the coparcenary family, and the partition deed under which the party who took all the debts due to the family agreed to bear the loss, if any, arising from the failure of the suit brought by the family to recover one of those debts is an adjustment which the defendant is not at liberty to go behind for raising a defence from the community of wrong in which he participated The fact that the partition was made pending the decision of the appeal makes no difference in principle.

No other question is argued on appeal, and I would dismiss the second appeal with costs

BEST, J —The point urged before us is that plaintiff's suit is not maintainable, as the agreement sued on is opposed to public policy and therefore void

The agreement sued on is part and parcel of the partition deed, under which plaintiff and his uncle, the father of the appellant (defendant) divided the family property

This division took place pending appeal suit No 50 of 1887 in this Court

That was an appeal against the decree of the Subordinate Judge of Negapatam, which dismissed a suit brought by plaintiff and his uncle (the father of defendants) for the recovery of a sum of Rs 4,000 and interest as due under a hypothecation bond executed by one Murugattal Annee This Murugattal Anee (as first defendant) admitted the then plaintiff's claim, but one Chokkammal Annee, who was the second defendant, denied the [81] executant's right to encumber the property, and pleaded that the hypothecation bond was fictitious The finding of this Court was that the hypothecation sued on was a colourable transaction The appeal was therefore dismissed with costs

As already observed, it was, while that appeal was pending, that this plaintiff and the father of defendant effected a partition of their family property, and in the deed of partition after mentioning the pending appeal, and after allotting the debt in question to this appellant's father exclusively, it is stipulated that the latter shall pay the entire costs of that suit in both Courts in case the appeal should fail, and it is further stipulated

(1) 1 C. M & R. 712

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that "if Naranappien (appellant's father) does not pay the same, and if "any sums are collected from Ramasawmi Iyen (present respondent) in "execution proceedings, those sums shall be collected from Naranappien by Ramasawmi Iyen amicably or through the Court." It is this contingency that has happened; and the question is whether plaintiff is debarred from recovering the costs paid by him by reason of the same having been incurred in a suit brought on a bond which was found to be a colorable transaction.

This is not a suit for "contribution" like *Manja* v. *Kadugochen* (1), and *Suput Singh* v. *Imrit Tewari* (2), but for the enforcement of one of the terms of the partition deed. Appellant's father would have been exclusively entitled to the whole of the amount then sued for had the appeal succeeded, and he could not have been allowed to disclaim his liability for the costs merely because the appeal failed. The contract is part and parcel of the partition deed from which it is inseparable, and, unless the partition can also be set aside, it is not open to the appellant to deny his liability for the amount now sought to be recovered from him.

This appeal must be dismissed with costs.

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17 M. 82.

[82] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KASSIM SAIB (*Counter-petitioner*), *Appellant v.* LUIS (*Petitioner*), *Respondent.** [12th and 17th October, 1893.]

Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund—Civil Procedure Code, Section 583.

In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one claiming title against the mortgagee was joined as second defendant. The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint: and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person entitled to it was paid over to the plaintiff. The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs; this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above:

Held that the applicant was not entitled to the refund claim.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in civil miscellaneous appeal No. 51 of 1891, confirming the order of U. Babu Rau, District Munsif of Udipi, in civil miscellaneous petition No. 493 of 1891.

In 1886 a suit was brought by a plaintiff, since deceased, and now represented by the respondent to the above petition, to receive from J. Luis, the present petitioner, a sum of money on account of rent accrued due on certain land in the defendant's possession. The plaintiff claimed to be the mortgagee of the land in question from the late trustee of

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* Appeal Against Appellate Order, No. 36 of 1892.

(1) 7 M. 89. (2) 5 C. 720.

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APPEL-LATE CIVIL.

17 M. 82

the Puttigi Mutt The trustee who had succeeded to office at the time of the suit, and who had been included in the suit as the second defendant, disputed the validity of the mortgage and claimed to be entitled to the rent in question The Court of first instance passed a decree dismissing the suit, but this decree was reversed by the District Court and in execution of the appellate decree, the [83] plaintiff received out of Court a sum, which had been paid in by Luis as the principal sum with the request that it should be paid out to the party entitled to it Against the decree of the District Court, however, Luis preferred a second appeal, on the ground that he was no liable to pay interest and costs and the second defendant preferred a second appeal against the appellate decree in its entirety impleading both the plaintiff and Luis Luis' second appeal was dismissed, but on the second appeal preferred by second defendant, the High Court restored the original decree in the suit by which, as above stated, the suit was dismissed

The present petition was preferred by Luis to recover the sum paid by him under the circumstances appearing above Both the Lower Courts held that he was entitled to the refund claimed The representative to this plaintiff preferred this second appeal

The further facts of the case appear sufficiently for the purposes of this report from the judgment of Mr Justice BEST.

Narayana Rau, for appellant

Ranga Rau, for respondent.

JUDGMENT

BEST, J —This is an appeal against an order of the District Judge, directing the appellant, who was plaintiff in the suit, to refund to the respondent, who was the first defendant, money paid by the latter on account of rent admittedly due on the land, of which respondent was tenant The land belongs to the Puttigi Mutt at Udipi, and had been mortgaged to the appellant by Sumatindra Swami as trustee of the Mutt The validity of Sumatindra's appointment to the trusteeship was under litigation at the time of the mortgage, and was eventually decided against him The rent, in question, was claimed also by Sudindra Swami, who was eventually declared the rightful trustee He was consequently included as second defendant in the suit The money was deposited in Court by the respondent with the request that it might be paid to whichever of the claimants might be found entitled to it The Court of first instance dismissed the plaintiff's, *i.e.*, appellant's suit, but on appeal that decision was reversed, and thereupon the money was paid to appellant But in second appeal preferred by Sudindra Swami, the second defendant in the suit, this Court reversed the decree of the Lower Appellate Court and restored that of the District Munsif Hence the application out of which the present appeal has arisen, for restitution to first defendant of the money wrongly paid to plaintiff The District [84] Court has upheld that order of the District Munsif in favour of the respondent, and from that order this second appeal is preferred by the plaintiff

It is contended on behalf of appellant that respondent is not entitled to restitution under Section 583 of the Code of Civil Procedure, as there is no decree in his favour, he not having been an appellant, but merely a respondent (jointly with the present appellant) in the second appeal No 657 of, 1889 in which was passed this Court's decree dismissing the present appellant's suit, whereas the appeal (second appeal No. 778 of 1889)

1893 Oct. 17. — Appel-late Civil — 17 M. 82.

preferred by this respondent from the same decree (which appeal was dismissed) related only to interest and costs.

The contention on behalf of appellant is that the respondent "was "not declared entitled to any benefit under any decree so as to claim "restitution." I do not understand this contention to mean that restitution can only be made under Section 583 of the Code, in cases in which it is expressly directed by the decree; such a contention would clearly be bad. *Balvantrav Oze* v. *Sadrudin* (1). I understand the contention on behalf of appellant to be that respondent is not entitled to the restitution sought, as there is *no decree whatever in his favour.* This contention is, I think, valid. The decree in second appeal No. 657 of 1889 was a decree in favour of the second defendant in that suit; and if, as the result of that decree, it happens that the money was wrongly paid to the present appellant, it is for that second defendant to ask the Court to get it back and pay it to himself as the party entitled to the same, it having been paid into Court by this respondent for payment to whichever of the two claimants before it in the same suit might be found entitled to the same.

Respondent having paid the money into Court in a suit to which both the claimants were parties, is fully discharged from all liability; and in the absence of a decree in his favour, he is entitled to no refund from the appellant I would, therefore, allow the appeal and, setting aside the order of both the Courts below, dismiss respondent's application with costs throughout.

Muttusami Ayyar, J.—I agree The payment was not made into Court under Chapter XXIII of the Code of Civil Procedure, for such payment pre-supposes an admission of the plaintiff's [85] claim to the extent of the payment. In the present case the payment was made with the request that the money should be paid out to the party really entitled to the rent. It is a payment made under the impression that the suit though brought by the plaintiff might be treated as being in the nature of an interpleader proceeding under Section 490, Civil Procedure Code. The Munsif was wrong in ordering the money to be paid out to the plaintiff without security before the decision of the second appeal, and the party entitled to put him in motion in order to rectify this error, and to call for a refund is the second defendant. The first defendant is, therefore, not entitled to ask for a refund, and I concur in the order proposed by my learned colleague.

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17 M. 85.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

Ramachandra and others (*Plaintiffs*), *Petitioners* v. Sesha (*Defendant*), *Respondent.** [20th, 24th and 27th April, 1893.]

Negotiable Instruments Act—Act XXVI of 1881, Section 13—Promissory note—Reference in the note to collateral security, effect of.

An instrument, signed and bearing a 1-anna stamp, was in the following terms, *viz*, "on deposit of title-deeds named herein-below for value received by "me I promise to pay three months after date Rs. 160 to A. B. or order," then followed the details of the title-deeds :

Held, that the instrument was a negotiable instrument.

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* Civil Revision Petition No. 646 of 1892.

(1) 18 B. 485.

1893 APRIL 27. APPELLATE CIVIL. 17 M. 85

PETITION under Provincial Small Cause Court's Act, Section 25, praying the High Court to revise the proceedings of G Ramasami Ayyar, District Munsif of Coimbatore, in small cause suit No. 213 of 1892

The plaintiffs, who carried on business in partnership, under the name of Srinivasa and Company, sued to recover principal and interest due under an instrument signed by the defendant and dated 13th October 1827 The instrument in question [86] bore a 1-anna stamp, and was in the following terms —" On deposit of title-deeds noted herein-below for " value received by me, I promise to pay three months after date Rs 160 " to the Coimbatore Native Money Savings Bank (Limited) or order," then follow the details of the title-deeds It was objected by the defendant that the above instrument was a promissory note transferable only by endorsement, whereas the plaintiffs not being endorsees sued under an assignment of all the assets and credits of the bank in question

The District Munsif upheld the contention of defendant and dismissed the suit as not being maintainable by the plaintiffs, and he referred to *Pattat Ambadi Marai* v *Krishnan* (1)

The plaintiffs preferred this petition.

Pattabhirama Ayyar and *Venkatarama Sarma*, for petitioners

Ramachandra Rau Saheb, for respondent.

JUDGMENT

It is urged on petitioners' behalf that the document sued upon is not a negotiable instrument but an instrument of pledge It is in these terms —" On deposit of title-deeds I promise to pay you or order " Rs. 160 for value received " The words ' or order ' show that the intention was that the promissory note should circulate from hand to hand, and the question therefore is, whether the terms on deposit of title-deeds' control its operation and restrain its negotiability Deposit of title-deeds as a collateral security does not make a promissory note the less a negotiable instrument, and it was so held in *Wise* v *Charlton* (2) Do the words ' on deposit of title-deeds,' import in the case before us more than that a collateral security is also given, or in any way restrain the operation of the promissory note as a negotiable instrument? We do not think an allusion to the mere deposit of title-deeds makes the payment contingent or otherwise qualifies the operation of the document as a negotiable instrument In our opinion it is not material whether the words occur in the same sentence which expresses the promise, as in this case, or in an additional sentence as in *Wise* v *Charlton* (2) The language of the instrument in its plain ordinary sense only signifies that a loan was made and that title-deeds were deposited as a collateral security, and there is nothing to show that the intention was to qualify the operation of the note as a negotiable instrument or to [87] regard the pledge as the primary transaction and the promissory note only as a further security This is the only point argued, and we dismiss this petition with costs.

(1) 11 M 290

(2) 4 Ad & E 486.

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17 M. 87.

17 M. 87.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Davies.

RAMUN NARAYAN (*Plaintiff*), *Appellant v.* SUBRAMANYA AYYAR (*Defendant*), *Respondent.** [11th and 13th April, 1893.]

Defamation—Privilege of Judge.

An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious and without reasonable cause.

[R., 31 M 400=18 M.L.J. 353=4 M.L.T. 222=10 M.L.T. 489; 36 M. 216 (219)=11 M.L.I. 416=(1912) M.W.N. 393; 13 Cr. L.J. 275 (276)=(1912) M.W.N. 476=14 Ind. Cas. 659; 3 L.B.R. 265 (272).]

APPEAL against the order of A. Thompson, District Judge of North Malabar in original suit No. 1 of 1892, rejecting a plaint under Civil Procedure Code, Section 54 (*c*), on the ground that the suit was barred by the provisions of Act XVIII of 1850.

The plaintiff had been a party to certain suits pending in the Court of a District Munsif, and it was averred in the present plaint that when the suits came on for hearing the District Munsif used certain expressions "in connection with me wilfully and unnecessarily with a malicious "intention of putting me to disgrace and without reasonable cause." The above-mentioned words, it was averred, were used neither in the judicial capacity of a Judge who was going on with the trial nor for the purpose of the suit under trial. The plaintiff now sought a decree for damages against the defendant, the said District Munsif, on account of the defamation above referred to. The plaint having been rejected as above stated, the plaintiff preferred this appeal.

Mr. *Wedderburn*, for appellant.

The Acting Government Pleader (*Subramanya Ayyar*) and *Sundara Ayyar*, for respondent.

JUDGMENT.

[88] This was an action for slander, and it was alleged in the plaint that the words complained of were uttered by the defendant, who is the Munsif of Payoli, during the hearing of a suit to which the plaintiff was a party.

The District Judge rejected the plaint under Section 54 (*c*), Civil Procedure Code, holding that the suit was barred under a positive rule of law, and that Act XVIII of 1850 applied.

The real question for our decision is, can an action for slander be maintained against a Judge for words used by him whilst trying a cause in Court even though such words were alleged to be false, malicious and without reasonable cause.

This question has long been decided in the negative by the Courts in England on the grounds of public policy, and we think that the English law is applicable to Courts in India. In *Scott* v. *Stansfield* (1), the facts were very similar to the present case, and the Court of Exchequer consisting of Kelly, C. B., and Martin, Bramwell and Channell, B. B., unanimously decided that such an action would not lie; the reasons given were

* Appeal No. 77 of 1892.
(1) L. R. 3 Ex. 220.

that it is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law; independently and freely without favour and without fear This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges do exercise their functions with independence and without fear of consequences In *Dawkins* v *Lord Rokeby* (1), the Court of Exchequer Chamber consisting of ten Judges held that the authorities are clear, uniform and conclusive that no action of slander lies against Judges for words spoken in the ordinary course of any proceeding before any Court or Tribunal recognised by law A Full Bench of the Madras High Court has held that English authorities on this subject apply to Judges and Courts in India See *Sullivan* v *Norton* (2)

Act XVIII of 1850 quoted by the District Judge does not appear to apply in a case like the present.

We dismiss the appeal with costs

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17 M. 89=3 M.L.J. 287.

[89] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

VENKATALINGAM (*Plaintiff*), *Appellant v* VEERASAMI AND OTHERS (*Defendants*), *Respondents* *

[28th April and 13th September, 1893]

Limitation Act—Act XV of 1877, Schedule II, Articles 137, 138—Purchase at Court auction—Suit for possession of land—Date of cause of action—Construction of enactment

In a suit for possession of land instituted on 1st April 1891, it appeared that the land in question had been purchased by the plaintiff in a Court auction held in execution of a decree on 20th June 1878, and that the sale to the plaintiff was confirmed on 31st March 1879, which was the date upon which the certificate issued The plaintiff failed to prove that the judgment debtor was out of possession at or subsequently to the date of the sale

Held, that the suit was governed by Limitation Act, Schedule II, Article 138 that ' the date of the sale " in that article means the date of the actual sale, not the date of the confirmation of the sale and that accordingly the suit was barred by limitation

[R., 25 B 275 (280), 10 A L J 13=15 Ind Cas 10 (11)]

SECOND appeal against the decree of B Sundara Rau, Subordinate Judge of Ellore, in appeal suit No 433 of 1891, confirming the decree of V Krishnamurthi Pantulu in original suit No 109 of 1891

Suit for land The property in question was brought to sale in execution of the decree in original suit No 654 of 1873 and had been purchased at Court auction by the present plaintiff on 20th June 1878 The sale was confirmed and certificate issued on 31st March 1879 Delivery of the property, however, was not made through the Court or otherwise, and the auction-purchaser now sued to recover the property in question. The plaint was filed on 1st April 1891 and the defendants raised a plea of limitation. This plea prevailed in the Lower Courts The Subordinate Judge observed that an averment in the memorandum of

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* Second Appeal No 1441 of 1892

(1) L R 8 Q B. 255

(2) 10 M. 28.

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the appeal filed in his Court to the effect that the defendants had been out of possession for four years after the sale did not appear in the plaint and appeared to have been made as an after thought in order to bring the suit without Limitation Act, Schedule II, Article 137.

[90] The plaintiff preferred this second appeal.

Pattabhirama Ayyar, for appellant.

Sriranga Charyar, for respondents.

JUDGMENT.

The facts of this case as found by the Courts below are shortly these:—Appellant purchased the land in dispute at the Court-sale held in execution of the decree in original suit No. 654 of 1873 on the file of the District Munsif of Narsapur. The property was put up to sale and knocked down to appellant as the highest bidder on the 20th June 1878. It was, however, on the 31st March 1879 that the sale was confirmed. The sale certificate bears that date whilst this suit was brought on 1st April 1891. The question for determination is whether the Courts below are right in holding that the suit was barred by Article 138 of the Second Schedule of the Act of Limitation. For appellant (plaintiff) it is urged first, that there is no evidence to show that the judgment-debtor was in possession of the property in dispute at the date of the Court-sale, and that even if that article applied, the sale referred to in the third column is not the actual sale but the sale which has been confirmed and became absolute.

Article 137 premises an execution sale at the time when the judgment-debtor is out of possession, and Article 138 presupposes a case in which the judgment-debtor is in possession of the property sold. According to the former the time from which the period begins to run is when the judgment-debtor becomes first entitled to possession and according to the latter time runs from the date of the sale. Referring to appellants' contention that defendants were out of possession for four years after the sale, the Subordinate Judge observes that the plaint did not state so, and that the allegation in the memorandum of appeal was an after thought. The first issue fixed in this case was whether the suit was barred, and it was thus open to appellant to have proved that the judgment-debtor had been out of possession for four years after the sale, but he tendered no evidence on the point. The *onus* of proof was on appellant, and we cannot say that the Subordinate Judge was in error in considering his allegation as untrustworthy, especially when the plaintiff himself stated before the District Munsif that he asked the defendants to quit the land in dispute until four or five years after taking the certificate and not subsequently.

The next question is whether assuming that Article 138 is [91] applicable to this suit, the claim is barred. If the word sale in the third column of that article means actual sale, the claim is clearly barred; but, if it means the sale which is confirmed the suit is in time. In its plain ordinary meaning the word sale means the auction-sale, itself, and it is used in Article 166 in that sense. Article 12, which refers to a sale that is confirmed, indicates also that the Legislature intentionally used the word without any qualification.

But it is argued that under Section 316 of the Code of Civil Procedure the title to the immoveable property purchased vests in the purchaser from the time when the sale is confirmed and not before, and as no purchaser can sue for possession before the property passes to him the term sale in

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APPEL-LATE CIVIL.

17 M. 89 = 3 M. L. J. 267.

Column 3 of Article 138 must be taken to signify as in Article 12 the sale which is confirmed. The direction in Section 316 of the Code of Civil Procedure concerning the date on which the title to immoveable property purchased at a Court-sale vests is not to be found in Act X of 1877, of which the corresponding section provides for the grant of a certificate, stating "the name of the person who, at the time of sale, is declared to "be the purchaser and the date of such sale." With reference to that section it has been held that when the sale is confirmed it relates back to the auction sale, and the property vests in the purchaser from the date of such sale. It was so held by the High Court at Calcutta in *Kishori Mohun Roy Chowdhry* v *Chunder Nath Pal* (1), and by a Full Bench of the same Court in *Bhyrub Chunder Bundopadhya* v *Soudamini Dabee* (2). It was by Act XII of 1879 that the clause "title shall vest in the pur-"chaser from the time when the sale is confirmed" was introduced into Section 316. Though it was then open to the Legislature to have altered the word sale in the third column of Article 138 of the Limitation Act, yet they have not done so. The same word cannot mean the actual sale in one place and the sale which is confirmed in another place in the same Act. The omission to alter the word sale into sale which is confirmed may be due to oversight, but the result of the grammatical interpretation must in law prevail when there is no ambiguity. We observe also that the sale in this case took place in June 1878, whereas Section 316 was not modified till 1879.

[**92**] We are of opinion that the Courts below are right in holding that the suit is barred by Article 138 of the Indian Limitation Act, and we dismiss this appeal with costs.

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17 M. 92.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

VENKATASUBBU AND ANOTHER (*Defendants*), *Appellants* v APPUSUNDRAM (*Plaintiff*), *Respondent* * [12th July, 1893.]

Limitation Act—Act XV of 1877, *Section* 20—*Suit for money—Payment on account of principal within the period of limitation—Evidence of such payment by writing made after period expired.*

The obligee of a registered mortgage bond, dated 30th January 1875, sued in February 1891 to recover from the obligor the principal and interest remaining due thereunder. In bar of limitation the plaintiff relied on entries of part payments from time to time in an account written by the defendant. These part-payments were made at such times as to keep alive the obligee's right of suit up to the date of the last of them. The last of these payments was made on a date which was less than six years (the period of limitation for the suit) before the date of institution of the suit but it was not entered in the defendant's accounts until after the date when the claim would otherwise have been barred by limitation.

Held, that the provisions of Limitation Act, Section 20, were satisfied, and that the suit was not barred by limitation.

[R., 4 L.B.R. 1.]

APPEAL against the judgment of Mr. Justice Best sitting on the original side of the Court in civil suit No. 32 of 1891.

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* Original Side Appeal No. 30 of 1892.

(1) 14 C. 644. (2) 2 C. 141 (145).

1893 JULY 12. APPEL-LATE CIVIL. 17 M. 92.

The facts of the case appear sufficiently for purposes of this report from the judgment of Mr. Justice Best.

BEST, J.—The suit is for Rs. 4,442-5-6, balance of principal and interest due to plaintiff under the registered mortgage bond A, dated 30th January 1875, executed by first defendant for a sum of Rs. 9,100. Second defendant is the son of first defendant. Defendants pleaded that they were entitled to credit for a further sum of Rs. 191-4-11 being amount of assessment and quit-rent [93] paid by them on account of plaintiff's proparty. They further pleaded that the suit is time-barred, in that it is merely for a personal decree against the defendants for a debt payable so for back as 31st December 1877.

It must here be noticed that plaintiff has explained in the plaint his reason for asking for a simple money decree, *viz.*, because the defendants have from time to time taken from the plaintiff all the title-deeds of the properties mentioned above and mortgaged them with others using the money so raised for a deposit with Messrs. DeClosets and Co., where the second defendant was employed as a Dubash.

The following are the issues recorded on the above pleadings:—

I. Is the suit barred by limitation?

II. Are defendants entitled to a credit of Rs. 191-4-11 as in paragraph 1 of the written statement mentioned?

Plaintiff now admits that defendants are entitled to credit for Rs. 191-4-11 as claimed by them. This disposes of the second issue.

The only point for consideration is, therefore, whether the suit for a merely money decree is time-barred.

Plaintiff has produced the account B as containing in the handwriting of first defendant himself admissions of part-payments sufficients under Section 20 of the Limitation Act to keep alive the claim for a simple money decree. This account B, plaintiff swears, was given to him by second defendant. It begins with an entry of Rs. 7,050 as due on the 31st December 1881 which amount is gradually reduced by payments made from time to time, on several occasions in each year from 1882 to 1888, leaving on the 31st December 1888 a balance of Rs. 2,073-14-10; to which a sum of Rs. 1,995-2-1 is added, as the total of interest due, calculated up to that date. Plaintiff swears that the entries up to 15th June 1888 are in the handwriting of first defendant, and it is contended that, as the suit is brought within six years from that date, Exhibit A being a registered document, it is not open to the objection of the limitation bar.

On the other hand it is contended on behalf of defendants that in order to be of use under Section 20 of the Limitation Act, the handwriting of the person making the payment referred to in [94] the proviso in Section 20 must have come into existence before the expiration of the prescribed period, within which the part-payment must be made. To hold thus would be to import into the proviso (Clause 4) words that are not to be found in it. It seems to me that if the fact of the part-payment having been made within the prescribed period appears in the handwriting of the person making it, the mere fact of this handwriting coming into existence after the period prescribed for the payment will not render such handwriting useless for the purpose of saving a claim from the limitation bar. The payments entered in B were made either on account of principal or on account of interest. If the latter, the mere fact of the payment would be sufficient for the purposes of Section 20. But as it does not appear from B that the payments were made on account of the interest as such, they must be taken to have been made as part-payment

of the principal amount; and the fact of such payment appearing in the handwriting of first defendant as proved by plaintiff (and not rebutted by the defendants), I find that this suit is not barred

1893 JULY 12

APPELLATE CIVIL.

17 M. 92.

I give plaintiff a money decree, therefore, for the amount claimed less the Rs. 191-4-11 referred to in the second issue, and less a further sum of Rs 112-10-0 which plaintiff admits has been paid to him subsequent to the institution of this suit

Defendants are directed to pay the above amount to plaintiff with further interest on the same at 6 per cent per annum from date of suit to date of payment, as also plaintiff's costs on the above amount, and plaintiff will pay defendants' costs on Rs 191-4-11

The defendants preferred this appeal

Sundaram Sastri, for appellants

Bhashyam Ayyangar and *Sivagnana Mudaliar*, for respondent

JUDGMENT

We think the learned Judge was right The section does not require that the writing should be made before the expiration of the period. It only requires a writing as the mode of proving the fact of payment. The appeal must be dismissed with costs.

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17 M. 95.

[95] APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr. Justice Parker

MUTHU AND ANOTHER (*Defendants*), *Appellants* v GANGATHARA (*Plaintiff*), *Respondent* *

[24th January and 3rd February, 1893]

Religious Endowments Act—Act XX of 1863, Section 14—Applicability of the Act.

In a suit, brought with the leave of the District Court under Act XX of 1863, to remove the trustees of a Hindu temple it did not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer

Held, that Act XX of 1863 was not applicable to the temple unless it was admitted or proved by evidence that the endowment was one which would have fallen under the provisions of Regulation VII of 1817

[Expl., 26 M 166 (167); R., 18 A 227 (231)]

APPEAL against the decree of J. A Davies, District Judge of Tanjore, in original suit No 9 of 1891.

The plaintiff sued for a decree removing the defendants from the office of trustees of a temple at Alagumangalam having previously obtained the sanction of the District Court under Act XX of 1863 The first issue framed raised the question whether that Act was applicable to the temple in question The District Judge held with reference to *Fakurudin Sahib* v *Ackeni Sahib* (1) that he had jurisdiction in the case and he passed a conditional decree in the form employed in *Sivasankara* v. *Vadagiri* (2). Defendants preferred this appeal.

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* Appeal No. 40 of 1892.

(1) 2 M. 197.

(2) 13 M 6.

1893 FEB. 8. — APPELLATE CIVIL. — 17 M. 92.

Vankatasubba Ayyar, for appellants.
Sivagnana Mudaliar, for responment.

JUDGMENT.

The first contention raised by the appellants, both at the grant of sanction and at the hearing of the suit, was that the provisions of Act XX of 1863 do not apply to the plaint temple. The District Judge overruled this objection on the ground that it was not denied that the public have a right of service in the plaint temple.

The suit was disposed of without taking any evidence; and we can find no note of the Judge or anything else on the record to show [96] that any such admission was made. On the contrary, the second paragraph of the written statement commences with a denial that the temple is a common place of worship, either for plaintiff or other Kammalas or for other Hindu castes. It does not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer. Unless, therefore, the endowment was one which would have fallen under the provisions of Regulation VII of 1817, it will not fall under the provisions of Act XX of 1863. See *Fakurudin Sahib* v. *Akeni Sahib* (1) and *Jan Ali* v. *Ram Nath Mundul* (2). We do not think this case can be disposed of without recording evidence. We must, therefore, set aside the decree of the District Judge and remand the suit for rehearing. The costs will follow the result.

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17 M. 96=4 M.L.J. 28.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Davies.

RAMASAMI (*Plaintiff*), *Appellant* v. SAMI AND OTHERS (*Defendants*), *Respondents*.* [29th August, 1893.]

Transfer of Property Act—Act IV of 1882, *Sections* 92, 93—*Decree for redemption—Mortgagor's failure to pay amount due within period fixed—Subsequent suit, no order under Section* 93 *having been made*—Res judicata.

A decree under Section 92 of the Transfer of Property Act becomes a final decree on the expiry of the time limited thereby, although no order is passed under Section 93; accordingly, no subsequent suit for redemption can be maintained.

[R., 24 A. 44 (52); 19 M. 40 (51) (F.B.); 25 M. 244 (264); 27 M. 40 (41); 21 A.W.N. 194; 6 O.C. 114 (115); Cons., 25 M, 300 (F.B.).]

SECOND appeal against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 365 of 1892, affirming the decree of T. M. Adinarayana Chettiar, District Munsif of Mannargudi, in original suit No. 66 of 1891.

Suit for redemption of a mortgage executed in 1886 by the plaintiff's vendor to the predecessor in title of the defendants under which it appeared that possession had passed to the mortgagee. [97] The plaintiff had previously brought original suit No. 241 of 1886 on the file of the District Munsif of Mannargudi for the redemption of the same mortgage, and on 30th September 1887 a decree was passed which directed that "on "the plaintiff paying to the defendants Nos. 2 to 7 or deposing in Court

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* Second Appeal No. 241 of 1893.

(1) 2 M. 197. (2) 8 C. 32.

1893 AUG. 29. APPELLATE CIVIL. 17 M. 96=4 M. L. J. 28.

" within three months from this date Rs. 67, he will be entitled to take " possession of the plaint items Nos 1 to 6, and in default, he will be " debarred from redeeming them thereafter " This decree was affirmed on appeal and in 1889 the plaintiff applied in execution for an order that possession be delivered to him on payment of the amount specified He obtained the order sought and gained possession of the land, but the High Court reversed the order and dismissed his application on the ground that it was too late

The prayer of the present plaint was for a decree " directing the " defendants to receive from plaintiff the mortgage debt and to return to " him all the documents relating to the mortgage, and holding that the " mortgage has been redeemed and for other relief as the nature of the " suit may admit " The third issue framed in the suit was as follows — " Whether the plaintiff's right of redemption has been extinguished by " the decree in the former suit No 241 of 1886?" The plaintiff's contention was that the equity of redemption was kept alive by reason of the fact that no order had been made under Transfer of Property Act, Section 93

The District Munsif decided this issue in favour of the defendant pointing out that the mortgage in question was not in his view a usufructuary mortgage and also expressing the opinion that the Transfer of Property Act was inapplicable to the suit, and he accordingly dismissed the suit

The Subordinate Judge on appeal affirmed this decree concurring in the opinion that the Transfer of Property Act was inapplicable, and observing " the deed of mortgage is not on record and it is not easy to say " what the real nature of the mortgage is, but as it is merged in the " decree, the latter is the proper guide for determining the question "

Narasimha Chariar, for appellant

Krishnasami Ayyar, for respondent

JUDGMENT

We consider that the decree in suit No 241 of 1886 on the Mannargudi Munsif's file was a final decree inasmuch as it decreed according to the last clause of Section 92 of the Transfer of Property Act, that in case of default in payment [98] within the stipulated time, the plaintiff was to be debarred of his right of redemption Orders passed under Section 93 are, in our opinion, merely supplementary to the decree under Section 92, showing whether the terms of the decree have or have not been fulfilled It is clear that in this case when the three months' time allowed in the decree had elapsed without payment being made, no extension of time for payment having been granted, the decree became a final decree without any further orders being required That decree then being a final one after confirmation in appeal, the present being based on precisely the same cause of action as that suit is, of course, barred as *res judicata.*

The second appeal fails and is dismissed with costs

1893
AUG. 8.

APPEL-
LATE
CIVIL.

17 M.
98=4
M. L. J.
21.

17 M. 98=4 M.L.J. 21.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

KUNHAYEN HAJI (*Plaintiff*), *Appellant* v. MAYAN (*Defendant No.* 2), *Respondent*.* [8th August, 1893.]

Transfer of Property Act—Act IV of 1882, *Section* 108, *sub-section* (*c*), 177—*Agricultural lease—Lease of a coffee garden—Destruction of plants by fire—Voidability of lease.*

The plaintiff was the assignee of the right and title of the lessor and the defendant was the lessee of a coffee garden, under an instrument which was held to constitute a lease of the coffee plants only. In a suit to recover the annual payment reserved under the lease, it appeared that the coffee plants had been destroyed by fire and the garden had been consequently abandoned by the defendant before the period to which the claim related :

Held, that the plaintiff was not entitled to recover.

Per cur. We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of Transfer of Property Act, Section 117.

[**N.F.**, 24 M, 421 (423) ; **R.**, 25 M. 627 (629).]

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of North Malabar, in appeal suit No. 823 of 1891, reversing the decree of J. A. De'Rozario, District Munsif of Vytri, in original suit No. 41 of 1891.

The plaintiff sued as the assignee of the title and interest of **[99]** defendant No. 1 by whom as it was alleged a portion of coffee estate held on Kulikanapattam had been leased to defendant No. 2 in consideration of an annual payment which had fallen into arrears. The defendant No. 2 alleged that he had been admitted as a partner in the first defendant's share in the estate and that he was liable only for a proportionate part of the Jemmabogam assessed thereon. This, he averred, he had paid up to 1883, when a conflagration occurred destroying all the coffee bushes on the estate, which had since been overgrown with thick jungle. The District Munsif held that the defendant No. 2 was nevertheless liable to the plaintiff and accordingly passed a decree as prayed. This decree was reversed on appeal by the Subordinate Judge and the plaintiff preferred this second appeal.

Sankaran Nayar and *Ryru Nambiar*, for appellant.

Sankara Menon and *Govindan Nambiar*, for respondent.

JUDGMENT.

We are clearly of opinion that a lease of a coffee garden is not an agricultural lease wihtin the meaning of Section 117 of the Transfer of Property Act. It is argued that Section 108 does not apply, because the money sought to be recovered is not rent and the property was not destroyed. Looking at the plaint and the karar B, we think the relation of lessor and lessee was asserted and in fact existed. It is rent which the plaintiff seeks to recover. It is not disputed that the whole of the plants situated in the part included in the karar was absolutely destroyed, and the second defendant in consequence abandoned the garden. If, as a matter of fact, the land only had been the subject of the demise it might

* Second Appeal No. 1624 of 1892.

be doubtful whether Section 108, Transfer of Property Act, applied But that is not the case As far as we can gather from karar B the lease was of the coffee plants only We think, therefore, the Subordinate Judge is right and accordingly dismiss the appeal with costs

1893 AUG. 8.

APPEL-LATE CIVIL.

17 M. 98=4 M.L.J. 21.

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17 M. 100=3 M.L.J. 259.

[100] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

VENKATA REDDI (*Petitioner*), *Appellant* v W TAYLOR (*Counter-petitioner*), *Respondent*.* [21st August, 1893]

Letters Patent of the High Court, Section 15—Appeal—District Municipalities Act (Madras)—Act IV of 1884, *Sections* 53, 59, 60—*Profession tax—Traders—Provincial Small Causes Courts Act—Act IX of* 1887, *Sections* 25, 27

A petition for revision preferred under Provincial Small Cause Courts Act, Section 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under Section 13 of the Charter Act The petition preferred an appeal under Letters Patent, Section 15

Held, that the appeal was not barred under Provincial Small Cause Courts Act, Section 27, and was maintainable

One who makes it his business to sell the produce of his own land for profits is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business

Held by Parker, J , that one who has paid profession tax as a Sheristadar in one Municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another Municipality under Act IV of 1884, Madras

[R., 22 M 68 (95)=8 M L J 231, 25 M 747 (750).]

APPEAL under Letters Patent, Section 15, against the judgment of Mr Justice Parker on civil revision petition No 27 of 1892

That was a petition under Provincial Small Cause Courts Act IX of 1887, Section 25, praying the High Court to revise the proceedings of K Somayajulu, Pantulu, District Munsif of Sompeta, in small cause suit No 133 of 1891

The plaintiff was the Taluk Sheristadar, and as such had paid profession tax under Act IV of 1884 (Madras) to the Municipality of Chicacole Subsequently he was assessed to pay a further tax as a trader in Parlakimedi He paid the amount demanded under protest and brought the present suit against the Chairman of the Municipal Council of Parlakimedi to recover the amount so paid The suit was dismissed by the District Munsif and the plaintiff preferred the petition above referred to The [101] petition was dismissed by Mr Justice Parkar, who delivered judgment as follows —

PARKAR, J —The petitioner is a Taluk Sheristadar at Chicacole and has paid one rupee profession tax in that Municipality He has now been assessed as a grain merchant at Parlagimedi and sues to recover from the Chairman of that municipal council the amount which has been levied from him.

It is first urged that petitioner does not carry on trade in grain since the paddy which he sold was grown on his own lands I am unable to accede to this contention The petitioner contends that he cannot be

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* Letters Patent Appeal No 8 of 1893

1893 Aug. 21. — Appellate Civil. — 17 M. 100=3 M. L. J. 259.

said to trade in grain unless he bought the grain before he sold it. If this be so, no owner of a tea or coffee estate could be said to trade. The term ' trade ' is not defined in the Act, but the meaning of the term as given in Wharton's Law Lexicon includes the exchange of goods for other goods or for money. I am of opinion that the petitioner does trade in grain.

The next contention is that as petitioner has paid profession tax at Chicacole, he cannot be taxed at Parlakimedi for the same year under Section 60, Madras Act IV of 1884. In support of this contention I am referred to decisions in *Tuticorin Municipality* v. *South Indian Railway* (1) and *Municipal Council of Tellicherry* v. *Bank of Madras* (2). In the first of these cases it was held that a railway company having paid profession tax at Negapatam was not liable to be assessed for the same half year at Tuticorin. In the second case it was held that the Bank of Madras having paid profession tax at Negapatam was not liable for the same tax at Tellicherry. But in both these cases it was the same business that was carried on, though in two different places. In the present case the petitioner carries on one business at Chicacole and another at Parlakimedi. He does not carry on grain trade at Chicacole or his work as Sheristadar at Parlakimedi. He cannot, therefore, be taxed in either Municipality under Section 59 upon his aggregate income from both sources, nor can he be assessed under Section 53 upon more than one source of income in each Municipality. Section 60 exempts a person from paying in a second Municipality the tax which has been assessed under Section 53 in another Municipality. But petitioner has not been assessed, nor could he be assessed as a [**102**] trader in grain at Chicacole under Section 53, and therefore he is not exempted by Section 60 from paying at Parlakimedi.

The petition is dismissed with costs.

The petitioner preferred the present appeal under Letters Patent, Section 15.

Mr. *Anderson* and *Sriranga Chariar*, for appellant.

Tha Advocate-General (Hon. Mr. *Spring Branson*), for respondent.

JUDGMENT.

The preliminary objection is taken that the petitioner's remedy is exhausted by the order passed by Mr. Justice Parker under Section 25 of the Small Cause Courts' Act, from which it is contended no appeal is allowable by reason of Section 27, which declares the decrees or orders of the Small Cause Court to be final, subject to the provisions of that Act. We observe that the revision contemplated in Section 25 is by the ' High Court.' Mr. Justice Parker exercised such revisional jurisdiction under the rules of this Court framed under Section 13 of the Charter Act. The judgment is, therefore, subject to the appeal provided by Section 15 of the Letters Patent.

The preliminary objection must consequently be disallowed.

Passing on to the merits, we see no reason to differ from the learned Judge in holding that any person who makes it his business to sell for profit is a ' trader ' within the meaning of the Municipal Act IV of 1884. We do not think the fact of what he sells being the produce of his own land makes him the less a trader, provided the sales are conducted in a shop or place of business as in this case. The other point is not pressed. The appeal fails and is dismissed with costs.

(1) 13 M. 78. (2) 15 M. 153.

17 M. 103=1 Weir 201.

[103] APPELLATE CRIMINAL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best

1893 Oct. 25.

APPELLATE CRIMINAL

17 M. 103=1 Weir. 201.

QUEEN-EMPRESS *v.* FAKIRA * [25th October, 1893]

***Penal Code—Act XLV of* 1860, *Section* 224— *Escape from custody of village officers—Regulation XI of* 1816, *Section* 5.**

On a charge under Penal Code, Section 226, it appeared that the accused had been apprehended on a hue and cry being raised as he was running after committing robbery, and that he was handed over to the Village Magistrate and was by him placed in the charge of taliyaries for retention till the next morning when he was to be taken to the police station, and that he escaped from the custody of the taliyaries

Held, distinguishing Queen v. *Bojjigan* (5 M 22), that the accused was rightly convicted of the offence charged.

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by the District Magistrate of Bellary

The case was stated as follows —

" One Korcha Fakira *alias* Donga Hanuma took to his heels on 8th " November last after robbing two Marwari merchants on the tank bund " of Hanisi, a village in Kudligli taluk He was pursued, arrested and " brought to the village chavadi by a washerman, who made him over to " the Village Magistrate Korcha Fakira was illegally tied to a post of the " chavadi and two taliyaries and two madigas were placed to watch him " with a view to make him over to the police Before sunrise, while it " was still dark, the accused Fakira, on the pretence that he wanted to go " out for purposes of nature, was loosened and at once ran away He " was thereupon charged before the Stationary Sub-Magistrate, Kudligli, " under Section 224, Indian Penal Code The Sub-Magistrate convicted " the accused and sentenced him to undergo imprisonment for four " months

" The custody of the taliyaries and madigas in this case does not con- " stitute lawful custody, inasmuch as the offence of dacoity was not com- " mitted in their presence *Queen* v. *Bojjigan* (1)

[104] " Under these circumstances the conviction appears to be bad " in law, and I respectfully recommend that it may be reversed "

Counsel were not instructed

JUDGMENT

BEST, J —It appears that the accused had been apprehended on a hue and cry being raised as he was running away after committing a robbery He was handed over to the Village Magistrate and was by the latter placed in charge of the taliyaries for detention till next morning, when he was to be taken to the police station. Early in the morning he asked to be allowed to go and ease himself, and availing himself of this opportunity, made his escape He has been convicted under Section 224 of the Penal Code and sentenced to four months' rigorous imprisonment The District Magistrate has referred the case under Section 438 of the Code of Criminal Procedure with a view to the conviction being set aside as illegal on the authority of *Queen* v. *Bojjigan* (1)

In that case the accused had escaped from the custody of a taliyari and a toti by whom he had been arrested on suspicion The custody was

* Criminal Revision Case No 487 of 1893.

(1) 5 M. 22.

1893 Oct. 25.

APPELLATE CRIMINAL.

17 M. 103=1 Weir. 201.

held to be not lawful, because the taliyari and toti, not being police officers, could not legally make the arrest for an offence not committed in their presence.

The present case is distinguishable, in that the prisoner on being arrested on the hue and cry was handed over to the Village Magistrate and was in custody of the taliyaries under his orders with a view to being handed over to the police. See *Queen-Empress* v. *Potadu* (1).

I do not think the conviction is illegal.

MUTTUSAMI AYYAR, J.—I am of the same opinion. By Section V, Regulation XI of 1816, heads of villages are authorized and directed to apprehend all persons charged with committing crimes and to forward them to the police officer of the district. The arrest being legal and the detention at night being necessary to his being forwarded to the police officer, the principle laid down in *Queen* v. *Bojjigan* (2) is not applicable. There it was the village taliyari and toti who arrested the accused, and the arrest and therefore the subsequent custody were unlawful.

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17 M. 105=1 Weir 786.

[105] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

SRINIVASA AYYANGAR (*Counter-petitioner*), *Appellant* v. QUEEN-EMPRESS.* [5th October, 1893.]

Letters Patent, Section 15—Appeal to two Judges—Sanction to prosecute granted by one Judge.

Where one Judge exercising the revisional jurisdiction of the High Court, in reversal of an order of a First-class Magistrate, had granted sanction under Criminal Procedure Code, Section 195, for a prosecution under Penal Code, Section 182, an appeal was preferred from his judgment under Letters Patent, Section 15 :

Held, that no appeal lay, that section of the Letters Patent being inapplicable in cases of criminal jurisdiction.

APPEAL under Letters Patent, Section 15, from the judgment of Mr. Justice Best in criminal revision case No. 152 of 1893.

In that case his Lordship, in exercise of the revisional jurisdiction of the High Court, reversed an order of the First-class Sub-divisional Magistrate of Mannargudi and granted sanction under Criminal Procedure Code, Section 195, for the prosecution of the counter-petitioner for an offence under Section 182, Penal Code. The counter-petitioner preferred the present appeal under Letters Patent, Section 15.

Parthasaradhi Ayyangar, for appellant.

JUDGMENT.

The clause of the Letters Patent to which the petitioner refers has nothing to do with criminal jurisdiction. It does not, therefore, justify the appeal. The case of *Navivahoo* v. *Narotamdas Candas* (3) has been cited. This point, however, is only mentioned incidentally and does not seem to have been considered. We are unable to agree with the decision. Section 195 of the Criminal Procedure Code is also inapplicable.

The petition is therefore dismissed.

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* Letters Patent Appeal No. 25 of 1893.

(1) 11 M. 480. (2) 5 M. 22. (3) 7 B. 5,

17 M. 106=4 M.L.J. 24.

1893 Aug. 30.

APPELLATE CIVIL.

17 M. 106=4 M.L.J. 24.

[106] APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr Justice Best.

GANGARAJU AND OTHERS (*Defendants Nos* 1, 4, 5 *and* 6), *Appellants* v. KONDIREDDISWAMI AND OTHERS (*Plaintiffs Nos* 1 *and* 2, *and Defendant No* 2), *Respondents*.* [30th August, 1893]

Civil Procedure Code—Act XIV of 1882, *Section* 13—*Res judicata—Rent Recovery Act* (*Madras*)—*Act VIII of* 1865—*Decision of a Revenue Court—Second suit in Civil Court—Question of title*

In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed The present plaintiff did not appear when the above orders were made The defendant relied on these proceedings as constituting a bar to the present suit

Held, following Rama v *Tirtasami* (7 M 61), that the decision of the Revenue Court was no bar to the suit

[**F.**, 12 P R 1909=124 P L R 1908=73 P.W R 1908, **R.**, 20 M 392 (393); **D.**, 21 M 482 (489) (**F.B.**)=8 M L J 210]

SECOND appeal against the decree of M B Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 197 of 1892, confirming the decree of V. Krishnamurthi Pantulu, District Munsif of Tanuku, in original suit No 95 of 1891

Suit to recover land with mesne profits It appeared that on the 6th May 1890 the first defendant, who was the father of the other defendants, brought a summary suit against the present plaintiff under Rent Recovery Act (Madras), 1865, to enforce the exchange of patta and muchalka for the land in question The present plaintiff did not appear before the Head Assistant Collector who passed an *ex parte* judgment against him The decision of the Revenue Court was not complied with, and the present first defendant obtained and executed a warrant of ejectment The present plaintiff moved the Revenue Court to set aside his decision, but this application was rejected on the ground that the summons had been duly served before the case was disposed of The plaintiff thereupon brought the present suit, alleging that he [**107**] was the owner of the property in question and that the summary decision of the Revenue Court had been obtained in fraud of his rights.

The District Munsif passed a decree as prayed overruling the contention of the defendant that the decision of the Revenue Court was a bar to the suit He referred to *Rama* v. *Tirtasami* (1), *Chunder Coomar Mundul* v *Numee Khanum* (2), *Debi Prasad* v *Jafar Ali* (3), *Boistub Churn Sein* v *Trahee Ram Sein* (4), *Manappa Mudali* v *McCarthy* (5), *Venkatachalapati* v *Krishna* (6)

On appeal the Subordinate Judge affirmed this decree The defendants preferred this second appeal

Srirangachariar, for appellants.

Venkatarama Sarma, for respondents.

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* Second Appeal No 63 of 1893.

(1) 7 M 61 (2) 11 B. L. R. 434. (3) 3 A 40
(4) 15 W R 32 (5) 3 M 192 (6) 13 M 287 (291)

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JUDGMENT.

Assuming that the suit was maintainable there can be no doubt that the decision is correct on the facts found.

It is contended, however, that the suit is not sustainable by reason of the decree in summary suit No. 72 of 1890 on the file of the Head Assistant Collector and of the order for ejectment under Section 10 of Act VIII of 1865 (Madras).

The first plaintiff did not appear to defend that suit and a subsequent application of his to have the *ex parte* decree set aside was dismissed. Hence the present suit on title.

As was held in *Rama* v. *Tirtasami* (1) the decision of a question of title by a Revenue Court is merely incidental, and no bar to a fresh suit on title in a Civil Court. Our attention has been called to the decision in *Ragava* v. *Rajagopal* (2). The learned Judges who decided that case held that the decision and order of a Revenue Court under Section 10 of Act VIII of 1865 would bar a subsequent suit on title in the Civil Courts. But it does not appear that the decision in *Rama* v. *Tirtasami* (1) was brought to their notice. We are of opinion that the principle laid down in *Rama* v. *Tirtasami* (1) is correct.

We, therefore, dismiss this appeal with costs.

17 M. 108.

[108] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VAIDYANATHA AYYAR AND OTHERS (*Plaintiffs*), *Appellants* v. CHINNASAMI NAIK (*Defendant*), *Respondent*.*

[4th September, 1893.]

Contract Act—Act IX of 1872, Section 45, 263—Suit by surviving member of a firm alone—Succession Certificate Act—Act VII of 1889, Section 4—Suit by surviving partner and heir of deceased partner.

In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner :

Held, that a surviving partner can sue alone for the recovery of a partnership debt :

Held further, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a coparcenary debt.

[F., 10 P.R. 1906; R., 17 A. 578 (579); 9 C.L.J. 331 (335)=13 C.W.N. 509; 9 C.P.L. R. 65 (67); 4 L.B.R. 99; U.B.R. Civil (1892—1896) 204 (210).]

CASE referred for the orders of the High Court by P. Srinivasa Rau, Second Judge of the Presidency Small Cause Court under Civil Procedure Code, Section 617.

The case was stated as follows:—

"This is a suit for the recovery of Rs. 91-14-6 on a promissory note alleged to have been executed by the defandant to a mercantile firm, of which the first plaintiff and one T. Viswanatha Ayyan were the partners.

* Referred Case No. 42 of 1892.

(1) 7 M. 61.

(2) 9 M. 39.

The said T Viswanatha Ayyan having died, the suit is brought by his representatives and the first plaintiff.

It is admitted that the said representatives have not obtained letters of administration or a certificate of succession. The defendant has allowed the suit to go *ex parte*. Nevertheless, as under Section 4 of the Succession Certificate Act VII of 1889, no decree can be passed in plaintiff's favour unless he produces letters of administration or a certificate of succession, in cases where such production [**109**] is required by law, I feel myself bound to consider whether this is a case in which the production of the letters or certificate is necessary

The plaintiff's Vakil, Mr K Krishnamachariar, contends that such production is not necessary on two grounds:—*firstly*, the deceased person and the first and other plaintiffs being members of an undivided Hindu family, the plaintiffs, upon the death of the deceased member, became possessed of the estate by right of survivorship, and not by succession, so that the Succession Certificate Act does not apply to this case; and *secondly*, the first plaintiff and the deceased person were carrying on business as partners, so that, on the death of the latter, the former, as the surviving partner, can alone maintain the suit, without joining the deceased's representatives as parties to the suit, and without obtaining letters of administration or certificate in favour of such representatives I entertain serious doubts as to the validity of these two grounds As to the first ground, I was under the impression that the matter was concluded by the authority of the ruling of the Madras High Court in *Venkataramanna* v *Venkayya* (1); but I am told that there are other decisions of our High Court to the contrary These decisions are not reported, and it seems pretty clear that the aforesaid decision in *Venkataramanna* v *Venkayya* (1) remains still unsuperseded Nevertheless, I consider that it would be highly presumptuous on my part to take upon myself to decide the point one way or the other, when the existence of conflicting decisions of our High Court is brought to my notice And, as to the second ground advanced by the plaintiff's Vakil, the decision of the Allahabad High Court, in *Gobind Prasad* v *Chandar Sekhar* (2) is quite opposed to that of the Calcutta High Court in *Ram Narain Nursing Doss* v *Ram Chunder Jankee Lall* (3), and I find no ruling of our own High Court on the subject in the published reports Under these circumstances, I consider it very desirable to obtain a decisive ruling of the High Court upon the points in question, especially as such points arise in numerous suits in this Court I, therefore, respectfully submit the following questions for the opinion of the High Court —

(1) Whether the Succession Certificate Act VII of 1889 applies to a Hindu, who alleges that the claim to recover the money sued for in the suit has devolved upon him by right of survivorship [**110**] (and not of succession) upon the death of an undivided member of his family

(2) Whether upon the death of one of the partners of a trading firm, the surviving partners can sue for the partnership debt, without joining in the suit the representatives of the deceased, and without obtaining letters of administration or a certificate in favour of the representatives — *firstly*, in cases where they sue as members of the old firm, engaged in winding up the Partnership business; and *secondly*, in cases where they take a new partner and bring the suits in their own names and in the name of the new member

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(1) 14 M. 377. (2) 9 A. 486 (3) 18 C 86.

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In regard to the first question, I think the Succession Certificate Act applies to the case of survivorship as well as to the case of succession. The Act makes no distinction between those cases in Section 4. It is true that in Section I the Act is called the Succession Certificate Act, and the preamble sets forth that one of the objects of the Act is to facilitate collection of debts on succession; but I do not think that the word succession is used there in the sense in which it is technically used in the English translations of the Hindu laws, as distinguished from a right of survivorship. As the Act is applicable to all classes of Her Majesty's subjects in British India, the Legislature seems to have chosen the word 'succession' as applicable to all the classes, without reference to the peculiar character of the estate which one takes upon the death of another.

Further, the language used in Section 4 of the Succession Certificate Act is too comprehensive to include cases of survivorship as well as those of succession. For the right of survivorship arises only upon the death of some one, and that right is inseparably coupled with the idea of property in which the deceased had an interest; so that when a person brings a suit on the ground of his right of survivorship, claiming the money lent by or in the sole name of the person who is since dead, he is practically claiming to be entitled to the effects of the deceased person within the meaning of the said section. It cannot be otherwise; he cannot say that he is claiming his own money; for this would not be true.

In the foregoing views, I am confirmed by the decision of the Calcutta High Court in *Mussamut Josoda Koonwur* v. *Gourie Byjonath Sohae Singh* (1), passed in 1866 (only a few years after [**111**] the passing of the old Act XXVII of 1860, the wording in which is the same as that in Section 4 of the Act now in force). There the Court observed:—"We "attach but little weight to the argument that, if the estate were joint, "Gourie Byjonath took any debts outstanding in the sole name of Joy "Kurran (the deceased), like the rest of the joint estate by survivorship, "and therefore a certificate was unnecessary and could not be granted. "We are of opinion that whether the nephew takes his uncle's share by "mere survivorship or by inheritance, if he takes on the ground of their "being joint in estate, he succeeds to and becomes entitled to the effects "of the deceased within the meaning of Act XXVII of 1860."

That this is the correct interpretation of the law is also evident from the main object of the law, namely, the protection of the debtor against liability to pay debts twice over. For, if a certificate is needed for the protection of a debtor, in the case in which the person who demands payment happens to be one who has succeeded to the deceased creditor's estate, it is equally needed where the claimant is one who has acquired a right of survivorship; the result in both the cases being the same; in both the cases the plaintiffs seek to recover money lent by the deceased; and in both the cases the defendants run the risk of paying the debts twice over, if not properly protected by the law.

The case, however, would have been different if one of the objects of the Succession Certificate Act were to establish the exclusive right of any person to recover the moneys lent by a deceased person; but such does not seem to be the case. For, although some enquiry is made for ascertaining whether the applicant for a certificate is entitled to have it or not, yet no question of title is judicially determined as the result of such inquiry. In administering the provisions of Act XXVII of 1860 (the Act

(1) 6 W. R. 189.

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which was in force prior to Act VII of 1889), it was observed by the High Court of Madras that "it has not been the practice of the Courts to enter "on the determination of intricate questions of law or fact"—*Surfoji* v *Kamakshiamba* (1) Similarly the High Court of Allahabad are of opinion that "it is clear that the issue of joint certificates (to two or more "persons) would ordinarily defeat, instead of subserving both the "objects of the Acts;" the duty of the Judge is to determine [112] which of the applicants has the better right—*Madan Mohan* v *Ramdial* (2) Then according to the Calcutta High Court the person who has the largest interest in the estate is entitled to a certificate—*Azeem Khan* v *Mussamut Ameerun* (3) For, says the same Court in another case, "the Court has by the law a discretion as to whom it shall entrust with "this important duty, out of the several heirs who have a right to it"—*Abdool Ali* v *Abidunnissa Khatoon* (4) The reason for granting the certificate to any one of the heirs and not necessarily to all who have a right to recover the debt is to be found in another judgment of the same High Court where it is observed that "the objects of the Act are to enable "debtors to get sufficient acquittances when they pay money due to the "estate of a deceased, and to preserve that estate from loss by giving "some one the right to collect the debts, lest they should be lost, *e.g.*, "by the operation of the Law of Limitation or otherwise This latter "object is also contemplated by the provision that security is to be taken "from the person who obtains the certificate In effect the holder of "the certificate is a trustee, liable to account for moneys received by him "to the legal heir or representative of the deceased,"—*in the matter of the petition of Nobodip Chunder Biswas* (5) The spirit of all these rulings is embodied in Clause (3), Section 7 of the Succession Certificate Act VII of 1889, which is now in force, and which provides that "if the Court "cannot decide the right to the certificate, without determining questions "of law or fact, which seem to be too intricate and difficult for determina-"tion in a summary proceeding, it may, nevertheless, grant a certificate "to the applicant if he appears to be the person having *prima facie* the "best title thereto"

Under these circumstances, it seems to me that in granting a certificate under the Act in question, it is quite unnecessary to consider whether the applicant is one upon whom the estate has devolved by right of survivorship, or is one who has succeeded to the estate All that the Court has to do is to invest one person as a trustee, as it were, for all who may be interested in the matter, with the power of collecting debts and giving complete discharges to the debtors.

Looked at in this light, the question whether the plaintiff in [113] any suit claims the money by right of survivorship or of succession becomes quite irrelevant, and the liability of the debtor to pay the debts only to the person who holds the certificate and not to others becomes quite apparent

Furthermore, it is worthy of notice that the objects aimed at by the Legislature in enacting the Succession Certificate Act appear to be two, *viz.*, the facilitation of the collection of debts, and the protection of debtors against all future liability. These two are coupled by a copulative conjunction and not separated by a disjunctive one in the Act, so that, unless effect is given to both those objects, the provisions of the Act are not

(1) 7 M. 452. (2) 5 A 195
(3) 12 W. R. 38. (4) W R (1864) Mis. 41. (5) 8 C. 68.

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satisfied. If we hold that a person who relies upon his right of survivorship is not bound to obtain a certificate, we are only dealing with one of the two objects of the Act, *viz.*, the object which is in favour of the creditor; but the other object, which has reference to the protection of the debtor would remain unsatisfied, unless we insist that the plaintiff shall obtain a certificate and afford good protection to the defendant thereby. This is what the Madras High Court held in *Venkataramanna* v. *Venkayya* (1) their Lordships observe that " though Act VII of 1889 applies " only to cases of succession, it states in the preamble that it is intended " to afford protection to parties paying debts to the representatives of " deceased persons. It would naturally impair the protection intended " to be afforded by the statute to throw in every case on the debtor the " obligation of making an inquiry at the time of payment, whether the " person claiming to recover the debt claims by right of survivorship or of " inheritance. Our answer, therefore, is that defendant is entitled to " insist upon the production of a certificate under Act VII of 1889, unless " it appears on the face of the bond that the debt was due to the joint " family consisting of the father and son."

The unreasonableness of throwing upon the debtor the duty of making inquiries as to the particular nature of the estate taken by the representative of the person with whom he dealt would be quite evidence when we consider the most complicated nature of the Hindu law of inheritance. The descent or devolution of property differs materially not only with reference to the status of the members of the family, as divided or undivided, and as sons [114] of the body or sons adopted, but also with reference to the mode in which the acquisition of the property was made, *e.g.*, whether it was acquired by the forefathers, or by any individual member himself; or whether it was inherited from a person related to all the members in an equal degree, or related to one of them only in particular. It would be impossible for a stranger like the debtor to ascertain all such intricate matters; and even supposing that he found it possible to make the inquiries, and believed conscientiously that such and such member of the family was entitled to collect the debt from him; or going a step further, even supposing that a Court of Justice, in a suit brought by one of the members of the family, determines that he is entitled to recover the debt, this would not in any way tend to exonerate the debtor from liability to pay the debt once more, if another member of the family, who was not a party to the first suit, and upon whom therefore the judgment was not binding, sues the debtor for the same debt, and proves that he, and not the plaintiff in the former suit, was the rightful party to recover the debt.

This hardship would be much greater when the debtors happen to be corporations or companies, in which the really interested parties are not the managers, but others who may be far away from the scene of the transactions and utterly unacquainted with persons dealing with their firms—as fairly illustrated in the case of *Muttammal* v. *The Bank of Madras* (2). There a Hindu widow sued the Bank for the return of certain Government promissory notes deposited by her deceased husband, and the Bank declined to return the deposit to the widow, unless she obtained letters of administration. The High Court was of opinion that there was no reasonable doubt as to the plaintiff being a party entitled to recover the deposit; and yet allowed the Bank's objections to prevail with the following observations:—" The circumstances are that the money in

(1) 14 M. 377. (2) 7 M. 115.

" question, and no doubt very much larger sums are in the charge of the " Bank, on behalf of shareholders and depositors, in whose interest the " Directors and Secretary act It is their duty to see that any moneys " they pay out are paid to the parties legally and rightly entitled thereto, " and to obtain proper receipts and discharges therefor The Directors " do not individually owe such moneys but are mere trustees They have " [115] large claims to pay constantly to representatives of deceased " shareholders and depositors If any such payments are made to per- " sons not properly qualified to give discharges, the interests of the share- " holders and possibly of the depositors may suffer."

Thus, it seems to me that it is clear that the protection which is intended to be given to debtors by the Succession Certificate Act would be lost, if, for any reason whatsoever, they be compelled to pay debts to persons who have not obtained certificate or letters of administration; and thus one of the objects of the Act is defeated

Nor, is the other object of the Act, *viz*, the facilitation of the recovery of debts, gained if the creditor, under any circumstances, fails to obtain a certificate or letters of administration in respect of outstandings due to a deceased person For, he will be under the necessity of proving his title to recover the money in every suit which he might institute against the several debtors of the deceased person, and chances are that judgments will be in his favour in some cases and not in others, for the quantity and quality of the testimony may not be the same in all the cases

The only thing that facilitates the collection of the deceased person's debts on one hand and gives protection to the debtors on the other is the certificate or letters of administration; and if this is dispensed with, both the creditor and debtor would suffer, and the highly beneficial objects of the Succession Certificate Act frustrated.

It is contended that Section 4 of the Probate and Administration Act V of 1881 is against granting of letters of administration to a person who has the right of survivorship But I do not think that this section has any such effect It provides for the vesting of the property in the person who possesses the right of survivorship in preference to the one who holds letters of administration, and I have shown above that the granting of letters or certificate does not alter the line of succession or affect the existing rights in any way It simply enables its holder to collect debts as a trustee for the benefit of himself and others who may have a right to participate therein, giving proper acquittances to the debtors at the same time This is evident from Section 23 of the said Act, which (second clause) provides that " when several such persons (*i e*, representatives) apply for " administration, it shall be in the discretion of the Court to grant it to " any one or more of them " This shows that the grantee of the letters of [116] administration is not necessarily the only person entitled to the effects of the deceased; or in words it shows that he is simply a trustee for self and others in the same way as the holder of a certificate is Hence I am of opinion that Section 4 of the Probate and Administration Act is no bar to the granting of a certificate to any one of the representatives without reference to the character of the estate he takes

As to the second question:—In this Court we have always acted upon the principle of the English law, that in trading partnerships " although the right of the deceased partner devolves on his executors, the " remedy survives to his co-partner, who alone must enforce the remedy " by action, and who will be liable on recovery to account to the executors

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"or administrators for the share of the deceased." Williams on Executors, 8th Edition, page 850, referred to in *McClean* v. *Kennard* (1). This is in consonance with the Indian Contract Act, which provides (Section 253, Clause 7) that by death of one of the partners, the partnership is dissolved as between all other members by the operation of law, and that (Section 263) after such dissolution, the rights of the partners continue in all things necessary for winding up the business of partnership; so that it is quite competent for the surviving members to sue in their own names for the recovery of the partnership debt, and it seems to me that Section 45 of the Contract Act, which provides that when a promise is made to two persons jointly, the right to claim performance rests with them jointly, and after the death of one of them, with his representatives and the suvivor, does not apply to partnership transactions, which are governed by special rules as already indicated. These views are supported by the ruling of the Allahabad High Court in *Gobind Prasad* v. *Chandar Sekhar* (2), where all the authorities upon the subject have been reviewed; and the inconvenience of insisting upon the representatives of the deceased partner being joined with the surviving partner in bringing the suit has been fully pointed out. But this judgment of the Allahabad High Court has been dissented from by the High Court of Calcutta in *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (3), in which it is held that the representatives of the deceased are necessary parties in a suit brought by [117] the surviving partners for the recovery of a partnership debt; and that such representatives should obtain certificate of succession. I find no reported decision of the Madras High Court on this point.

Further, it seems to me very doubtful whether even according to the decision of the Allahabad High Court, the surviving partners of a firm can alone sue for the partnership debt in cases where they take new partners and constitute in fact a new firm altogether. The new firm has no claim against persons who owed moneys to the old firm, and the representatives of the deceased partners of the old firm can have no right to compel the new firm to account for moneys due to them by the old firm. It would in such cases be, I think, necessary to protect tne interests of the representatives of the deceased partners by making them parties to the suit.

The fact of the partnership firm in this case being composed of the members of a Hindu undivided family does not, I think, make much difference. These members possess a double character, their firm being carried on as the creature of relationship and of contract as well. Their rights and obligations are different in each of these two conditions; and they cannot take advantage of the privileges common to one of the said two capacities when dealing under the capacity."

Sadagopachariar and *Krishnasami Ayyangar*, for plaintiffs.

The defendant was not represented.

OPINION.

There can be no doubt that a surviving partner can sue alone for the recovery of a partnership debt, and, in that case, no certificate will be necessary. On this point we agree with the Bombay High Court in *Motilal Bechardoss* v. *Ghellabhai Hariram* (4).

We are also of opinion that the suit is maintainable if brought by the surviving partner conjointly with the heir of the deceased partner. In the

(1) L. R. 9 Ch. App. 346. (2) 9 A. 486. (3) 18 C. 86. (4) 17 B. 6.

latter case a certificate of heirship will be necessary, unless it appears, on the face of the document sued on, that the debt is a coparcenary debt—compare *Venkataramanna* v *Venkayya* (1). 1893 Sep. 4.

The above is, we think, a sufficient answer to the questions referred to us. APPELLATE CIVIL.

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[118] APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Shephard.

QUEEN-EMPRESS v MARIAN CHETTI AND ANOTHER *

[27 October and 1st November, 1893.]

Indian Ports Act—Act X of 1889, Sections 6, 8, order purporting to be made under the Act by Conservator of Port—Public body authorized by Legislature to make rules, powers of

The Conservator of the Port of Negapatam, purporting to act under the Indian Ports Act, Section 8, made and published an order that when a certain flag was flying at the signal station, all boats returning from the sea should cast anchor and not come inside the river The Local Government had made a rule with reference to Section 6 (*k*) of the above Act requiring boat owners to "carry out at all times all orders issued by the Conservator in connection with the plying of their boats and which are not inconsistent with the regulations issued by Government" A charge was brought against two persons, being the owners and tindals of licensed cargo boats for neglecting to obey the aforesaid order, and they were convicted under Indian Ports Act, Section 8 (2), by the Conservator in his capacity as Special First-class Magistrate

Held, that the order was *ultra vires* and the conviction was accordingly illegal

Per cur. A public body, whether the Executive Government or a corporation, being entrusted by the Legislature with the duty of making rules, cannot relieve itself of the responsibility and depute other agencies to discharge the duty

CASE referred for the orders of the High Court by H M Winterbotham, Acting District Magistrate of Tanjore, under Criminal Procedure Code, Section 438.

Together with this case was taken up for disposal a peitition preferred by the accused persons under Criminal Procedure Code, Section 435, and 439, praying for the intervention of the High Court in revision

The case was referred as follows —

"The two accused are owners and tindals of two licensed cargo "boats plying at the Negapatam port They have been convicted under "Section 8 (2) of the Indian Ports Act, 1889, of wilfully and without law-"ful excuse neglecting to obey a lawful direction of the Conservator, and "have been fined Rs 30 and Rs [119] 40 respectively The facts "proved against them are that they brought their boats from the sea into "the river while a certain flag marked W was flying at the port signal "station On April 23rd, 1891, the Port Officer appears to have pub-"lished a notice in Tamil, of which a copy is with the record of the case "I also enclose a translation This notice directs that when a flag "marked W is hoisted at the singal station, all boats returning from the "sea should cast anchor and not come inside the river The notice pur-"ports to lay down a standing rule applicable to all boats at all times

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* Criminal Revision Cases Nos. 273 and 318 of 1893.

(1) 14 M 377

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"The object of the rule (apart from the question of its legality) is not clear, "but however laudable its object may be, it appears obviously improper "to apply one and the same restriction to all boats, whether loaded or "unloaded, and irrespective of the depth of water they draw.

"As to the legality of the rule, the judgment states that it was framed and published under Section 8 of the Indian Ports Act. There is "nothing in this section which confers on the Conservator the power to "frame rules, and if the Conservator had the power, it would not be necessary specially to invest the Local Government therewith as is done in "Section 6.

"Rule 16 of the boat rules sanctioned by Government empowers the "registering officer 'to prevent any registered boat from leaving the shore "when in his judgment danger would be incurred by so doing.' Rule 17 "forbids any registered boat to ply 'in rough weather' if loaded with "passengers or cargo greater in number or quantity than that 'authorized "for the occasion' by the registering officer, but it is, I think, beyond the "Port Officer's authority to lay down a general rule that no boat shall "enter the river when a certain flag is flying, and I think the punishment "of the accused for disobeying the rules is illegal.

"On general principles it appears objectionable that the Special "Magistrate should try persons for an offence committed in contempt of "his own authority, but in respect of offences punishable under the Indian "Ports Act, there appears to be no legal prohibition similar to that in "Section 487, Criminal Procedure Code The interest of a Magistrate in "enforcing obedience to an order issued by him in another capacity is, I "think, not a personal interest within the meaning of Section 555, "Criminal Procedure Code.

[120] "The two accused ought not to have been tried jointly, but "with reference to Section 61 of the Indian Ports Act this is not a "material irregularity.

"The Special Magistrate has not been empowered to try cases summarily (*vide* notification No. 387, *Fort Saint George Gazette*, December "16th, 1890, page 1041, Part I). He should, therefore, have observed "the directions of Sections 243 and 364, Criminal Procedure Code."

Mr. *W. Grant* and *Narayana Ayyangar*, for the accused.

The Acting Public Prosecutor (*Subramanya Ayyar*), in support of the conviction.

JUDGMENT.

The act charged as an offence is the bringing a boat into the Negapatam river in disregard of a general order passed by the Port Conservator to the effect that boats should not be brought in while the flag W is flying. This act is said to be punishable under Section 8 of the Ports Act. That section authorizes the Conservator to give directions for carrying into effect any rule passed under Section 6 of the same Act, and goes on to make it penal to disobey any such lawful direction. It has therefore to be seen whether the Conservator was carrying into effect any valid rule passed under the Act. The rules to which we have been referred are those numbered V and VIII, being rules passed with reference to Clauses (*f*) and (*k*) of Section 6 respectively. In our opinion there is clearly no connection between the former of these rules and the direction which in this case has been disobeyed.

Rule VIII is a rule of wider scope, for it requires boat owners to "carry out at all times all orders issued by the Conservator in connection

"with the plying of their boats and which are not inconsistent with the "regulations issued by Government" 1893 Nov 1

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In order to put an interpretation on the rule VIII, and to see whether it covers the present case, we think that the rule must be read with the clause of the Act under which it is framed and the other clauses specifying the matter in respect of which rules may be made by the Government It must be presumed that the Government intended to pass a rule which they were authorized to pass by the terms of Clause (*k*) of the section, and a construction which has the effect of extending the operation of the rule to matters not covered by Clause (*k*) ought we think if possible to be avoided Now when it is seen that by Clause (*a*) of the [**121**] section the Government is empowered to make rules for regulating the time at which vessels are to enter or leave any port, it seems tolerably clear that the rules to be framed under Clause (*k*) were not intended to regulate the entry or exit of vessels in the matter of time This being so, we do not think that the rule VIII passed with reference to the latter clause can be taken to refer to such matters Accordingly the direction of the Conservator not to bring boats into the river when a certain flag is flying cannot be a direction for carrying into effect the rule in question, and therefore no lawful direction was disobeyed In referring to Clause (*a*), we do not overlook the fact that boats may go out of the river without leaving the port That may be so We should still be disposed to think that the regulation intended by Clause (*k*) was a regulation different in kind from that intended by Clause (*a*)

There is however another reason why the conviction cannot be supported The charge is not based immediately on an alleged breach of rule VIII, indeed no rule at all is mentioned in the charge The conviction can only be supported on the ground that the direction of the Conservator which was disobeyed was a direction lawfully given in pursuance of an authority lawfully conferred on him by rule VIII or some other rule To support the conviction it has to be shown that the Government is by Section 6 of the Act authorized to empower other persons to make rules such as the one which has been disobeyed in the present case In our opinion, the contention cannot rightly be maintained, and if rule VIII or any other rule purports to give the Conservator authority to make such rules, that rule is to that extent *ultra vires* and therefore void In the case of power being by statute given to the Government or other public body to make rules having the force of law, the maxim *delegatus non potest delegare* must, we think, be applied When the legislature entrusts to some public body, it may be the Executive Government or a corporation, the duty of making rules, such public body cannot, in our judgment, relieve itself of the responsibility and depute other agencies to discharge the duty The authority to make rules must remain in the hands to which it was entrusted It is absurd to suppose that the legislature intended this important authority to be exercised by any person whom the Government might choose to select The rule laid down by the Conservator [**122**] may be a perfectly reasonable one, and it may be one which the Local Government may make under Section 6 On this we offer no opinion At present it is enough to say there is no such rule having the force of law and therefore the conviction as for breach of it must fall to the ground

For these reasons we think the conviction should be set aside and the fine, if paid, refunded We would add that in these cases where the charge in effect relates to an alleged breach of a rule passed under an Act, care ought to be taken to specify the particular rule said to have been infringed.

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APPEL-LATE CIVIL.

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17 M. 122=4 M.L.J. 52.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMAYYA AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Appellants* v. VENKATARATNAM (*Plaintiff*), *Respondent.**
[13th September and 31st October, 1893.]

Hindu law—Liability of son for father's debts—Civil Procedure Code—Act XIV of 1882, *Sections* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *Schedule II, Articles* 120, 122.

A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons.

The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother:

Held, (1) that since the plaint (as amended) showed that the plaintiff sued as [123] managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit;

(2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, Section 43 or Section 244;

(3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor;

(4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to the subsequent instalments.

[**R.**, 28 A. 508 (516)=3 A.L.J. 274=(1906) A.W.N. 117; 27 M. 243=14 M.L.J. 84 (**F.B.**); 35 M. 685 (689)=10 Ind. Cas. 874=21 M.L.J. 508=(1911) 1 M.W.N. 442; 2 L.B.R. 246 (250); 69 P.R. 1906=118 P.L.R. 1906; 23 P.W.R. 1907=43 P.L.R. 1907; **Cons.**, 23 M. 292 (296) (**F.B.**); **D.**, 2 C W.N. 603 (604); 13 Ind. Cas. 670=243 P.W.R. 1912.]

APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 7 of 1891.

In original suit No 5 of 1877 the plaintiff brought a suit on a mortgage of 1873 against Chidambarayyar and his two sons and obtained a money decree of which the amount was made payable by instalments. Part only of the judgment-debt was discharged and Chidambarayyar died in 1883, two more sons having been born to him since the date of the decree. In 1888 the decree-holder applied for execution against his four sons and attached part of their family property. The two younger sons objected to the attachment so far as it affected their shares: their objection prevailed in the District Court and the attachment was accordingly raised. On an appeal by the decree-holder

* Appeal No 91 of 1892.

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the High Court upheld the order of the District Judge in the view that the matter in controversy was one that should be determined in a regular suit and not in execution proceedings. In the meantime the other defendants in the previous suits had died, one of them leaving two minor sons.

The decree-holder now sued the two younger sons who had objected to the attachment, and also the infant sons of their brother, for a decree "declaring that the defendants are bound to pay at once on the liability "of the entire family property including the defendants' property already "caused to be attached by the plaintiff, the amount with interest of the "past instalments due up to date and the amounts of the future instal-"ments according to their respective instalments, &c."

The defendants raised various pleas which are stated in the following judgment, including a plea that the suit was bad for non-joinder of an undivided brother of the plaintiff. This was the subject of the fifth issue which the District Judge decided in favour of the plaintiff on the ground that the mortgage sued on in 1877 was executed in favour of the plaintiff only. The third issue [124] raised the question when the younger sons of Chidambarayyar were born, and the District Judge found that they had not been born at the date of the decree in the previous suit. There was no plea or evidence that the secured debt had been incurred for immoral purposes, although it was averred that it had not been contracted for the benefit of the family. As to the question whether the suit was maintainable the District Judge in paragraph 14 of his judgment (which is expressly referred to by their Lordships) said :—"I have no hesitation "in deciding that the suit will lie. This was a debt incurred for family "purposes by the father of the first and second defendants, the grand-"father of the third and fourth defendants. The defendants have by "survivorship taken the family property. I can see no reason why this "is not a good suit. The Bombay cases cited *Merwanji Nowroji* v. *Ashabai* (1) and *Bhavanishankar Shevakram* v. *Pursadri Kalidas* (2) refer to "decrees which could be executed, but this previous decree cannot be "executed against these defendants."

The District Judge passed a decree against all the defendants for payment out of the family property of all the instalments down to May 1895. The two defendants, who had objected to the attachment as above stated, preferred this appeal.

Pattabhirama Ayyar and *Venkatarama Sarma*, for appellants.

The Advocate-General (Hon. *Mr. Spring Branson*), for respondent.

JUDGMENT.

Appellants' father, Maddi Chidambarayyar, was judgment-debtor and respondent Venkataratnam was execution-creditor in original suit No. 5 of 1877 on the file of the District Court of Kistna. Besides the minor appellants, who are twins, Chidambarayyar had two other sons named Veerayya and Rama Murti and subsequent to the decree in the above suit, the former died in coparcenary without issue and the latter died leaving him surviving two minor sons, the third and fourth defendants in the present suit. Prior to 1873, Chidambarayyar had dealings with Venkataratnam for several years, and on the 19th March of that year the former executed in favour of the latter the mortgage Exhibit A as security for the sum of

(1) 8 B. 1. (2) 6 B. 292.

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Rs. 8,000 then found due by the one to the other. It was upon this mortgage, original suit No. 5 of 1877 was brought against Chidambarayyar and his two elder sons Veerayya and Rama Murti, but only a money decree [125] was obtained against them. The decree directed them to pay respondent Rs. 9,677-2-5 with interest at 6 per cent. per annum from date of suit to date of decree, Rs. 6,000 odd in three specified instalments in 1877 and 1878 and the balance 4,250 by yearly instalments of Rs. 250 commencing with the 1st May 1879. The decree was passed on the 19th October 1877 and Chidambarayyar died on the 28th December 1883 after having paid part of the debt. On the 19th April 1888, respondent applied for execution against Chidambarayyar's four sons, *viz.*, Veerayya and Rama Murti, who were parties to the decree, and against appellants who, as alleged by respondent, are twins born subsequent to the suit, and in pursuance of this application he attached some of the property belonging to Chidambarayyar's family. On appellants objecting to the attachment so far as it affected their shares, the District Court raised it on the ground that the younger sons were not parties to the decree under execution and that a fresh decree should be obtained against them before the property which passed to them by survivorship could be proceeded against in execution. The District Court made its order on the 18th September 1889, and on appeal preferred from that order under Section 244, Civil Procedure Code, the High Court confirmed it on the 21st October 1890. Hence this suit.

In his plaint, respondent prayed for a decree declaring that defendants are bound to pay at once on the liability of the entire family property including their interest and already caused to be attached Rs. 1,792, the amount of six past instalments from 1st May 1885 to 1st May 1890 and Rs. 1,250, the amount of five future instalments when they become due with the condition of paying interest in default of payment on the due date as per terms of the decree in original suit No. 5 of 1877. The plaint prayed also for an injunction, for costs of the suit and for such other reliefs as the Court may deem it proper to grant.

Respondent's case was that, as sons taking ancestral property by survivorship on the death of their father, appellants were liable for the debt sued for. The sons resisted the claim on the following grounds, *viz.*, (1) that the suit is bad for non-joinder of respondent's brother, (2) that at the date of the former suit, appellants were alive and the suit is therefore barred by Section 43, Civil Procedure Code, (3) that the claim is time-barred, and (4) that the debt in question is not binding upon them. The District [126] Judge gave judgment for respondent with costs and directed that defendants Nos. 1, 2, 3, and 4 do pay plaintiff Rs. 1,792 (the six past instalments and interest thereon), together with interest at 6 per cent. per annum from date of plaint to date of payment from the property of the family in the hands of the defendants and ordered further that the defendants do pay the five future instalments on the respective dates on which they fell due with interest at 6 per cent. from those dates from the property in their hands. Against this decree, first and second defendants have appealed and they reiterate the grounds of defence in support of their appeal and also urge that the suit is either not maintainable at all or at least in its present form. On the merits, there can be no doubt that appellants are liable to pay their father's debt. Respondent deposed that the debt in dispute was contracted on account of the trade which Chidambarayyar carried on and of the cultivation of his lands. Appellants offered no evidence to show that the debt was either illegal or immoral, nor did they

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allege either that no ancestral property came to them by survivorship or that such property as so came was not sufficient to satisfy respondent's claim The contest in appeal has reference in the main to several preliminary objections urged against the claim and the first of them is the non-joinder of respondent's undivided brother as a co-plaintiff This formed the subject of the fifth issue, and the Judge determined it in respondent's favour observing that no evidence need be brought on that issue It appears that appellants and respondent's undivided brother asked that the latter should be included in the suit, but that their application was refused on the ground that he was not a necessary party The procedure followed by the Judge cannot be reconciled with the policy of Section 32, Civil Procedure Code, as explained in *Vydianadayyen* v *Sitaramayyan* (1) and with the principle that, when the debt sued for is due to a joint Hindu family, the debtor is entitled to insist that all the joint creditors, from whom he can claim a discharge, ought to be parties to the suit in order that the decree which may be passed therein may effectually discharge him as against all It appears, however, that respondent amended the plaint by describing himself as managing coparcener and representative of the joint family The omission, therefore, to make respondent's brother a party to [127] the suit is by reason of the amendment a mere formal error by which appellants cannot be prejudiced As regards the second preliminary objection that this suit does not lie, the Judge very properly disallowed it for the reasons mentioned in paragraph 14 of his judgment The right which respondent seeks to enforce is that of the creditor to recover the debt of a deceased Hindu father, from his sons to the extent they take ancestral property by survivorship, and the ground of action is that by Hindu law it is the pious obligation of the latter to discharge, so far as ancestral property permits, the debt which the former died without paying The present suit is not a suit to enforce the original mortgage because it has merged in the money decree in original suit No 5 of 1877 Nor is it a suit to enforce the decree in that suit which can only operate *inter partes* It is a suit to enforce an obligation imposed by Hindu law on the son to pay upon his father's death his debt in certain contingencies, an obligation which was not adjudicated upon in the previous suit and which can only be enforced by a fresh suit In *Arunachala* v *The Zemindar of Sivagiri* (2) and *Natasayyan* v *Ponnusami* (3), this Court allowed such obligation to be enforced by a new suit In *Hanumantha* v *Hanumayya* (4) the Full Bench observed that, to enforce the liability of ancestral property in the hands of sons to satisfy their father's debt, the holder of a money decree must have recourse to a separate suit

The third preliminary objection is that the question whether ancestral property is liable or not for the father's debt in the present suit is one which relates to execution of the decree in original suit No 5 of 1877, and that the order whereby this attachment was raised was an order made under Section 244, Civil Procedure Code, and that no fresh suit can be brought This contention is however at variance with the order of this Court passed in an appeal preferred under Section 244 on the 21st October 1890 It must also be observed that this order is in accordance with the principle laid down by the Full Bench in *Hanumantha* v *Hanumayya* (4) It may also be noted here that, under Section 234, Civil Procedure Code, an execution-creditor can only proceed against the property of a deceased debtor in the hands of his representatives and not

(1) 5 M 52 (2) 7 M 328 (3) 16 M 99 (4) 5 M 232

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against the property of the representative. It is loosely said at times that joint ancestral property [128] in the hands of a son is under the Mitakshara law assets for the payment of the father's debt, but it is not so *per se*, but assets only when the debt is either admitted to be binding or when in case of a *bona fide* dispute, it is finally adjudicated in a fresh suit to be neither illegal nor immoral.

Another preliminary objection is that the order passed by the Judge on the 18th September 1889 and confirmed by the High Court on the 21st October 1890 was an order made under Section 280 of the Civil Procedure Code and that a declaratory suit is the only one which can be maintained under Section 283 for the purpose of rendering that order inoperative. That was clearly not an order made under Section 280. It purported to be made under Section 244, and there was an appeal to the High Court and the final adjudication there was to the effect that the matter then in controversy was one which ought to be dealt with not in execution, but in a regular suit.

The fifth preliminary objection is that appellants were in existence before the date of suit No. 5 of 1877, and that the present suit against them is consequently barred by Section 43 of the Civil Procedure Code. We are not prepared to attach weight to this objection for two reasons, *viz.*, (1) because the cause of action in the present suit is not the same as in the previous suit and (2) because we concur in the Judge's finding that appellants were born subsequent to the former suit. We adopt the reasons mentioned in paragraph 8 of the Lower Court's judgment.

Two more objections are argued in support of this appeal. It is urged that the plaint asked only for a declaratory decree and that the Judge passed a decree for payment not only of instalments which had accrued due prior to suit but also those which had not then become due. So far as it relates to future instalments, the decree should have been merely declaratory, and it was not competent to the Judge to direct payment of a debt in respect of which the cause of action had not arisen at the date of suit. The clause in the plaint which prays for a decree declaring that defendants are bound at once to pay Rs. 1,792, the amount of the past six instalments, is ambiguous, but it prays also for such relief as the Court may deem proper and a direction that the instalments which had become due be paid awards only such as are properly claimable on the facts of the case However imperfect the wording of the clause may be, there is reason to think [129] that the intention was to claim consequential relief in respect of past instalments. The payment of the full institution fee, the words ' are bound at once to pay ' and the prayer for such other relief as the Court may grant show that a reasonable construction has been placed on the plaint and that the decree is substantially correct in so far as it relates to past instalments.

The last preliminary objection is that the suit is time-barred. The Judge holds that time began to run from the date on which each instalment fell due and that the period of limitation is twelve years under Article 122, Schedule II of the Act of Limitations. But it is clear that Article 122 is not applicable, for this is not a suit upon a judgment, and under the Civil Procedure Code no second suit will lie upon a previous judgment, the remedy provided being its execution in the manner therein prescribed. As was observed in *Natasayyan* v. *Ponnusami* (1), it is Article 120 that governs the suit and the statutory period is six and not twelve

(1) 16 M. 99.

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17 M. 122 4 M. L. J. 52.

years as considered by the Judge According to Article 120, time begins to run from the date when the right to sue accrues and applying this principle to the case before us, we agree with the Judge that time begins to run from the date on which each instalment becomes due To this view, appellants' pleader objects first on the ground that the son's obligation to pay the father's debts arose immediately on the father's death, which in this case occurred on the 28th December 1883, whereas the present suit was not brought till the 3rd February 1891 But this objection is not sound inasmuch as the father's obligation was only inchoate at the date of his death and the words 'right to sue' presuppose the existence of an obligation which is no longer inchoate, but is perfected and clothed with a right of action It is not correct to say that the obligor's death perfects all his inchoate obligations which devolve on his heir and renders them enforceable at once without reference to the contract or rule of law which originated them Suppose that the father executed an instalment bond for Rs 10,000 payable in ten yearly instalments and died before the first instalment became due, leaving considerable separate property for his son to inherit, may the creditor demand the whole debt saying that the father's death perfected all his inchoate obligations as against the heir? The general principle is [130] that the son succeeds to the father's assets and liabilities as they are at the death of the latter and that the father's death does not alter either the nature or extent of the rights of liabilities transmitted to the son Why should the case then be otherwise where the obligation attaches to ancestral instead of separate property in the hands of the son? The theory of the son's pious obligation rests on this basis, that the nonpayment of a debt is a sin and that so long as it remains unpaid it is a source of torment to the *manes* of the father which it is the son's duty to relieve him against The object is to afford relief to the father by discharging his debt when it becomes due, and not to benefit the creditor by making the debt more onerous against the son than it was against the father The answer to the question when an obligation ceases to be immature and becomes actionable must depend upon the contract or the rule of law which is its cause, and not upon any new contract to be made by the Court for the parties concerned In the case of a pious obligation devolving on the son under Hindu law when ancestral property survives, the obligation devolves on the son in the condition in which it would be enforceable against the father if he had been still alive. It is no doubt correct to say that the father's debt is binding on the son when ancestral property survives to him upon the father's death, but it is not correct to hold that the debt becomes always payable at once on the father's death In most cases the debt may be, and is, one due at the date of the father's death, but cases may arise in which it may fall due some years after that event It is, no doubt, stated in *Natasayyan* v *Ponnusami* (1) that time runs from the date of the father's death, but it should not be forgotten that in that case the debt was overdue when the father died We are therefore of opinion that the suit is not time-barred

The result is that the decree of the Judge will be modified by omitting the direction about the payment of future instalments and by substituting for it a declaration that appellants are liable to pay future instalments as they fall due, and the decree is confirmed in other respects The appeal having substantially failed, appellants will pay respondent's costs

(1) 16 M. 99.

1893
DEC. 7.

FULL
BENCH.

17 M. 131
(F.B.)
=4
M. L. J.
50.

17 M. 131 (F.B.)=4 M.L.J. 50.

[131] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SIVAKAMI AMMAL (*Plaintiff*), *Appellant v.* GOPALA SAVUNDRAM AYYAN AND ANOTHER (*Defendants*), *Respondents*.*

[14th December, 1891, and 24th November and 7th December, 1893.]

Transfer of Property Act—Act IV of 1882, Sections 67 (a), 68 (a)—Mortgagee's right to sue for mortgage money and for sales—Usufructuary mortgage—Covenant to repay mortgage money.

The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband. It contained a covenant to pay the mortgage money in Chittrai Kalavadi of the year 1883. This covenant was followed by these words: "If I fail to pay the mortgage amount in the said Kalavadi, then "you shall receive the said mortgage amount in the Chittrai Kalavadi of what- "ever year I may pay it, deliver the said lands to my possession having cleared off "the arrears of Government revenue, and also give back the bond" The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property:

Held, by a Full Bench, that the bond contained a covenant to pay, and that, therefore, the suit was maintainable.

[Diss., 28 A. 157 (160) = (1905) A.W.N. 226; F., 19 M. 411 (413); Appr., 21 A. 4 (11).]

APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in original suit No. 26 of 1889.

The first defendant executed a mortgage of certain land in favour of plaintiff's deceased husband. The instrument, after describing the property in question and giving details regarding the payments comprising the mortgage sum, proceeded as follows. "As I have properly received this sum "of three thousand rupees as per the above particulars, you shall yourself "enjoy the said lands comprised under the mortgage, with possession in "lieu of interest on the said sum and shall yourself pay the Sircar teerwah, "the village Suvantiram (perquisites), Oobyam (service fees), &c. There "are no arrears due to Government on the said lands up to the current "Fasli 87. I shall pay you the said mortgage amount of Rs. 3,000 in "Chittrai Kalavadi (cultivation season of Chittrai) of the [132] year 1883 "and take back this deed of mortgage with possession and the cancelled "bonds mentioned above If I fail to pay the mortgage amount in the "said Kalavadi (cultivation season), then you shall receive the said mort- "gage amount in the Chittrai Kalavadi (cultivation season of Chittrai) "of whatever year I may pay it, deliver the said lands to my possession "having cleared off the arrears of Government revenue and also give back "this bond."

Puttabhirama Ayyar, for appellant.

Mr. *H. G. Wedderburn*, for respondents.

This appeal came on for hearing before their Lordships Mr. Justice Parker and Mr. Justice Shephard on Monday, the 14th day of December 1891, when the Court made the following

ORDER OF REFERENCE TO FULL BENCH:—The District Judge has held that the mortgage executed by the first defendant in favour of the plaintiff's late husband is purely a usufructuary mortgage, and that, therefore, the

* Appeal No. 25 of 1891.

suit which is brought to recover the money secured against the defendant personally and by sale of the property is not maintainable

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If the mortgage instrument contains a covenant on the part of the defendant to pay the money, we think there can be no doubt that the action lies The clause on which the plaintiff relies is as follows

" I shall pay you the said mortgage amount of Rs 3,000 in Chittrai " Kalavadi of the year 1883 and take back this deed of mortgage with " possession and the cancelled bonds mentioned above " The mortgage instrument is dated 10th May 1873 Clearly the clause quoted imports a covenant to pay the mortgage money But it is said that the clause which immediately follows shows that no covenant was intended. That clause runs thus

" If I fail to pay the mortgage amount in the said Kalavadi, then " you shall receive the said mortgage amount in the Chittrai Kalavadi " of whatever year I may pay it, deliver the said lands to my possession " having cleared off the arrears of Government revenue and also, give " back the bond "

We are unable to see that the clause is in any way inconsistent with the preceding one

By the first clause, the mortgagor covenants to repay the money in the cultivation season of 1883, by the second clause, it is stipulated that on the mortgagor's default to pay the money in 1883, the mortgagee shall accept payment of the same in any late [133] cultivation season In other words, this second clause, which, like the first, is for the immediate benefit of the mortgagee, limits the discretion of the mortgagor to repay the money and redeem the land

Naturally the mortgagee was anxious not to be called upon to give up his security except at a season when the land could not, in the nature of things, be bringing him in any profit

In our opinion the covenant to pay is not affected by the clause, but inasmuch as in the case cited (Appeal No 4 of 1891) the Chief Justice and Wilkinson, J , have taken a different view of the manner in which a similar document (the terms of which we are unable to distinguish) should be construed, we refer to a Full Bench the question, " Whether " plaintiff is entitled to sue for sale under the provisions of the Transfer " of Property Act "?

In pursuance of the above reference, the case came on for hearing on Friday, the 24th November 1893, before a Full Bench, consisting of the Honourable the Chief Justice, Justice Sir T Muttusami Ayyar and Mr Justice Shephard, when the Court expressed the following

OPINION.—" We are clearly of opinion that the mortgage contains a " covenant to pay and that therefore a suit for sale lies "

This appeal came on for hearing this day, when the Court delivered the following

JUDGMENT.

We must reverse the decree (see Full Bench decision) and remand the suit for disposal. Costs to be provided for in the revised decree

1893 Nov. 16.

APPELLATE CIVIL.

17 M. 134=4 M.L.J. 85

17 M. 134=4 M.L.J. 85.

[134] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAJA GOUNDAN (*Plaintiff*) *Appellant v.* RAJA GOUNDAN AND OTHERS (*Defendants*), *Respondents.**

[24th, 25th, 29th and 30th August and 16th November, 1893.]

Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Revenue Recovery Act—Madras Act II of 1864, Sections 38, 59—Limitation—Admissibility of horoscope—Indian Evidence Act—Act I of 1872, Sections 17 and 18.

The plaintiff was the owner of a share in a mittah which was sold on 15th February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale in the form prescribed under Madras Act II of 1864. The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890:

Held, (1) that the sale of 16th June 1886 was not a sale under Section 38 of Act II of 1864, although the notification of the sale was in the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 15th February;

(2) that even assuming the sale of the 16th June 1886 to have been a sale under Section 38 of Act II of 1864, the suit was time-barred under Section 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, *viz*, 29th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, Sections 17 and 18 *Ram Narain Kallia* v. *Monee Bibee* (1) and *Satis Chundar Mukhopadhya* v. *Mohendro Lal Pathuk* (2) distinguished;

(3) that the limitation prescribed by Section 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. *Gobind Lal Roy* v. *Ramjanam Misser* (3) relied on.

APPEAL against the decree of P. Dorasawmy Aiyar, Subordinate Judge of Bellary and Salem, in original suit No. 6 of 1890.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court. The decree [135] of the Lower Court was for the defendants. The plaintiff preferred this appeal.

Sadagopachariar, for appellant.

The Acting Government Pleader (*Subramanya Ayyar*), *Bhashyam Ayyangar*, and *T. Subramanya Ayyar*, for respondents.

JUDGMENT.

BEST, J.—The appellant was plaintiff in the Lower Court, his suit being (1) for cancellation, so far as his share of the Puthur mittah (in Salem district) is concerned, of a sale held on the 16th June 1886 by which the entire mittah was sold; or (2) in case it is found that the sale is not liable to be set aside, for a declaration that defendants hold the plaintiff's share as trustees and for a decree directing them to convey to plaintiff his share of the mittah and of the income thereof since the date on which defendants got possession of the same.

The Subordinate Judge has found that plaintiff's suit was not barred by limitation, and that if the suit had been for the purpose of setting aside

* Appeal No. 24 of 1892.

(1) 9 C. 613. (2) 17 C. 849. (3) 21 C. 70.

1893 Nov. 16. APPELLATE CIVIL. 17 M. 134=4 M. L. J. 85.

the *first* sale held in February 1886, plaintiff would have been entitled to a decree, but that the second sale (of June 1886) is not one that is open to question by the plaintiff, as it was a sale of property no longer belonging to plaintiff, but belonging to Government as purchaser at the sale of February 1886

As is seen from Exhibit I the mittah in question was put up for sale, for arrears of revenue, on 15th February 1886, when there being no other bidders, it was purchased on behalf of Government for Rs 1,000 and this fact was reported to the Board of Revenue on the following day (see Exhibit T), and orders were also issued at once to the treasury to credit this sum of Rs 1,000 towards the arrears of the said mittah (see Exhibit XXXIX, also Exhibits XL and III) The mittah was again sold, on 16th June 1886, on the Collector's recommendation contained in his letter to the Board of Revenue which is filed as Exhibit H (dated 11th March 1886), the resale being sanctioned by the Revenue Board's Proceedings, dated 2nd April 1886 (see Exhibit I).

The Collector's letter H is as follows " Since reporting the result of " the sales of the Puthur and Tammakurichi mittahs, I have the honour to " inform the Board that I have received two offers, one for Rs 35,000 for " the two mittahs that have been sold As only a certain number of the " villages of each mittah (though not separately registered) belongs to the " minor proprietors for whose default they were sold, and as the owners " of the other villages have regularly paid their share, I would strongly ' [136] recommend a resale to enable Kylasa Goundan who has offered " the Rs. 35,000 or some other co-sharers to secure these old-standing " mittahs and thus arrange among themselves to clear off all encumbrances " This Kylasa Goundan proposes to do Government can in no case be " loser."

It must here be noticed that Tammakurichi mittah was also sold on the 15th February 1886 when Puthur was sold, and bought like Puthur on behalf of Government for Rs 1,000, but plaintiff does not appear to claim any interest in that mittah, his case being (*vide* paragraph 2 of the plaint) that there had been a partition between his branch of the family and that of defendants 1 and 3 to 8, though the registry continued joint By I " the resale of the mittahs is sanctioned as recommended " with the proviso that " Kylasa Goundan's offer should be fixed as the upset price "

The mittahs were accordingly resold on the 16th June 1886, when first defendant became the purchaser, this is the sale that is now sought to be set aside, and which the Subordinate Judge has held to be not a sale under Section 38 of Act II of 1864, but a sale by Government of property that had already become its own by reason of the purchase at the prior sale of 15th February

The first question for consideration in this appeal is whether the Subordinate Judge is right in thus holding? The answer to this question must, I think, be in the affirmative As pointed out by the Subordinate Judge, no order passed by the Collector cancelling the sale of February, with reference to the provisions of Section 38 of Act II of 1864 as amended by Act III of 1884, has been produced On the contrary, it is admitted that no such order was passed, but the Collector's letter H (above set out in full) is referred to as being equivalent to such an order Neither in this letter however nor in the Revenue Board's order thereon (Exhibit I) is there anything said about setting aside the previous sale, and the mere use of the word *resale* clearly implies nothing more than a second sale It is clear also from Exhibits II and Y that the resale was with reference to

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Standing Order No. 111 of the Board of Revenue which deals with lands bought in by Government. No doubt the notification of this resale was issued in the form prescribed under Act II of 1864 for sales on account of arrears of revenue; but it is explained, on behalf of the respondents, that no form had then been prescribed for sales under Standing Order No 111. Be this as it may, the circumstance [**137**] that in the notification A (clause 2) the current revenue payable by the purchaser is entered as *nil*, when compared with the corresponding entry in B, the notification of the sale of 15th February (in which the sum is stated to be Rs. 8,532-1-7) places beyond doubt the fact that the 'resale' was not on account of arrears of revenue, but of property that belonged to Government as purchasers at the previous sale. Such being the case, the order (Exhibit O) is of no weight. This suit which is for setting aside the sale of 16th June 1886 for irregularities *in such sale* must therefore fail.

But even if the suit did not fail on this ground, it must do so as time-barred in so far as cancellation of the sale is sought. The period of limitation for a suit of this kind is six months from the date of the sale (see Section 59 of Act II of 1864 and *Venkata* v. *Chengadu* (1). The appellant's contention that the limitation prescribed by the above section is inapplicable to sales which are open to the objection of illegality (as distinguished from mere irregularities) by reason of their contravening some express law—such as Regulation X of 1831, as alleged in the present case, is opposed to the recent ruling (dated 8th July 1893) of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser* (2), where a similar contention in the case of a sale under Act XI of 1859 was disallowed on the ground that "a sale is a sale made under the Act within the meaning of "the Act, when it is a sale for arrears of Government revenue, held by "the Collector or other officer authorized to hold sales under the Act, "although it may be contrary to the provisions of the Act either by reason "of some irregularity in publishing or conducting the sale, *or in conse-"quence of some express provision for exemption having been directly con-"travened.*"

It was therefore incumbent on appellant to have brought his suit before the expiration of six months from the date of his attaining majority. If it were a fact, as alleged in the plaint, that plaintiff was a minor till October 1889, this suit, which was brought on 31st March 1890, would be in time. But the Subordinate Judge has found—and no doubt rightly—that plaintiff was born on 29th November 1870 and consequently attained his majority on the 29th November 1888, which is sixteen months prior to the institution of this suit.

[**138**] The fact of plaintiff's birth having taken place in November 1870 is proved from his horoscope (Exhibit XXV) which was produced by his mother before the Tahsildar in November 1880. It is initialled by the Tahsildar with the addition of the date, 10th November 1880, and in the deposition VII of Kaliyammal (appellant's mother), dated 9th idem, she is found to have stated that there was a copy of the horoscope with Rama Krishnier and that she would "send a person and get it this night." Rama Krishnier has been examined as defendants' third witness and identifies Exhibit XXV as the copy which he then gave to Kaliyammal It is now produced from the public records where it appears to have been kept ever since its production in November 1880. Moreover, there is no room for doubt as to its identity with the

(1) 12 M. 168. (2) 21 C. 70.

horoscope produced before the Tahsildar, for in his report (X) to the Collector, which is dated 12th November 1880, he gives the plaintiff's age as 9 years 11th months and 11 days on the 18th idem, and in the Collector's letter VIII (of 13th December 1880) to the Board of Revenue the plaintiff is stated to be a minor 'now aged 10 years' As at the time of the deposition VII and production of XXV there was no reason for misrepresenting the age of plaintiff, the evidence thus afforded may be safely relied on It is also in accordance with the age of the plaintiff as stated in Exhibits V and LIII, the former of which is a deposition of Kaliyammal, dated 22nd March 1879, when she stated the plaintiff's age to be eight years, and the latter a petition of the same Kaliyammal, dated 7th December 1879, in which her son's age is given as nine years This petition is proved by defendant's eighth witness Ramalinga Aiyan, by whom it was presented on behalf of Kaliyammal under the vakalat (Exhibit LII) These documents give support to the evidence of defendants' fourth witness Ramasawmi Aiyen, who was manager under plaintiff's father from Akshaya (1866-67) till his death in Iswara (1877-78) He states that plaintiff was born in the year Pramoduta (1870-71) It has been contended on behalf of appellant that the horoscope is inadmissible in evidence and in support of this contention we have been referred to the rulings of the Calcutta High Court in *Ramnarain Kallia* v *Monee Bibee* (1) and *Satis Chunder Mukhopadhya* v *Mohendro Lal Pathuk* (2) Those cases are not on all fours with the present one In both the Calcutta cases [139] the horoscopes were produced then for the first time and by the parties relying on them; whereas in the present case defendants are relying on a horoscope produced by plaintiff's mother and which has been a public record from a period *ante litem motam* It is not put in here as evidence admissible under Section 32 of the Evidence Act, but more as an 'admission,' to which Sections 17 and 18 of that Act are applicable The date of plaintiff's birth is found to be 29th November 1870 and this finding is well supported by the evidence The suit so far as it seeks for cancellation of the sale is consequently time-barred under Section 59 of Act II of 1864

It is therefore unnecessary to consider the alleged illegalities or irregularities in the conduct of the sale.

But it is further contended on behalf of appellant that, even if plaintiff is not entitled to a decree setting aside the sale, the first defendant should be held to have purchased as a trustee on plaintiff's behalf and a decree should be passed awarding to plaintiff his share of the zemindari First defendant was in no sense a trustee for the plaintiff, and there is no reason whatever for holding that the sale was brought about by fraud on the part of the defendants As is seen from the Collector's letter (Exhibit H), the arrears of revenue on account of which the mittah was sold were entirely due on the villages which constituted the share of plaintiff's branch, and the shares of defendants 3 to 8 were sold only because they were also liable in consequence of their not being separately registered It was because the revenue due on the other shares had been 'regularly paid' that the Collector recommended the resale "to enable Kylasa Goudan or some other co-" sharer to secure these long-standing mittahs and to arrange among " themselves to clear off all encumbrances" There is therefore no ground for presuming fraud from the circumstance of first defendant having

(1) 9 C 613 (2) 17 C 849

1893. Nov. 16. subsequently to his purchase on 16th June 1886, resold portions to defendants 3 and 5 to 8 respectively under Exhibits G and F.

APPELLATE CIVIL I would dismiss this appeal with costs (two sets).

MUTTUSAMI AYYAR, J.—I concur.

17 M. 134=4 M. L. J. 85.

17 M. 140=4 M.L.J. 96.

[140] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ABDUL RAHIMAN SAHEB (*Plaintiff*), *Appellant* v. ANNA PILLAI (*Defendant*), *Respondent* * [16th and 23rd October, 1893.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 9, 10—*Suit to enforce acceptance of pattah*—Bona fide *denial by defendant of plaintiff's title—Jurisdiction of Revenue Court.*

The plaintiff obtained a permanent lease of inam lands attached to a mosque from the four owners thereof. The defendant was a cultivating tenant on the lands, and the plaintiff duly offered the defendant a pattah. The defendant refused to execute corresponding muchilika on the ground that the plaintiff was not his landlord, since the first of the aforesaid owners had granted a lease for 35 years to a person who had sublet the land to the defendant. The plaintiff thereupon brought a suit to enforce acceptance of pattah under Section 9 of Madras Act VIII of 1865. The Deputy Collector having decided the case in the plaintiff's favour, the defendant appealed and the District Judge dismissed the suit on the ground that the defendant's contention raised a *bona fide* question of title which ousted the jurisdiction of the Deputy Collector.

Held, that there is no provision in Madras Act VIII of 1865 that a *bona fide* denial of the relationship of landlord and tenant ousts the jurisdiction of the Revenue Courts, and, with regard to Section 10 of the Act, that "whenever a "Court is invested with jurisdiction to determine the existence of a particular "legal relation, the intention must be taken to be to authorize it to adjudicate "on every matter of fact or of law incidental to such adjudication." *Narayana Chariar* v. *Ranga Ayyangar* (1) and *Ayappa* v *Venkata Krishnamarazu* (2) cited and followed.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 79 of 1891, reversing the decision of the Court of the Deputy Collector in summary suit No. 4 of 1890.

The facts of this case appear sufficiently for the purposes of this report from the following judgment.

The plaintiff preferred this second appeal.

Balajee Rau, for appellant.

Sunkara Menon, for respondent.

JUDGMENT.

[141] This was a suit to enforce the acceptance of a pattah under Act VIII of 1865. The land in respect of which the pattah was tendered admittedly belongs to a mosque called Kazi Abdulla Asari's mosque. Appellant claimed to be respondent's landlord under a permanent lease granted to him by one Abdul Rahiman and his three sisters whom he described to be entitled to the land. He further alleged that respondent was a tenant cultivating about 4 acres of land. It was conceded that appellant duly tendered a pattah, but respondent denied that the former was his landlord. He contended that Abdul Rahiman granted a lease

* Second Appeal No. 1425 of 1892.

(1) 15 M. 223. (2) 15 M. 484.

1893 OCT. 23.

APPELLATE CIVIL.

17 M. 140=4 M. L. J. 26.

for 35 years to one Ragavendra Rao, who sublet the land to him The first issue in the case was whether appellant's lessors were competent to execute the permanent lease in his favour, and the Deputy Collector decided the question in appellant's favour, observing that Abdul Rahiman, who granted the lease to Ragavendra Rao, was only one of four inamdars whilst all the four inamdars granted the permanent lease to appellant, that Ragavendra's lease was further a benamee transaction and that it was never acted upon On appeal, the Judge dismissed the suit and rested his decision on the ground that respondent's contention raised a *bona fide* question of title which ousted the jurisdiction of the Deputy Collector It is argued on appellant's behalf that the Judge is in error in dismissing the suit for the reason that there was a *bona fide* dispute as to title and that he should have proceeded, as was done by the Deputy Collector, to adjudicate upon it It is provided by Section 10, Act VIII of 1865, that the Collector shall first inquire whether the party was bound to accept a pattah and give a muchilika and that, unless this is proved, the suit shall be dismissed with costs Whilst it is thus clear that the Judge is bound to decide whether there is the relation of landholder and tenant for the year for which the pattah is tendered, there is no provision in the Act that a *bona fide* denial of that relation is a good defence or ousts the jurisdiction of Revenue Courts

Whenever a Court is invested with jurisdiction to determine the existence of a particular legal relation, the intention must be taken to be to authorize it to adjudicate on every matter of fact or of law incidental to such adjudication. The Judge ought to have determined whether Ragavendra Rao's lease was acted upon, whether it was not a benamee transaction, or whether the actual relation of landlord and tenant existed as between appellant [142] and respondent, otherwise a tenant who was originally let into possession by A and paid him rent for a series of years may collude with an adverse claimant and render his landlord's right to tender a pattah infructuous

The decision in *Narayana Chariar* v *Ranga Ayyangar* (1) proceeds on this principle There the suit was brought by the tenant and the landlord denied the tenancy The Head Assistant Collector dismissed the suit observing " as a question regarding the existence or otherwise of " the relationship of landlord and tenant has arisen in this case, the " matter must be determined in the regular way "

The District Judge concurred in that opinion, but the High Court remanded the case for trial on the merits, and the learned Judges observed. " The Judge is to try the case The plaintiff's case is that he is a tenant " and entitled to a pattah which defendant denies To say that the " Collector is to hold his hand and make no further inquiry merely because " the landholder denies that plaintiff is his tenant, is to put it in the power " of the landholder always to deprive the tenant of the remedy by summary " suit given him by Section 8 "

Again, in *Ayappa* v *Venkata Krishnamarazu* (2), the tenant's defence was that, though he was a tenant in the zemindari, the plaintiff was a member of an undivided family together with three other persons, that the defendant had already accepted pattah and executed a muchilika made out in the names of the plaintiff and his two coparceners The District Judge held that the plaintiff being the registered zemindar, had a right to compel defendant to accept the pattah, and the High Court upheld the

(1) 15 M. 223.

(2) 15 M 484

1893 Oct. 23. — Appellate Civil. — 17 M. 140=4 M. L. J. 26.

decision as correct. These are the latest decisions on the question and the principle on which they rest appears to be open to no objection.

We set aside the decree of the District Court and remand the case for trial on the merits.

Costs of this appeal will abide and follow the result.

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17 M. 143.

[143] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr Justice Handley.

SANKARAMURTI MUDALIAR (*Plaintiff's Representative*), *Appellant v.* CHIDAMBARA NADAN (*Defendant*), *Respondent.**
[15th February, 1893.]

Suit by the Dharmakarta of a temple to recover possession of temple property—Religious Endowments Act—Act XX of 1863, Section 12.

The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution, unless he is precluded by any special law from exercising it There is nothing in the Religious Endowments Act to take away such powers Section 12 relates only to the rents of property transferred by Government to the committees of such institutions.

SECOND appeal against the decree of P. Dorasawmy Iyer, Second Subordinate Judge of Tinnevelly, in appeal suit No. 229 of 1890, affirming the decision of S. Krishnasawmy Aiyar, District Munsif of Srivilliputtur, in original suit No. 308 of 1889.

The plaintiff, who had been appointed as Dharmakarta of a temple by a committee constituted under Act XX of 1863, sued to recover from the defendant possession of certain property belonging to the temple. The Lower Courts held that only committees are empowered by Section 12 of Act XX of 1863 to bring such suits, and that no authority is given them to delegate that power, and that consequently the plaintiff could not maintain the suit. Against the decree of the Second Subordinate Judge the plaintiff preferred this appeal.

Desikachariar, for appellant.

The respondent was not represented.

JUDGMENT.

The Lower Courts are in error in supposing that the present suit is of the nature of the suits which the committee are authorized to bring by Section 12 of Act XX of 1863. That section relates only to the rents of property transferred by the Board of Revenue or local agents of Government to the committee, and it is not alleged that the property in question in this [144] suit was so transferred, and moreover this is not a suit for rent. The right to bring suits for the recovery of the property of a religious or charitable institution is vested as an ordinary incident of his office in the trustee or manager or such institution, unless he is precluded by any special law from exercising it. There is nothing in the Act to take away such right from trustees appointed by the committee, and therefore plaintiff is entitled to maintain this suit. We reverse the decrees of the Courts below and remand the suit to the Court of first instance for disposal on the merits. Costs hitherto incurred including costs of this appeal will be costs in the cause.

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* Second Appeal No. 882 of 1892.

17 M. 144.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

1893 March 17.

APPELLATE CIVIL.

17 M. 144.

RAMANAYYA (*Plaintiff*), *Appellant* v RANGAPPAYYA AND ANOTHER (*Defendants Nos. 2 and 3*), *Respondents* *
[17th March, 1893]

Attachment before judgment—Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship

Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution *Sadayappa* v *Ponnama* (1) followed

[**R**, 16 C P L R 19 (26), **D**, 26 M 604 (606)=13 M L J 308]

SECOND appeal against the decree of S Subbaiyar, Subordinate Judge of South Canara, in appeal suit No 188 of 1890, confirming the decree of S Raghunathaiya, District Munsif of Karkal, in original suit No 41 of 1890

Suit to recover Rs 1,078-8-0 due under a registered bond executed by defendant No 1 in plaintiff's favour Defendant No 1 died after the institution of the suit and before the summons was served on him, but after certain land belonging to him, and defendants Nos 2 and 3, had been provisionally attached Defendants Nos 2 and 3 were then sued as the personal representatives [**145**] of defendant No 1 The Lower Courts passed decrees in favour of the defendants and the plaintiff preferred this second appeal

Pattabhirama Ayyar, for appellant

Ramachandra Rau Saheb and *Ranga Rau*, for respondents

JUDGMENT

It is argued before us that the debt contracted by the deceased first defendant was a family debt and is therefore binding on the respondents, and that the Subordinate Judge is in error in omitting to record a finding on this point

The suit was originally brought against first defendant alone upon a bond executed by him He does not appear to have been sued as representing the family, and defendants Nos 2 and 3 were only brought in after his death as his legal representatives In the view that the debt was a family debt, the contention in the Courts below as to the effect of the attachment on survivorship was immaterial This contention is at variance with the case on which the parties proceeded to trial in the Courts below

As to the effect of the attachment on survivorship, it is to be observed that the attachment in question was one before judgment, and intended to protect the property from alienation by the defendant pending the decision of the suit Till decree was passed it could not operate to render the attached property available for sale in execution In the case before us there was no decree when the respondents' right of survivorship accrued on

* Second Appeal No 829 of 1892.

(1) 8 M 554.

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the death of the first defendant, and the principle laid down in *Sadayappa* v. *Ponnama* (1), we think, governs this case; consequently the right of survivorship took effect before the attachment became effectual for the purpose of execution. The result is that the appeal fails and is dismissed with costs.

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17 M. 146.

[146] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Davies.

PONNAYYA GOUNDAN (*Plaintiff*), *Appellant v.* MUTTU GOUNDAN AND ANOTHER (*Defendants*), *Respondents.** [25th September, 1893.]

Sale of immoveable property—Transfer of Property Act—Act IV of 1882, *Section* 54—*Effect of registration of sale-deed.*

Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. *Narain Chunder Chuckerbutty* v. *Dataram* (2) followed.

[**F.**, 11 Ind. Cas. 24=10 M.L.T. 44=(1911) 2 M.W.N. 376 (377); 14 Ind. Cas. 120 (121); 1 M.L.T. 432; **R.**, 3 O.C. 215 (222); **D.**, 28 M. 124 (126)=14 M.L.J. 493; 21 T.L R. 119.]

SECOND appeal against the decree of L. A. Campbell, District Judge of Coimbatore, in appeal suit No. 62 of 1892, reversing the decree of the Court of the District Munsif of Udamalpet, in original suit No. 136 of 1891.

The plaintiff sued for a decree establishing his right to certain immoveable property and for the possession thereof; for the recovery of a sale-deed executed and registered by the first defendant in respect of the said property, and for the cancellation and delivery to the plaintiff of a sale-deed executed and given by the first defendant to the second defendant. The plaintiff having agreed to purchase certain immoveable property of the first defendant, paid to him Rs. 60 for earnest money and expenses, and it was agreed between them that the first defendant should write the sale-deed and get it registered on that very day and deliver it to the plaintiff within five days, upon which the balance of the purchase money should be paid. Defendant executed and got the document registered on the day agreed upon, and thereupon he proceeded to sell the property to the second defendant, and executed and registered a sale-deed in respect of the second sale.

The District Munsif decreed the cancellation of the second sale-deed and specific performance of the contract to sell the property to the plaintiff.

[147] The District Judge set aside the decree of the Lower Court and dismissed the suit, on the ground that the plaintiff had failed to perform his part of the contract, inasmuch as he neither tendered nor paid the balance of the purchase-money on the execution and registration of the document.

The plaintiff preferred this appeal.

Bhashyam Ayyangar, for appellant.

Kothandaramayyar, for respondents.

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* Second Appeal No. 22 of 1893.

(1) 8 M. 554.

(2) 8 C. 597.

JUDGMENT.

We are of opinion that the registration of the sale-deed to plaintiff effected a transfer of the property to him by virtue of Section 54 of the Transfer of Property Act It has been held in *Narain Chunder Chuckerbutty* v *Dataram* (1) that a registered transfer without delivery of possession will pass any interest in land, and we consider that registration constitutes a sufficient delivery of the deed to pass such interest, otherwise the object of registration would be defeated, that object being to let all the world know in whom the title to property lies We must therefore reverse the decree of the District Judge and restore that of the Munsif, the plaintiff still being liable for the balance of the unpaid purchase-money The defendants must pay the plaintiff's costs in this and in the Lower Appellate Court

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17 M. 147.

APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt , Chief Justice, and Mr Justice Shephard

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CHOCKALINGA PILLAI (*Defendant*), *Appellant* v NATESA AYYAR AND ANOTHER (*Plaintiffs*), *Respondents* *

[11th and 14th July, 1893]

Letters of administration—Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters

Two brothers, members of an undivided Hindu family, who traded as 'T Iyavier and Brother', became the holders of a promissory note given to the firm The elder brother having died, his son joined the firm in his place, and he and [148] his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend The plaintiffs had not taken out letters of administration to their respective fathers' estates

Held, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided,

(2) that, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs *Venkataramanna* v *Venkayya* (2) distinguished

APPEAL against the judgment of Handley, J , in civil suit No. 150 of 1889 on the file of the High Court, original side.

The plaintiffs sued to recover the sum of Rs 3,096-10-8 due on a promissory note under the following circumstances. T Iyavier, the deceased father of the second plaintiff, and Visvanadha Ayyar, the deceased father of the first plaintiff, were undivided Hindu brothers, who carried on business under the firm and style of T Iyavier and Brother In 1884, in the course of business, the firm lent the sum of Rs. 2,000 to one P. A. Chockalingam Pillai, defendant in the present suit, taking from him a promissory note for the amount and interest thereon at 12 per cent. per annum. T Iyavier having died, his son, T I Vythinatha Ayyar, the

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* Appeal No 19 of 1892

(1) 8 C 597

(2) 14 M 377

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second plaintiff, joined the firm in his place, and in 1887 the defendant endorsed on the note a renewal of his promise to pay. In 1889 the firm filed a suit against the defendant to recover the amount of the loan and interest, but before the hearing, the first plaintiff died and his son, T. Natesa Ayyar (a minor) appeared as plaintiff in his stead by his next friend the second plaintiff. The plaintiffs had not taken out letters of administration to their respective fathers' estates.

Handley, J., delivered judgment for the plaintiff on the ground, *inter alia*, that letters of administration were not necessary for the maintenance of the suit since it was a suit by a surviving partner to recover a debt due to the *firm*, and not a suit to recover a debt due to a deceased person. The defendant preferred this appeal.

Branson and *Branson*, for appellant.

Sadagopachariar and *Krishnamachariar*, for respondents.

JUDGMENT.

[149] The document, which is in the nature of a bond, is executed by the appellant in favour of Visvanadha, originally a plaintiff on the record, but now deceased, and Iyavier, who died before action brought.

The question is whether the suit is maintainable, no letters of administration having been taken out to Visvanadha or Iyavier. The learned Judge has held that letters were not required because the action was not to recover a debt due to a deceased person, but was an action by the surviving member of a firm. In saying this, however, he overlooked the fact that the surviving partner also was, at the time of trial himself, dead and that the actual plaintiff Natesa was seeking to recover a debt due to his deceased father Visvanadha. Assuming, therefore, that the latter could have sued alone as the surviving partner, we fail to see how, on death, the necessity of taking out letters of administration can be avoided. But it has been argued that the money was really owing to the family and not to the obligees of the bond, and that the plaintiffs as members of the family were entitled to sue in their own right of survivorship without obtaining letters of administration. *Venkataramanna* v *Venkayya* (1) was cited in favour of this contention. What was said, however, in *Venkataramanna* v. *Venkayya* (1) was that, if on the face of the document, it appeared that the debt was a family debt, the surviving member might sue in his own interest, the money being due to the family. In the present case the bond does not show the nature of the debt and therefore the decision is really not applicable.

Moreover, if it was competent to the plaintiffs as being themselves primarily and not in a representative character interested in the claim, the other members of the family ought to have been joined, and no application to join them was made though the objection of non-joinder was taken at the earliest opportunity.

It is said that the second plaintiff became a member of the firm on the death of Iyavier and that as such he is entitled to sue, but that contention is clearly unsound. The right originally vested in Iyavier might have been assigned to the plaintiffs or, on Iyavier's death, might have passed to his representative. But it certainly did not pass to him owing to the mere fact that he joined [150] the firm. In our opinion the plaintiffs' suit was not properly framed and ought to have been dismissed.

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(1) 14 M. 377.

If Visvanadha Ayyar and Iyavier were partners of a firm constituted in the ordinary way by contract, as appears to have been the case, for otherwise the second plaintiff would not have been said to have joined the firm on his father's death (see *Ram Narain Nursing Doss* v *Ram Chunder Jankee Lall* (1),) then it is clear that their representatives or at least the representative of the survivor must establish his character as such in the legal way by taking out letters of administration. In that case the Act clearly applies

1893 JULY 14. APPELLATE CIVIL. 17 M. 147

On the other hand, if it is said that the money was due to the family and that the plaintiffs as surviving members of the family were suing to recover it, they are met with the difficulties already mentioned

We must reverse the decree and dismiss the suit directing the plaintiffs to pay the costs throughout

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17 M. 150.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU (*Plaintiff*), *Appellant* v SRI RAJA RAU CHELLAYAMMI GARU (*Defendant*), *Respondent* *

[25th April and 20th October, 1893]

Grant of portion of impartible zemindari—Construction of instrument to grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession

In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zemindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immoveable property of the grantee should be put in possession of the grantor's line On the death of the first grantee, the [151] property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son On his death, without male issue, the estate passed into the possession of his widow, defendant in the present suit The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant, that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch, and that notwithstanding the grant, the members of the two branches did not cease to be co-parceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant

Held, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of male issue contravened the principle laid down in the Tagore case and was inoperative

[R., 31 C 561 (569)]

APPEAL against the decree of the Subordinate Judge's Court of Cocanada in original suit No 27 of 1888

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court

Bhashyam Ayyangar, for appellant

Subramanya Ayyar, for respondent

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* Appeal No 44 of 1892

(1) 18 C. 86

1893 Oct. 20. —— APPELLATE CIVIL. —— 17 M. 150.

JUDGMENT.

This was a suit brought by the late Zemindar of Pithapuram to recover possession of an estate called the Kolanka estate. The plaint prayed also for a decree for *mesne* profits at the rate of Rs. 26,400 per annum for fasli 1297 and subsequent years till delivery of possession. The appellant is the present minor Zemindar of Pithapuram, and respondent is his paternal grandfather's brother's son's widow. The subjoined pedigree shows how the parties are related to each other and to the other members of their family:—

Sri Raja Niladri Rau Bahadur Garu, who died in 1828.
| sons |

- Sri Raja Rau Venkata Mahipati Surya Rau Garu.
  - Sri Raja Rau Venkata Mahipati Gangadhara Rama Rau Bahadur Garu. original plaintiff.
    - Sri Raja Rau Venkata Kumara Mahipati Surya Rau Bahadur Garu, minor appellant.
- Kumara Venkata Rau Bahadur Garu, Widow, Lakshmi Narasu Amma Garu.
  | sons |
  - Venkata Mahipati Dharma Rau, who died in 1881 without issue. Widow, Subbayya Ammi Garu.
  - Venkata Mahipati Surya Rau, who died in 1887. Widow Chellayammi Garu.

[152] The estate of Kolanka had, prior to 1845, formed part of the zamindari of Pithapuram which is impartible property belonging to appellant's family and descending in accordance with the rule of primogeniture. Exhibit I declares that it was the ancient custom of the family for the eldest male in the eldest line to manage the zemindari, and for the other members to receive from him a periodical money allowance on account of their maintenance. On the 26th April 1845, appellant's grandfather severed nine villages from the zemindari, constituted the group into a separate estate and granted it to his younger brother who was respondent's father-in-law.

Exhibit I is the instrument whereby the grant was made, and it is in these terms:—

"Kararnamah (agreement) executed on Saturday the 5th Chaitra "Bahula of Visvavasu, corresponding to 26th April 1845, by (me) Sri Raja "Rau Venkata Surya Rau Bahadur, Zemindar of Pithapuram, &c., in "favour of my younger brother, Raja Kumara Venkata Rau.

"The conditions agreed to by us are as follow:—

"1. As from the days of the person who first acquired the said "zemindari, it has been the unbroken custom in our family for the "eldest to manage the raj in the eldest line, and for the rest to receive "maintenance in cash from the person exercising the powers of the raj, "and as the zemindari has been put in my possession this year after I "ceased to be a minor, and as it is difficult for me to pay maintenance "annually in cash as has been done by our ancestors, and difficult for you, "too, if I should fail to pay it regularly, it appears convenient to me to give "to you and your descendants, on account of maintenance, the following

"nine villages, *viz*, (i) Kolanka, (ii) Mungetooru, (iii) Veeraraghavapuram, (iv) Raipuroo, (v) Chanduroo, (vi) Vunnapoody, (vii) Kaddavaly, (viii) Gokivanda, (ix) Jagapatirajapooram, attached to Gollaprolu Mitta acquired by our father and paying a kist of Rs 18,494 a year up to fasli 1254. You have also consented to this I will get registered and give you, on account of maintenance, the said villages for hereditary enjoyment From the date of this kararnamah you should conduct all the affairs of these villages for fasli 1255 The Collector of Rajahmundry should collect from you from fasli 1255, according to kistbundi, the permanent peshcush already fixed, until a permanent beriz [153] is fixed by him for the sub-division and afterwards the permanent beriz which may be fixed for it and grant receipts in your name Henceforward, inayatnamahs relating to those villages should be addressed to you As I have written an arzi this day to the Collector of Rajahmundry specifying the terms under which you and your descendants should enjoy those villages for maintenance, you must yourself manage hereafter the affairs of those villages for the ensuing fasli 1255, and enjoy all the profits hereditarily from son to grandson paying to the Government the permanent beriz each year from the said fasli

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"2 Till the said nine villages given to you by me are formed into a sub-division and a permanent beriz is fixed therefor, you should yourself from this date manage all the affairs of the villages, such as leasing them for fasli 1255, &c, and pay from the said fasli, every year the permanent beriz already fixed without allowing it to fall in arrears As I have been collecting the rents for fasli 1254, I will continue to do so to the end of the year and pay the peshcush due to Government up to the end of this fasli paying the money due for all remaining instalments so that there may be no arrears It is also settled that I myself should take the profit and loss for fasli 1254 You have nothing to do with it. Therefore we must pay the permanent beriz to the Collector of Rajahmundry as stipulated above

"3 If while [the peshcush] is being paid to the Collector as stated above, the Government should take under its own management the said villages dispossessing you of the same, owing to arrears which may accrue since fasli 1255 by reason of adverse season or for any other reason, you should be responsible for it I have nothing to do with it

"4 As referred to in the first paragraph of this kararnamah, I have sent a petition to have registered in your name the said nine villages given to you by me We both must, therefore, submit to any amount that may be fixed as permanent beriz for the said nine villages and not quarrel that it is high or low

"5 If owing to your failure to pay and obtain receipts for the permanent beriz which may be fixed as stated in paragraph 4 for the nine villages which I have resolved to get registered in your name on account of maintenance, according to the instalments, or for any other reason, the said villages should be attached and [154] sold, neither you nor your heirs shall again claim from me or my heirs maintenance or make any kind of demand

"6 It is agreed that water should every year continue to flow through the channels issuing from Velaru to the nine villages given to you by me and to the other villages in the manner in which it used to flow for the past up to fasli 1254

"7. If I should be in arrears of peshcush due to the Government on account of the zemindari of Pithapuram or if there should be outstandings

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" due by me to people or litigation in Courts, you have nothing whatever " to do with them and the like. Nor have I anything to do with the " arrears due by you to Government or with the outstanding due by you " to people or with any litigation in Courts and the like. As we have " entered into a settlement as indicated above, we will never have any " pecuniary claim against each other with reference to the above " conditions.

" 8. Your assets and liabilities and your property, moveable and " immoveable, belong to you and to your heirs and my assets and liabilities " and my property, moveable and immoveable, belong to me and my heirs, " Neither of us need therefore be responsible for the affairs of the other.

" 9. In whatever manner you may hereafter acquire property, " moveable and immoveable, I will have nothing to do with it. In " whatever manner I may hereafter acquire property, moveable and " immoveable, you shall have nothing to do with it.

" 10. As to the immoveable property belonging to us both, the said " immoveable property should in case of the failure of ' aurasa ' (self- " begotten) male issue in either of these two lines, *i e.*, either for yourself " or in your line of ' aurasa ' sons or in my line of ' aurasa ' sons be put " in possession of the other line, but it should not be alienated by making " adoption and the like

" 11. We both having resolved to carry out the provisions of this " kararnamah, you have this day executed to me a kararnamah, with the " above conditions and I too have executed this kararnamah to you.

" This kararnamah has been executed of my own full accord."

Subsequent to the grant, the nine villages were registered in the Collector's books as a separate estate in the name of the grantee Humara Venkata Rau. They were also charged with proportionate peshcush and became under Regulation I of 1819 an [155] independent permanently assessed estate. From the year 1845 to the year 1887, they had been in the possession, first of the grantee, Kumara Venkata Rau; next of his son Venkata Mahipati Dharma Rau and respondent's husband; and since the former's death in 1881, in the possession of respondent's husband alone till his death in 1887 when the villages passed into the possession of his widow, the respondent.

During this period, there occurred three events in the family which require to be noticed in this judgment. The first is another grant of three villages made in December 1869 by the original plaintiff for the maintenance of his own younger brother when the latter executed a document in favour of the former, similar in terms to Exhibit I. The next event is the litigation in the family commencing with original suit No. 11 of 1879 on the file of the District Court of Godavari and ending with the judgment of the Privy Council, dated the 29th September 1886 (Exhibits A, B, C, D, II, III and IV). Respondent's late husband brought that suit to set aside an adoption made by appellant's father, the late Zemindar of Pithapuram, on the ground that such adoption was contrary to the ancient custom of the family and to the agreement made in 1845, which it was alleged, precluded the Zemindar for the time being from excluding by adoption or the like, the next heir male from succession. Referring to the 10th article of the agreement, the Judicial Committee observed, " It is " clear that the father of Gangadhara could not bind his son, who was " then in existence, *not* to adopt or legally stipulate that if he should adopt, " the son so adopted should not inherit. The words are ' In case of the " failure of self-begotten male issue.' Mr. Mayne has been forced to

"admit that those words meant an indefinite failure of issue, and that an "adopted son should not even take by descent from his father It appears "to their Lordships that that would be entirely altering the law of descent "and contrary to the principle laid down in the Tagore case " The third event is the will left by respondent's husband on the 6th January 1887 granting her authority to adopt and constituting her his successor until such authority was exercised. The testator died on the 22nd January 1887 and this suit was instituted on the 2nd July 1888.

The appellant's case is (I) that the grant made to respondent's father-in-law was a maintenance grant, (II) that under its terms the estate reverted to his father on the death of respondent's husband when there was a failure of male heirs in his branch, [156] (III) that notwithstanding the grant, the members of the two branches did not cease to be co-parceners and by a right of survivorship, the original plaintiff was entitled under Hindu law to take the Kolanka estate to the exclusion of a childless widow like the respondent. It is also contended for the appellant that on the question of subsisting co-parcenary between the two branches, the adjudication in the suit of 1879 and in the appeals which arose from it is conclusive

On the other hand, it is urged for the respondent that by reason of the grant, the Kolanka estate became the separate property of her branch of the family, that Article 10 of the agreement I is inoperative and does not support appellant's claim, that the two branches were since then divided in interest, and that the decisions in the suit of 1879 had reference to the zemindari of Pithapuram The Subordinate Judge upheld respondent's contention and dismissed the suit with costs, hence this appeal.

It is urged on behalf of the appellant that the Subordinate Judge is in error in holding that the Kolanka estate was the separate property of Kumara Venkata Rau's branch and that the grant made to him in 1845 was not a mere maintenance grant We do not consider this contention to be tenable Our decision must depend on the legal effect of Exhibit I as to the nature and extent of the estate which was thereby intended to be granted. The object with which the grant was made was certainly a desire to assign land in lieu of money allowance which was previously paid for maintenance, but that object might legally be effectuated either by an absolute grant in full satisfaction of the claim to maintenance or by an annual grant of the income for one or more lives The question therefore, is one of construction as to the intention of the parties to the agreement I What was actually given under that instrument was a group of villages and the intention was to transfer the property therein to the grantee and not merely its income The villages are described as 'given,' they were further constituted into a separate mitta, and the mitta was registered in the name of Kumara Venkata Rau as proprietor. Possession was also transferred to him at once and his right of independent management and his right to the whole of the profit was recognised Moreover, the grant was declared to be hereditary from son to grandson or to be 'Putra poutra parampparyam ' which are words of inheritance and mean the grantee and his heirs

[157] Again, there are several provisions which make the Kolanka estate independent of the zemindari of Pithapuram and the one is severed from the other as completely as it can be severed by partition The words in Article 5 ' to you and your heirs,' and ' me and my heirs ' show that the agreement was intended to be in force between the future representatives of the two branches as well as between the parties themselves Exhibit I

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is manifestly not a grant either for one life or a specific number of lives, but it is a permanent grant made for hereditary enjoyment. In this connection appellant's pleader argues that the grant was made for a *specific* number of lives, but the grant suggests no determinate number of lives. Again, he draws our attention to Article 10 of the agreement and urges that it was a grant to Kumara Venkata Rau and to the heirs male of his branch. But the article which relates to the immoveable property owned by the appellant's grandfather and by the grantee purports to create a special right of reversion in respect of such property for each branch, in case there was failure of male issue in the other and forbids its alienation by adoption and the like. It was held to be inoperative in the previous suit by their Lordships of the Privy Council so far as it prohibits adoption, and in our judgment it is equally inoperative so far as it excludes female heirs from succession. Both restrictions alike contravene the principle laid down in the Tagore case, *viz.*, that when property is once given absolutely, the grantor is not competent to restrict its descent in accordance with the law of inheritance which is applicable to the parties concerned. The conclusion to which we come is that by agreement, property in the Kolanka estate was given to Kumara Venkata Rau and his heirs absolutely, that as between appellant and respondent it is the separate property of the latter's branch, and the Article 10 which forbids its descent in accordance with the Mitakshara law to the widow of the last male holder is inoperative.

Another ground upon which the Subordinate Judge relies is that even assuming that Article 10 is not inoperative, the intention was, upon its true construction, *not* to exclude the respondent from succession.

In support of this view he observes that respondent, though a childless widow in Kumara Venkata Rau's branch, was entitled to maintenance like its male representatives, and that there is, therefore, no reason to think that she is not of that class of persons for whose benefit the grant was made. Adverting to a similar provision [158] in Exhibit VIII which is a grant made by appellant's father on account of the maintenance of his own brother, the Subordinate Judge refers to an admission made by the former that the article was designed to prevent the estate passing to strangers outside the family and not to shut out from succession wives of the grantee's male heirs. So far as the inference from the object of the grant is concerned, the reasoning does not appear to be conclusive. So far as the original plaintiff's admission regarding the effect of a similar article in Exhibit VIII is concerned, it cannot be used against the appellant in favour of the respondent who was no party to it if, upon the true construction of Article 10 of agreement I, it excludes females. The words are "on failure of aurasa or self-begotten male issue in either of these "two lines, the immoveable property should be put in possession of the "other line," and they are wide enough to bear the interpretation that the contingency contemplated is either an adoption from outside the family or the failure of male representatives. We prefer to rest our decision on the ground that Article 10 being inoperative should be expunged from the instrument and that the agreement I when read without that article clearly evidences a permanent grant to Kumara Venkata Rau and his lawful heirs of whom respondent is one.

Another contention urged on behalf of the appellant is that when respondent's husband died, the Kolanka estate was co-parcenary property and that by right of survivorship the appellant is a preferable heir. It

is further stated that the decision in the previous suit of 1879 are conclusive on this matter. 1893 Oct. 20. — Appellate Civil — 17 M. 150.

The decision of the Privy Council in the previous suit proceeded on the ground that a custom prohibitive of adoption was not made out as found by the District Court and the High Court and that Article 10 which forbade adoption was illegal and inoperative. The High Court, whilst it rested its decision on the custom not being proved, expressed also an opinion that there was co-parcenary among the parties to that suit But that opinion was expressed with reference to the zemindari of Pithapuram to which the adopted son was an heir previous to the birth of the appellant, and it is not conclusive as argued for the appellant in respect of the Kolanka estate which forms the subject of the present suit

It may well be that the zemindari of Pithapuram is an impartible estate from which male co-parceners of a junior branch have a right to exclude a childless widow of the last male Zemindar and [159] yet with respect to all other properties the two may be divided in interest Unlike the zemindari, the Kolanka estate is property carved out of it and made the subject of a recent grant We have already stated our reasons for holding that under the terms of the grant, it is, as between the parties to this appeal, the separate property of Kumara Venkata Rau's branch This does not rest on mere inference for Article 8 of the agreement refers to the property owned then by each branch and describes its *status* in relation to it in these terms—" your assets and liabilities and your property, moveable and immoveable, belong to you and your heirs, and my " assets and liabilities and property, moveable and immoveable, belong to " me and my heirs Neither of us need therefore be responsible for the " affairs of the other." They are words of severed interest and severed liability and are inconsistent with community of interest in the absence of which no co-parcenary can subsist.

Article 9 relates to after-acquired moveable and immoveable property and provides with reference to it in these terms—" in whatever manner " you may hereafter acquire property, moveable and immoveable, I will " have nothing to do it In whatever manner I may hereafter acquire " property, moveable and immoveable, you shall have nothing to do with " it " It appears to be a reasonable inference from these two articles that, from the date of the agreement, the parties by mutual consent determined their *status* as co-parceners, for from that day forward, it is clear there was to be neither unity of interest nor of enjoyment either in the Kolanka estate or in after-acquired property. In paragraph 44 of his judgment, the Subordinate Judge discusses also the conduct of the parties both prior and subsequent to the agreement and comes to the conclusion that it likewise denotes determination of co-parcenary from the date of the agreement I We do not desire to be understood as expressing any opinion regarding the zemindari of Pithapuram which is an ancient impartible zemindari, but we entirely agree with the Subordinate Judge that as regards the Kolanka estate, the after-acquired and other property of the respondent's branch, the co-parcenary or joint interest of the appellant's branch has ceased from the date of the agreement I.

For these reasons, we are of opinion that this appeal cannot be supported and that it must be dismissed with costs.

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DEC. 22.

APPELLATE CIVIL

17 M. 160.

17 M. 160.

[160] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ANANTHAYA (*Defendant*), *Appellant v.* VISHNU (*Plaintiff*), *Respondent.* [25th October and 22nd December, 1893.]

Hindu law—Illegitimate son—Maintenance

Under the Mitakshara law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes The maintenance decreed to an illegitimate son may be secured on the family property

[R., 34 M 68 (70)=5 Ind Cas. 919=20 M.L J 350=7 M L T. 161=(1910) M W.N 138]

SECOND appeal against the decree of W. C. Holmes, Acting District Judge of South Canara, in appeal suit No. 178 of 1891, modifying the decree of M. Mundappa Bangera, District Munsif of Mangalore.

The plaintiff, an illegitimate son of the defendant's father, a Brahmin by caste, sued to recover from defendant his maintenance as a charge on certain immoveable family property. Both the Lower Courts decreed in favour of the plaintiff, and the defendant preferred this appeal.

Pattabhirama Ayyar, for appellant.

Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

Both Courts have found that respondent is the illegitimate son of appellant's father Krishnaraya, who was a Brahmin by caste. As observed by the District Munsif, it is a settled rule of Hindu law that among the regenerate classes illegitimate sons are entitled to maintenance. The District Judge considered Rs. 4 a month to be a suitable provision for respondent and decreed to him future maintenance and arrears of maintenance for fourteen months before suit at the rate of Rs. 4 per mensem From this decision the defendant has preferred this second appeal.

There can be no doubt that under the Mitakshara law, by which the parties are governed, an illegitimate son is entitled to [161] maintenance among the regenerate classes. The Smriti of Yajnyavalkya and its exposition in the Mit., Chapter I, Section XII, leaves no room for doubt on this point. An illegitimate son is one of that class of persons who, by reason of their exclusion from inheritance, are allowed maintenance by the Hindu law, and this is clear from the facts that among Sudras he shares his father's property together with the legitimate son. It is urged on appellant's behalf that respondent is not entitled to maintenance after he attains his age, but we are unable to accede to this contention. The Smriti of Yagnyavalkya awards maintenance to an illegitimate son not as a provision against starvation and vagrancy, but in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives. We do not, however, desire to be understood as holding that his earnings, when he is able to earn, should not

* Second Appeal No. 239 of 1893.

be considered in fixing the rate at which maintenance should be paid. 1893 Dec 22.

Another contention is that maintenance can only be decreed subject to the condition that he is ' docile ' and our attention is drawn to the decision in *Hargobind Kuari* v *Tharam Singh* (1) and to the words in Mit , Chapter I, Section XII, sloka 3, " but if he be docile, he receives " a simple maintenance " By docility, cited above in the text, is meant nothing more than showing such consideration and rendering such reasonable service as are ordinarily due to the head of the family by its members It is not necessary to consider, for the purposes of this appeal, whether the text is more than directory, as there was no plea in the Courts below based on this ground

APPELLATE CIVIL.

17 M. 160.

The third contention is that the maintenance should not be made a charge on any immoveable property belonging to the family As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, &c , are to be met, the maintenance decreed to an illegitimate son may be secured on the family property, as in the case of a female member, by being declared to be a charge

The fourth contention for the appellant is that respondent's [162] mother was a dancing girl by caste But both Courts find that respondent is the illegitimate son of his father, and as this is a question of fact, the finding is binding upon us The position of the mother as a dancing girl by caste is only important as showing that her connection with the father was casual and *not* continued concubinage, but in the present case the Judge referred to evidence showing that respondent's mother was the concubine of his father for a long period of years This appeal cannot be supported and we dismiss it with costs

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17 M 162.

APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt , Chief Justice, and Mr Justice Shephard

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MUHAMMED ALIM OOLLAH SAHIB (*Plaintiff*), *Appellant* v THE SECRETARY OF STATE FOR INDIA (*Defendant*), *Respondent* * [10th July, 1893]

Suit against Secretary of State in Council—Dismissal of suit with costs—Review of taxation—Remuneration of the Advocate-General and Government Solicitor by fixed salaries—Liability of party condemned in costs

Assuming that the arrangement between the Government and its Solicitor is that the latter should receive a salary and in addition the costs awarded to Government, this arrangement cannot affect a third party condemned in costs, neither is it illegal or contrary to public policy

APPEAL against the judgment of Wilkinson, J , sitting on the original side in civil suit No. 128 of 1891

The facts of the case appear sufficiently for the purpose of this report from the judgment of

WILKINSON, J —" This is an application to review the taxation of the " defendant's bill of costs in the above suit to set aside the allocation of

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* Appeal No 16 of 1892

(1) 6 A 329

1893 July 10. — Appellate Civil. — 7 M. 162.

" the taxing officer and to lay down the mode in which and the principle on " which the bill should be taxed.

" The suit was one by a private individual against the Secretary of " State. At the first hearing the Secretary of State was [163] represented " by the Advocate-General, instructed by the Government Solicitor, and " the suit was dismissed, the plaintiff being ordered to pay the costs of " the Secretary of State.

" The taxing officer's notes show that before him the plaintiff object- " ed to defendant's bill of costs on the ground that defendant had incur- " red no costs ' unless for the time of their officers ' (whatever that may " mean). The Government Solicitor replied that the taxing officer was not at " liberty to go behind the order to tax, that costs were given as a penalty, " and that it had for more than thirty years been the invariable practice " of the Court to tax Government bills of costs in the same way as other " bills of costs. The taxing officer accepted the plea of the Government " Solicitor and taxed the costs as between party and party.

" Mr. Norton appears for the plaintiff and argues that as Government " pay the Government Solicitor a fixed monthly salary to do its legal " work, the Secretary of State, the defendant in this case, cannot be said " to have incurred any cost; that, as the Government Solicitor cannot " recover from the Government the items mentioned in the bill of costs, " Government cannot recover them from the plaintiff, and that the prin- " ciple upon which the Court ought to proceed in fixing costs is to ascertain " what was the actual damnification caused to the successful party and " to award to him the sum while he is actually out of pocket. Mr. " Norton's argument proceeds on the assumption that the plaintiff is " entitled to the benefit of any arrangement entered into by the Govern- " ment with the Solicitor whose services the Government see fit to retain " by the payment of a monthly salary. I do not think that he is. The " principle applicable in cases like the present appears to be that laid " down in the case relied on by the Advocate-General, *Raymond* v. *Lakeman* " (1). In that case the Taxing Master allowed a company which employ- " ed standing solicitors at a fixed salary such costs as the company would " be bound to pay to their solicitors. It was argued before the Court " that as the standing solicitors were paid a fixed salary, the company had " no right to charge the unsuccessful party more than their own stand- " ing solicitors could have charged them. The master of the Rolls main- " tained the order of the Taxing Master, holding that the unsuccessful " party could not [164] have the benefit of any private arrangement be- " tween the Solicitor and the company as to costs. The case appears to " me on all fours with the present case. The unsuccessful party, the " plaintiff, has been ordered to pay to the defendant the costs incurred by " him. The defendant asserts that costs have been incurred by the " employment of a Solicitor to receive the summons, to instruct counsel, " put in written statements, &c. It is not denied that the costs which " the present defendant claims to recover from the plaintiff are such as " any other defendant must have incurred in defending the suit and " would be bound to pay to his solicitor. But it is argued that unless the " Government Solicitor proves that he can recover the costs from Govern- " ment, Government cannot recover them from plaintiff. This is entirely " beside the question, which is one between plaintiff and defendant, not " one between plaintiff and the Government Solicitor as Mr. Norton

(1) 34 Beav. 584.

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" suggests. The plaintiff has no right to assume that the defendant has " not expended these sums, nor is he entitled to call upon the defendant " to prove the nature of the contract between him and his solicitor. The " case of *Barnes* v *Attwood* (1) is not really in point, as there the taxing " officer had been induced by false affidavits to allow a larger sum as " expenses to commissioners than had actually been paid. It is true that " Mr Norton's whole argument proceeded on the assumption that the " bill of costs put in by the defendant in this case represents absolutely " fictitious transactions as between the Government Solicitor and the " Government. But it is unnecessary to consider that question. The only " question is—Has the defendant incurred any, and if so what costs The " answer is—The defendant has employed a solicitor, who has done certain " acts and is entitled to charge for his time and work, and the defend- " ant is liable to remunerate the solicitor Whether Government chooses " to do by a fixed salary and whether the costs, if recovered, go to the " Government treasury or into the solicitor's pocket is not a matter into " which the taxing officer is competent to inquire

" The petition must be dismissed with costs "

The plaintiff (appellant) preferred this appeal

Messrs *Branson* and *Branson*, for appellant

[165] The Government Solicitor (Messrs *Barclay*, *Morgan* and *Orr*), for respondent

JUDGMENT.

It is by no means clear what are the exact terms on which contentious business is done as between the Government Solicitor and Government Assuming, however, that the arrangement is that he should receive a salary and, in addition, the costs recoverable from third parties in those causes in which costs are awarded to Government, we are unable to see how that arrangement can affect a third party who is condemned in costs *Raymond* v *Lakeman* (2).

The arrangement does not appear to be contrary to public policy, and there is no Act under which it is made illegal. *Jennings* v *Johnson* (3)

The appeal is dismissed with costs

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17 M. 165=3 M.L.J. 296.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

KOORMAYYA AND OTHERS (*Petitioners*), *Appellants* v KRISHNAMMA NAIDU AND OTHERS (*Counter-petitioners*), *Respondents* * [4th September, 1893],

Limitation—Act XV of 1877, Schedule II, Art 179—Step in aid of execution—Request for payment of money realized in satisfaction of a decree

A request for the payment of money realized in satisfaction of a decree is sufficient to keep the decree alive, being a step in aid of execution *Venkatarayalu* v *Narasimha* (4) approved and followed

Whether a particular act is or is not an application for, or step in aid of execution, depends upon the nature of the act rather than the time at which it may possibly be done *Hem Chunder Chowdhry* v *Brojo Soondury Dabee* (5) qualified

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* Appeal against Order No 53 of 1892.

(1) 5 C B 164 (2) 34 Beav 584 (3) L. R 8 C. P. 325 (4) 2 M 174. (5) 8 C. 89.

1893 SEP. 4. — APPELLATE CIVIL. — 17 M. 165 = 3 M. L. J. 296.

[R., 22 B. 340 (342); 35 B 452=13 Bom. L R. 661 (668)=11 Ind. Cas 987; 23 C. 196 (199); 11 C.P.L.R. 161 (162); 8 O.C. 161 (166); 103 P.R. 1908=142 P.W R. 1908=207 P.L R. 1908.]

APPEAL against the order of H. G. Joseph, Acting District Judge of Gunjam, in original suit No. 2 of 1883.

The plaintiff, holder of a decree dated 14th October 1884, [166] presented a petition, dated 14th April 1891, to show good reasons why the decree had not been barred by limitation. It appeared that the plaintiff applied for and was paid certain moneys through the Court under receipts dated 15th May and 28th October 1889. The District Judge held on the authority of *Fazal Iman* v. *Metta Singh* (1) that such an application was not a step in execution within the meaning of Clause 4 of Article 179, Schedule II of Act XV of 1877, and that consequently the limitation was not saved.

The petitioner preferred this appeal.

Pattabhirama Ayyar, for appellants

The respondents were not represented.

JUDGMENT.

It must be inferred, from the Sheristadar's report on the receipts of 1889 and the Judge's subsequent order thereon, that there was a request for payment of the money realized in satisfaction of the decree, and such request is sufficient to keep the decree alive, as held in *Venkatarayalu* v. *Narasimha* (2).

Though the Judge considers the opinion expressed in *Venkatarayalu* v. *Narasimha* (2) to be a mere *obtier dictum*, it was certainly one of the grounds of decision in the case, and we agree with it. With reference to the observation in *Hem Chunder Chowdhry* v. *Brojo Soondury Dabee* (3) that the money may be drawn at any time, it seems to us that in deciding whether any particular act is or is not an application for, or step in aid of execution, it is the nature of the act that must be looked to, and not the time at which it may possibly be done.

We set aside the order of the District Judge and direct that the execution be proceeded with.

[The costs of this appeal will be costs in execution]*

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17 M. 167=4 M.L.J. 71.

[167] APPELLATE CIVIL .

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

SUBBA RAO (*Petitioner*), *Appellant* v. PALANIANDI PILLAI (*Counter-Petitioner*), *Respondent*.† [12th October, 1893.]

Succession Certificate Act—Act VII of 1889, *Sections* 19 *and* 26*—Appeal from an order of a District Court under Section* 26.

Section 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by Section 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case.

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* Forms a portion of the judgment, though omitted in I.L.R.—Ed.

† Appeal against Appellate Order No. 5 of 1893.

(1) 10 C. 549. (2) 2 M. 174. (3) 8 C. 89.

APPEAL against the decree of R S Benson, District Judge of South Malabar, in civil miscellaneous appeal No 63 of 1892, confirming the order of the Subordinate Judge of Palghat in civil miscellaneous petition No 7 of 1892

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The petitioner applied for a certificate of heirship under Section 6 of the Succession Certificate Act The Subordinate Judge rejected the petition The petitioner appealed to the District Court under Section 26 of that Act and his appeal was dismissed He then preferred this appeal

Sundra Ayyar, for appellant

Krishna Menon, for respondent.

JUDGMENT

The preliminary objection is taken that no second appeal lies The language of Section 26 appears to us to support the contention The intention was, we think, to confer on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by Section 19 on the High Court over the order of a District Court

There is no provision in the Act for a second appeal in any case Both Section 19 and Section 26 declare that the orders of District Courts shall be final

The material words in Section 19, Clause 3, are " subject to the provisions of sub-Section 1 and of Chapters 46 and 47 of the Code of Civil " Procedure as applied by Section 647 of that Code, an order [168] of the District Court, under this section, shall be final " Section 26, Clause 3, is to the same effect, but the words ' subject to the other provisions of this Act,' are omitted

It is contended that the word final is intended to preclude any other suit This may be But we are of opinion that it also precludes a further appeal except when such is expressly allowed

The use of the words subject to the other ' provisions of this Act ' in Section 19 and their omission in Section 26 is significant

We are of opinion that the preliminary objection must prevail

This appeal is, therefore, dismissed with costs

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17 M. 168=4 M.L.J 31.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Davies.

NAMASIVAYA GURUKKAL AND OTHERS (*Defendants Nos* 1 *to* 6), *Appellants v* KADIR AMMAL AND OTHERS (1*st Plaintiff's Representatives and plaintiffs Nos* 3 *and* 4 (*Respondents*) *

[12th, 13th July and 5th October, 1893]

Contract—Executory contract involving personal considerations—Assignment—Contract consisting of distinct contracts with separate parties—Misjoinder of the parties as defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only.

Seven salt manufacturers, the defendants, contracted with A to manufacture and store in the factory in the name of and for the benefit of A such quantities of salt as he might require them to manufacture each season for seven years, in consideration of A's paying them at the rate of Rs. 11-8-0 per garce of salt, four months' credit after each delivery being allowed to A, and of his paying Government taxes and dues, and executing all but petty repairs in the defendants'

* Second Appeals Nos 93 to 114 of 1892

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factory. B was a party with A to the contract though he was not expressly mentioned therein. A assigned his share in the contract to C. B, as first plaintiff, and C, as second plaintiff, brought a suit against the defendants alleging that the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886) and praying (1) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886; (2) that defendants 2, 4 and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt. The Court of first instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own [169] pans only, decreed (1) that the seven defendants should pay damages at the rate of Rs. 5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree; (2) that the defendants should pay the plaintiffs' costs. On appeal the District Judge modified the decree by fixing the rate of damages at Rs. 45-10-0 for each garce of salt.

Held on appeal (1) that A was not competent to assign his interest in the contract to the second plaintiff since the contract was based on personal considerations, and that the assignment of it as an executory contract was invalid without the consent of the defendants. *Farrow* v. *Wilson* (1), *Humble* v. *Hunter* (2), *Arkansas Valley Smelting Company* v. *Belden Mining Company* (3), followed;

(2) that the suit was bad for misjoinder, since the case of each defendant, as a party to a distinct contract, should be decided on its own merits;

(3) that the decrees of the lower Courts were bad in making all the defendants jointly and severally liable for costs, and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant;

(4) that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the lower appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty.

[F., 18 M. 189 (191); R., 27 M. 80 (84); 29 M. 195 (198)=16 M.L.J. 41=1 M.L.T. 25; 2 C.L.J. 602 (607); 5 C.L.J. 71 (75).]

SECOND appeals against the decree of T. Weir, District Judge of Madura, in appeal suits Nos. 225, 240 and 304 to 325 of 1890, modifying the decree of A. Ramasamy Sastrial, Additional District Munsif of Sivaganga, in referred suit No. 137 of 1888

The facts of the case appear sufficiently for the purpose of this report from the above and from the judgment of the High Court. The contract in question was as follows:—

" 1. As we have bound ourselves to present petitions and store up in " your name, of seven years, from 11th April 1885 to 10th April 1892, " *all the salt* manufactured by us under the license, in accordance with the " new excise rules, in the salt-pans of the Vattanam factory which were " in our forefathers' enjoyment before and which are in our enjoyment " now, we will manufacture salt for the said seven years according to the " instructions given by you or your agent and, according to the Circar " rules, present petitions in your name beforehand and store up salt and " preserve them by putting them in heaps according to the instructions " given by you or your agent, use clay for those heaps according to the " Circar rules and use sand for the cracks, &c.; and within four months " from the date of our giving over the salt [170] to you in the abovesaid " manner you are to pay each of us at 11½ rupees per garce and take " receipts from us.

" 2. Either you or your agent must give to each of us a kachat then " and there for the salt stored up after measurement and secured or pre- " served in the manner stated in para. 1.

(1) L.R. 4 C.P. 744. (2) 12 Q.B.R.P. 310. (3) 127 U.S.R. 379.

"3. We are to execute, at our own cost, the repairs of 'kadal vaikal,' "kanni vaikal' (channels, the water of which is used for watering the "salt-pans), 'keni' (a sort of well), patti (salt-pans), panni, &c., places "where salt is manufactured, and we will ourselves execute the repairs that "have now to be done.

"4. All the taxes or duties that we have to pay to the Salt department "according to the license under the new system shall be paid by yourselves.

"5. Out of the repairs that we might be ordered to execute under the "rules that might be framed by the Government, you are to execute all "sorts of repairs excepting those stated in para 3

"6 You are not only to accept for the said seven years the salt "manufactured by us according to the 'dittum' (*standard* or estimate, so "translated by Mr Winslow) prescribed by you, but also to exercise all "the rights that we possess in the factory, as our representatives

"7 You are yourselves to sell the salt mentioned above If we lay "waste the salt-pans mentioned below without manufacturing salt, and if "we do not show, in the matter of storing up of salt, satisfactory reasons, "such as the unfavourable circumstances of the weather and the like, each "of us will be responsible and pay you at Rs 5¼ per garce for the loss "that might accrue to you (by the non-manufacture of salt) and the salt "being below the standard or estimate

"8 At the end of the term, after all the salt stored up in your name "has been sold away, we will sell at our pleasure the salt that we might "manufacture subsequently

"9. This agreement, containing the above conditions, was executed by us with our free consent"

The lower Courts decreed in favour of the plaintiffs, and the defendants preferred this appeal.

Subramanya Ayyar, for appellant No 2

Sivasami Ayyar and *Krishnasami Ayyar*, for appellants

Parthasaradhi Ayyangar, *Bhashyam Ayyangar* and *Tiruvenkata Chariar*, for respondents

JUDGMENT.

[171] The seven defendants were salt manufacturers holding pans in the factory at Vattanam, and they entered into the contract A, dated the 16th November 1884, with one Nur Mahomed engaging themselves in consideration of the said Nur Mahomed discharging the Government taxes and executing certain repairs and paying them at the rate of Rs. 11-8-0 per garce of salt, to manufacture and store in the factory in the name of, and for the benefit of, the said Nur Mahomed such quantities of salt as he might require them to manufacture each season for seven years from 11th April 1885 to 10th April 1892

It has been found as a fact by both the lower Courts on the fourth issue raised in the case that the first plaintiff Mahomed Aliar Rowther (now-deceased, but represented by respondents 1 to 4) was a party with Nur Mahomed to the contract, though he is not expressly mentioned therein. The first plaintiff's share was 2 in 5⅝ shares, and Nur Mahomed's share was the balance 3⅝ shares Nur Mahomed assigned his 3⅝ shares to second plaintiff (now deceased, but represented by respondents 5 and 6) under the deed of assignment Z, dated 11th January 1886

This suit was brought in February 1887 against the seven defendants alleging that, while the contract had been fulfilled on both sides for the

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season 1885 up to the 14th January 1886, the defendants had failed to fulfil their part of it for the season 1886 and praying that all the defendants should be directed to deliver to plaintiffs the salt they had collected and heaped in 1886, and that defendants Nos. 2, 4 and 7 should be specially held liable for any damages plaintiffs might suffer through a fall in the price of salt. There was also an incidental prayer that each defendant should be directed to execute a separate power of attorney to the plaintiffs as required by the Salt department in lieu of a single instrument that had been jointly executed by them, and for a general declaration of plaintiffs' rights. Several issues of law and of fact were raised at the trial, all of which have been found in favour of plaintiffs except that the agreement A was held good so far as the stamp duty was concerned only as against one of the defendants, and penalties were levied upon it in regard to the other six defendants, it being rightly held that it contained seven separate and distinct contracts, each defendant having entered into a separate engagement in regard to his own pans only. The decree of the Court of first instance after a general [172] declaration of plaintiffs' rights including the right of the second plaintiff to sue as the assignee of Nur Mahomed and a direction for each defendant to execute a separate power of attorney as prayed in the plaint, further directed each of the seven defendants to pay plaintiffs' damages for the years 1886 to 1889 (the decree being dated 10th day of January 1890) at the rate of Rs. 5-12-0 per garce for the salt collected by each of them during those years, leaving the quantity to be ascertained in the execution of the decree, and also directed the defendants to pay the plaintiff's costs.

It may as well at once be noted that this decree is bad in three different respects:—*first*, in decreeing damages for the four years 1886 to 1889, and that against all the seven defendants, when in the plaint, damages for the year 1886 alone were or could be asked for, and that against only defendants Nos. 2, 4 and 7, the claim against the others being only for the delivery of specific salt; *secondly*, in reserving for determination in execution what was necessary for determination by the decree itself, namely the amount of each defendant's liability to damages; and *thirdly*, in making the defendants jointly and severally liable to plaintiffs' costs, when, as it had been found that the contract of each was separate, they were liable only to pay costs on the amount of damages assessed against each of them separately. The decree of the appellate Court, without remedying any of the defects noticed, perpetuates and even aggravates them. Thus another year—the year 1885—is added to the other four years 1886, 1887, 1888 and 1889 for which all the defendants are to pay damages apparently jointly and severally, and they are again in appeal also made severally and jointly liable for the plaintiffs' costs; the amount of their liability in damages being still left for determination in execution The appellate Court also enhanced the rate to be paid as damages from Rs. 5-12-0 to Rs. 45-10-0 per garce.

The chief points taken in second appeal by the first six defendants are as follows:—

(1) that the second plaintiff had no right of suit on the assignment,
(2) that the suit was bad for misjoinder,
(3) that the decrees are defective in regard to the matters just pointed out, and,
(4) that the rate allowed by the appellate Court for [173] damages is opposed to the terms of the contracts between the parties.

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As to the first objection, it is that Nur Mahomed was not competent to assign his interest in the contract A It is argued that the contract was based on personal considerations and that the rights conferred upon Nur Mahomed by the contract were coupled with liabilities and that on both these grounds the contract was not assignable In support of this contention the appellants' pleader relied on *Farrow* v *Wilson* (1), *Humble* v *Hunter* (2) and *Arkansas Valley Smelting Company* v *Belden Mining Company* (3) In *Farrow* v *Wilson* (1) the contract in suit was an agreement whereby the plaintiff undertook to serve one Pugh as farm bailiff, the agreement being terminable upon six months' notice on either side. The question for decision was whether the death of Pugh put an end to the contract, which did not contain the word ' assigns,' and it was held that it did The ground of decision was that, in contracts, for personal service, it is an implied condition that death of either party should dissolve the contract Mr Justice Willis laid down the principle which governed the case in these terms —" Where personal considerations are " of the foundation of the contract, as in cases of principal and agent and " of master and servant, the death of either party puts an end to the " relation " The contract in *Humble* v *Hunter* (2) was a charter-party signed by the plaintiff's son on the one part and by the defendant on the other, and it recited that the son was the owner of the ship The question was whether the plaintiff might show that she was the real principal and that her son, though he signed the contract, was really agent Two principles were discussed, *viz* , (1) that a principal may come in and take the benefit of a contract made by his agent, and (2) that no parol evidence shall be admitted to contradict a written contract It was held that the evidence was not admissible, the reason being that the son gave himself a special description and asserted a title to the ship as owner, and that this circumstance took the case out of the general rule, that a principal may sue upon the contract made by his agent Lord Denman, C J , referred to the general principle that a party to a contract has a right to the benefit he contemplates from the character, credit and substance [174] of the party with whom he contracted In the American case, the contract was to sell and deliver lead ore from time to time at the smelting works of a firm of partners, that the ore was to become upon delivery the property of the partnership, and that it was to be paid for after a subsequent assay of the ore and ascertainment of the price The question was whether the partnership might assign the contracts as to future deliveries and it was determined in the negative The Court stated that every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It also referred to the principle mentioned by Lord Denman, namely , " you " have the right to the benefit you anticipate from the character, credit " and substance of the party with whom you contract " It referred to the rule in Pollok's *Treatise on Contracts* (fourth edition, page 425) that rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them, to be exercised only by him in whom he confided Applying that principle to the case before them the Court remarked that during the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for the payment

(1) L R. 4 C P 744. (2) 12 Q.B.R.P 310. (3) 127 U S R 379

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except in the character and solvency of Billing and Eilers, the parties with whom he made the original contract. The defendant therefore could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom he had contracted.

Now in this case it will be seen from the terms of the contract A, which are set forth in full in the judgment of the lower appellate Court, and need not therefore be repeated here, that by Article 1 the defendants were to allow Nur Mahomed four months' time for payment after delivery of their salt to him, by Article 4 that he was liable to pay the Government taxes and dues, by Article 5 that he was to execute all but petty repairs, and by Article 6 that he was to fix the quantity of salt to be delivered by defendants. There is therefore not only credit given to Nur Mahomed in the matter of payment, but other liabilities are thrown upon him, the discharge of which depended upon his solvency, and there is also a certain discretion vested in him in [175] regard to the quantity of salt to be demanded. Further, the assignment Z upon which the second plaintiff was suing was an assignment of an executory or continuing contract. The assignment was made on the 11th January 1886 and the breach of contract sued upon was for a breach subsequent to that date. So that we have here all the elements which we find in the principles above laid down for holding that the contract was based on personal considerations and that the assignment of it as an executory contract was invalid without the assent of the defendants. It is not pretended that such assent was expressly given, nor is there evidence on the record of such a character as would amount to a novation of the contract such as is contemplated by Section 62 of the Indian Contract Act. It is contended for the second plaintiff that after the assignment to him the defendants accepted payment from him for salt delivered as is shown by entries in the accounts C to C 4 and D. But those accounts are kept in the name of the first plaintiff as well as of the second plaintiff, so that they afford no distinct proof of a direct recognition of the second plaintiff's rights as assignee. On the grounds that have been stated we must allow the objection that the contract was one not capable of assignment to second plaintiff, and therefore that he had no right of suit under it.

The second objection that the suit was bad for misjoinder was taken with reference to the joinder of the six defendants in one suit, when the contracts of each were found to be individual and separate. The District Judge disallowed the objection on the ground that it was not taken at the earliest possible moment, namely in the written statement, and that no prejudice to the interest of the defendants from their joinder in one suit could have occurred. Enough however has already appeared in the faulty decrees that have been passed to show how much the defendants have been prejudiced by their several cases being lumped together as one, and though the plea of misjoinder was not taken in the written statement, it was taken at the settlement of issues before the trial of the suit. And it will further be shown under the fourth head of objection how the liability of each defendant to pay the Rs. 5-12-0 rate per garce for damages or a higher rate will depend entirely upon the nature of the particular default, if any, that each has committed. As the case of each defendant must be decided on its own merits without any reference to the case of another, and as the cases of each will be different (as even [176] the plaint itself shows), we are of opinion that the misjoinder has affected and must affect the merits of each man's case and cannot therefore be passed over as a mere irregularity and condoned as such under Section 578 of the Code of

Civil Procedure It must also be borne in mind that this misjoinder of defendants is now coupled with a misjoinder of plaintiffs according to our finding under the first objection, and with this double misjoinder of parties before us, we must allow the second objection also that the suit is bad for misjoinder

The validity of the third objection, as to the decrees granting relief that was not prayed for and not granting the relief that was prayed for, cannot but be conceded by the other side In making all the defendants liable jointly and severally for costs and for damages (as the decree of the Lower Appellate Court certainly seems to do), in awarding damages for other years than the single year 1886, and in not ascertaining in the suit and incorporating in the decree the amount of damages payable by each defendant, but leaving the matter for determination in execution, the decrees are not maintainable and must at least be reversed in these respects

It is contended on the fourth objection that Article 7 of the contract A provides a uniform rate of Rs 5-12-0 per garce as the rate at which damages are to be assessed; and that while the Munsif adopted this rate, the District Judge has allowed the difference between the contract price to be paid to defendants and the selling price in the market to be taken as the measure of damages, that is the profit the plaintiffs would have made on each garce duly delivered to them which, he finds, would have been Rs 45-10-0 The question is whether the rate fixed in Article 7 governs every breach of the contract or only certain breaches therein specified We are of opinion upon a construction of the clause that it was meant only to cover the special default therein mentioned, namely, a short delivery or non-delivery of the amount fixed for delivery by the plaintiff, owing to failure either to manufacture or to store in the factory the quantity manufactured The language used is not such as to cover every breach of the contract The contract contemplates other acts than those referred to in Clause 7, and they are not referred to in Clause 7, either generally or by implication. The contingency of the repudiation of the contract altogether does not seem to have been in the contempla-[177] tion of the parties The contract presupposes a *bona fide* intention to keep it For these reasons, we agree that in such a case as that put by the District Judge where the defendants actually manufactured salt and then sold it to others, the measure of damages would not be the liquidated rate mentioned in Clause 7 of the contract, but what the plaintiffs had lost by the wilful breach of the engagement At the same time, it has to be pointed out that the Judge was wrong in applying the rate fixed on the latter principle to every defendant in this suit and in the connected suits, without first ascertaining the particular nature of the breach of which each defendant was guilty. Those who defaulted under the terms of Article 7 only were clearly liable only to the rate therein fixed, and it is a matter of evidence in each case whether any other kind of breach not falling under that article has been committed before the measure of damages as against any defendant can be fixed The decree of the Lower Appellate Court is, therefore, further bad in this respect also, that is, in its not determining at what particular rate each defendant, according to the nature of his default, was subject to pay And the decree of the Munsif was equally wrong in fixing the uniform rate of Rs 5—12—0 without first determining that all the cases of breach of contract fell within the terms of Article 7 Both rates—of the Munsif and that of the District Judge—must, therefore, be expunged from the decrees.

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There is another point to be considered in the cases of those defendants whose default is only under Article 7 of the contract, and that is, whether they can be held liable for non-delivery or short delivery in the absence of any estimate framed or 'dittam' fixed by the plaintiffs as to the quantity of salt to be delivered by each defendant. We have no doubt that the word 'dittam' refers to the quantity. The contention of respondents' Vakil that it refers only to quality is not only opposed to the plain meaning of the term, but is inconsistent with the provision of the uniform rate for damages fixed in Article 7. In cases where the breach was not under Article 7, the question of the dittam is not material, the defendants having contracted in Article 1 to sell to plaintiffs all the salt manufactured and stored by them.

Our judgment in this second appeal governs the judgment in all the connected second appeals Nos. 94 to 114 of 1892, and it only remains to pass our final orders in each of these appeals.

[178] In the present second appeal No. 93, we have found there was a misjoinder which does not apply to the other second appeals. On this ground, we must reverse the decrees of the Lower Courts and dismiss the plaintiffs' suit with costs throughout, for it is too late now to allow the plaint to be returned for amendment

All the other second appeals follow the judgment in No. 93 in respect to the inability of the second plaintiff to sue, the errors in the decree, and the method of determining the measure of damages, but with regard to four of them, *viz.*, second appeals Nos. 94, 99, 105 and 113, special points arise which will be separately noticed As to the remainder, that is, second appeals Nos. 95, 96, 97, 98, 100, 101, 102, 103, 104, 106, 107, 108, 109, 110, 111, 112 and 114, the suits will be dismissed so far as the second plaintiff's suit is concerned with defendants' costs throughout; but they will be allowed to proceed so far as the first plaintiff is concerned. The decrees of both Courts as they at present stand are, however, so generally defective in respect to the practical question, that is, the consequential relief claimed, that we consider it necessary to set them aside and to order a new trial. Besides decreeing things not asked for and not decreeing what was asked for, several of the material issues have not been satisfactorily tried. We therefore reverse the decrees in these cases and remand them for proper trial by the light of the observations we have recorded. It will be necessary in each case to determine according to the prayer in the plaint what is exactly the relief sought for and the enquiry as to the nature of the default will be confined to the year 1886. It will further be necessary to determine by what measure of damages the default (if any) found on the part of each defendant is to be ruled. Then, when the actual total amount is so determined, it is to be reduced to what the first plaintiff is entitled to claim as his proportionate share of two shares out of 5⅜ shares, and the amount so arrived at entered in the revised decree, together with any other reliefs as to declaration and so on that may be found necessary.

In second appeal No. 94, the Munsif dismissed the plaintiffs' suit as barred by *res judicata*, but the Judge reversed the Munsif's decree without apparently noticing this point. The appellant in this second appeal now urges that this suit should be dismissed on the ground stated, but we do not agree with the Munsif that [179] the case was *res judicata* by reason of the decision in a similar suit of the previous year (No. 447 of 1886). Not only was that a suit of a Small Cause nature and therefore not open to second appeal, *Govind Bin Lakshman Shet* v. *Dhondbarav Bin Ganbarav*

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Tambye (1) followed in *Vithilinga Padayachi* v *Vithilinga Mudali* (2), but the simple issue therein decided was that plaintiff was not entitled to relief as he had not executed repairs It was not decided that the contract was void or had been rescinded, and the cause of action now, though upon the same contract, being for a different year, there is no *res judicata*. We therefore disallow this objection and, as the other special objection is abandoned, this second appeal falls to be treated like the bulk of them, and will be dealt with accordingly by a reversal and remand with similar directions to find out and decree what actual amount is due by defendant to first plaintiff

In second appeal No 99 of 1892, the second defendant's name must be struck out if he is no party to the agreement sued on, as it is stated he is not, and this second appeal will be dealt with like the bulk of them with the separate issue for trial whether second defendant is liable to the suit or not

In second appeal No 105 of 1892, an exactly similar order to that just given in second appeal No 99 is passed

In second appeal No 113 of 1892, the defendant signed the contract as guardian of a minor The Judge has thereupon directed that the decree be made against the property of the minor, but as the minor was not a party to the suit, only the defendant's name appearing therein, the Judge's order was obviously wrong Under our powers of revision (Section 622 of the Code of Civil Procedure), we cancel this portion of the decree and the result will be that the suit should proceed against the defendant named therein The decree in this case will accordingly be reversed and remanded like the bulk of them with similar directions, and a separate issue should be taken as to defendant's liability.

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17 M. 180.

[180] APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt , Chief Justice, and Mr Justice Parker.

SRINIVASA SASTRIAL (*Defendant*), *Appellant v.* SAMI RAO (*Plaintiff*), *Respondent* * [23rd and 24th January, 1893]

Declaratory decree—Code of Civil Procedure—Act XIV of 1882, Sections 278 and 283 Termination of attachment by abandonment

The plaintiff had an attachment against certain property Owing to his not filing a necessary affidavit, the execution petition was struck off Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff

SECOND appeal against the decree of J A Davies, District Judge of Tanjore, in appeal suit No 454 of 1891, modifying the decree of S Ramasamy Iyengar, District Munsif of Tiruvadi, in original suit No 63 of 1888

The lands in dispute in this case originally belonged to one Krishnasami Moitay, against whom the plaintiff in this suit obtained a decree in 1887 and the lands were attached in execution thereof, but the execution petition was subsequently struck off the file owing to the plaintiff's default

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* Second Appeal No. 541 of 1892

(1) 15 B 104. (2) 15 M 111

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in filing a necessary affidavit. In 1889 the plaintiff applied for the sale of the property attached in 1887, and the Court directed a fresh attachment to issue. The defendant then came forward and alleged that he had purchased the property prior to the second attachment and obtained an order in his favour. The plaintiff alleged that the defendant's sale having been subsequent to the first attachment, was not valid against the plaintiff, and that the defendant was bound by the terms of his sale to pay the plaintiff the debt decreed in 1887, and that the said debt was therefore a charge on the said property in the defendant's hands. Hence this suit.

The District Munsif decreed in favour of the plaintiff, declaring the subsistence of the attachment of 1887 of the plaint properties and his rights to realize his money by a sale of those properties.

[181] On appeal against the District Munsif's decree by the defendant, the District Judge delivered the following judgment:—

"The test question in these cases is, has there been an abandonment "of the first attachment either in fact or constructively. Now in this "case there was no actul withdrawal from the first attachment, and "there was no order for releasing that attachment, so there was no ab- "andonment in fact. The delay in following up the attachment is satis- "factorily explained by the plaintiff's taking of other legal proceedings, so "on the score of delay an abandonment cannot be presumed. Nor can "such presumption arise from the Munsif's order directing a second "attachment which plaintiff accordingly made, for that was the act of "the Court and not of the party. I therefore agree with the Munsif for "the further voluminous reasons given by him that plaintiff's attach- "ment of 1887 never ceased to exist and consequently defendant's sale "was subject to it under Section 376 of the Code of Civil Procedure.

"It is further urged in appeal that plaintiff being able upon the terms "of that sale to sue defendant for the recovery of his money had no right "to seek for a mere declaration that his attachment was in force, but "should also have sued for the recovery of the money due to him under "the sale-deed to defendant. But this is a vain contention, because "plaintiff was not a party to the contract of sale, and could not, therefore, "have enforced its provisions.

"The appeal, therefore, fails and is dismissed with costs."

The defendants preferred this appeal, alleging that the plaintiff's suit was not maintainable under either Section 283 of the Civil Procedure Code nor under Section 42 of the Specific Relief Act; that an appeal should have been preferred against the order of the District Munsif directing a second attachment; and that the first attachment did not continue to subsist at the time of the defendant's sale-deed.

Sivaswami Ayyar, for appellant.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

We have no doubt that a suit for a declaratory decree is maintainable. The plaintiff's petition was put in under Section 278 of the Code of Civil Procedure and a suit under Section 283 is his only possible remedy.

[182] The next point urged is that an appeal should have been preferred against the order of the District Munsif directing a second attachment. But that order was a mere direction of the Court without notice to either party and in no case could defendant have been made a party to the appeal if there had been one.

The decision quoted in *Puddomonee Dossee* v *Roy Muthooranath Chowdhry* (1) lays down no general rule, but the effect of it is that it is a matter of inference in the particular case whether the striking off of an execution petition terminates an attachment We agree with the District Judge that in this case there was no intention to abandon or to terminate the attachment This may be inferred not only from plaintiff's subsequent conduct, but from the very terms of the sale-deed under which the defendant purchased, provision being therein made that defendant should pay off the balance of the decree debt in the suit in which the attachment had been made No mention in terms is made of the attachment, but it is a legitimate inference that it was then regarded as subsisting

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We dismiss the second appeal with costs.

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17 M 182=4 M.L.J. 39.

APPELLATE CIVIL.

Before Sir Arthur J H Collins, Kt , Chief Justice, and Mr Justice Davies

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RAMAPPA UDAYAN (*Defendant No.* 1), *Appellant* v ARUMUGATH UDAYAN (*Plaintiff*), *Respondent* *
[15th September and 24th October, 1893]

Hindu law—Succession of a daughter's daughter to her grandfather's estate

On the principle laid down in *Nallanna* v *Ponnal* (2), a daughter's daughter is, in the absence of preferential male heirs, entitled to succeed to her grandfather as a bhandu

[**Diss**, 28 A 187 (192)=2 A L J 654=A W N (1905) 242, 28 A 307 (309)=3 A L J 87=1906 A W N 13, 10 C P L R 65 (66), **F.**, 19 B 631 (634), **R.**, 19 A 215 (226), 21 M 263 (267)=8 M L J 130, 30 M 406=17 M L J 285=2 M L T 317, 4 N L R 35]

SECOND appeal against the decree of V Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No 7 of 1892, [**183**] reversing the decree of A Ramalingam Pillai, District Munsif of Tiruvalur, in original suit No 480 of 1890

Suit for the possession of certain property It was admitted on both sides that the property in dispute was originally the property of a Hindu, who dying left a widow (Kamalam) and two daughters The plaintiff contended that, Kamalam and one of the daughters having died, the surviving daughter Meenakshi inherited her grandfather's property Meenakshi sold the property to one Swarnum, who sold it to plaintiff, both conveyances being registered The defendants alleged that Kamalam had previously sold the property, which in its turn was sold to defendant No 1, both defendants being now in possession of it Kamalam's conveyance was not registered

The District Munsif dismissed the suit, but his decree was reversed by the Subordinate Judge, who held that Meenakshi was heir to her grandfather, and that her registered conveyance defeated the prior unregistered deed of her mother

The first defendant preferred this appeal

Sivasami Ayyar, for appellant

The respondent was not represented

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* Second Appeal No. 23 of 1893

(1) 12 B L R 411. (2) 14 M 149

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JUDGMENT.

We think the case quoted by the Subordinate Judge, *Nallanna* v. *Ponnal* (1), is sufficient authority for holding that a daughter's daughter is a bhandu on the principle there laid down that consanguinity may be recognized as the basis of title to succession in the absence of preferential male heirs. Meenakshi was a direct relation by blood to her grandfather through her mother his daughter.

The second appeal therefore fails and it is dismissed.

17 M. 184.

[**184**] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMAN MENON (*Plaintiff*), *Appellant v.* CHATHUNNI (*Defendant No.* 2), *Respondent*.* [9th January and 15th August, 1893]

Makkatayam rule of inheritance—Tiyans—Whether compulsory partition can be effected.

The ordinary rule of Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam, no custom to the contrary having been made out

[**F.**, 19 M. 1 (2); **R.**, 19 M 440 (441); 22 M 297 (298)]

SECOND appeal against the decree of E. R. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 1054 of 1890, reversing the decree of A. N. Ananta Ram Iyen, Additional District Munsif of Calicut, in original suit No. 211 of 1890.

The defendants 1 to 4 were Tiyans following the Makkatayam rule of inheritance. The plaintiff, having obtained a Small Cause decree against the first defendant, in execution thereof, attached the family properties. The second defendant, karnavan of the tarwad, intervened and put in a petition alleging that the properties were impartible. The claim was allowed and the attachment removed. The plaintiff brought this suit to declare that, according to the law prevailing among the Tiyans, the first defendant had a definite share in the properties, and that such share was liable to be sold for his decree. The District Munsif decreed in favour of the plaintiff, whilst the Subordinate Judge, on appeal, reversed the decree,

The plaintiff preferred this appeal.

Sankara Menon, for appellant.

Govinda Menon, for respondent.

JUDGMENT.

The plaintiff's case was that, according to the customary law prevailing among the Tiyans, the first defendant was entitled to a definite share in the property. The defandants denied the alleged custom and pleaded that the properties were indivisible. The issue (fifth) on the point was too vague to direct [**185**] the attention of the parties to the real question which had to be tried, and the evidence adduced was inconclusive. The Subordinate Judge remarks that the witnesses were not asked the real question at issue, but on the authority of two unreported cases has come to the conclusion that

* Second Appeal No. 142 of 1892.

(1) 14 M. 149.

the ordinary rule of Marumakkatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam. We do not think that a question of such general importance should have been decided in this way, and we shall, therefore, ask the present Subordinate Judge to return a finding on the following issue —Whether, according to the customary law followed by the parties to this suit, compulsory partition can be effected according to the wish of one member of the tarwad.

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Fresh evidence may be taken

In compliance with the above order the Subordinate Judge submitted a finding in which, on the authority of *Karichan* v *Peiachi* (1), he held that there was no presumption that the Hindu law rule of partibility of family property applied to the case of Makkatayam Tiyans, that there was no written evidence forthcoming in support of any such custom, and that the oral evidence was quite unsatisfactory or insufficient to establish any custom followed by the parties to the suit whereby compulsory partition could be effected according to the wish of one member of the tarwad

JUDGMENT

The finding is that, according to the customary law of the parties, compulsory partition cannot be effected at the will of one member of the tarwad

This is in accordance with finding in regular appeal No 164 of 1891

Accepting it, we dismiss this appeal

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17 M. 186=4 M.L.J. 59.

[186] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

CHATHAKELAN (*Petitioner*), *Appellant* v. GOVIND KARUMIAR (*Counter-Petitioner*), *Respondent* *

[16th November, 1893]

Code of Civil Procedure—Act XIV of 1882, Section 234—A stranger to a decree against a deceased person in possession of his property—'Legal representative'

The words 'legal representative' in Section 234 of the Code of Civil Procedure do not include any person who does not in law represent the estate of the deceased person Consequently, a stranger in possession of property of a deceased person who was not a party to a decree against such person cannot be proceeded against in execution otherwise than by a regular suit

[R., 21 B 424 (431), 21 B 539 (543), 30 C 1044 (1058), 8 C W N 843 (851), D, 33 M 6=4 Ind Cas 1059=19 M L J 671=6 M.L.T 269]

APPEAL against the order of R S Benson, District Judge of South Malabar, in civil miscellaneous appeal No 17 of 1892, confirming the order of V Ramasastri, District Munsif of Palghat, in miscellaneous petitions Nos 380 and 2325 of 1891

The petitioner in this case had obtained a decree for money against one Edathara Valaya, since deceased, and now sought to enforce the decree to the extent of Rs 170 against his successor in stanam, the counter-petitioner, who had collected the said money for the Malikhana due to his predecessor Both the Lower Courts decreed in favour of the

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* Appeal against Appellate Order No 51 of 1892

(1) 15 M. 281

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"petitioner, the District Judge holding that, although the term legal "representative' in Section 284, Civil Procedure Code, is not defined, "there is authority for holding that in the absence, as in this case, of any "claim by the next-of-kin, the words 'legal representative' will include, "for the purposes of this section, the person who has taken possession of "the property of the deceased."

Sankaran Nayar, for appellant.

Desika Chariar, for respondent.

JUDGMENT.

Though the Judge says there is authority for holding that the words 'legal representative' in Setction 234 of the Code of Civil Procedure include any person who has taken possession of the property of the deceased judgment-debtor, he [**187**] has not cited any such authority. It was held in *Dunput Singh Bahadur* v. *Ranee Rajesuree* (1) that property in the possession of others than the legal representative might be taken in execution of a decree; but it was so held with reference to the language of Section 210 of the Code of 1859, which allowed of execution being taken either against the legal representative or the estate of the deceased judgment-debtor. But in Section 234 of the present Code the words 'against the estate of the deceased debtor' are not to be found, and execution is allowed only against the legal representative and "to the extent of the property of the deceased which has come to his hands and has not been duly disposed of."

We do not think that the words 'legal representative' can be taken to include any person who does not in law represent the estate of the deceased. The wording of Section 234 seems to point to the intention that a stranger in possession of property who was not a party to the decree ought not to be proceeded against in execution or otherwise than by a regular suit.

We must set aside the orders of the Courts below with costs throughout.

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17 M. 187.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Davies.

KRISHNAYA NAVADA AND OTHERS (*Plaintiffs*), *Appellants v.* PANCHU AND OTHERS (*Defendants*), *Respondents.**

[18th September, 1893.]

Code of Civil Procedure—Act XIV of 1882, *Sections* 562, 566 *and* 582—*Order made on appeal to amend plaint.*

On appeal from the decision of a District Munsif in favour of the plaintiffs, in a suit for the recovery of rent, the District Judge set aside the decree of the Lower Court, ordered a new trial, and directed the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiffs claimed the rent:

[**188**] *Held,* that the order for amendment of the plaint was bad under Section 562 of the Code of Civil Procedure, since the original Court had not "disposed of the suit upon a preliminary point," and that it was likewise bad under Section 582, since there had been no dispute as to the boundaries of the land before the

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* Appeal against Order No. 117 of 1892.

(1) 15 W. R. 476.

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17 M. 187.

original Court If the information was necessary, the District Judge should have sent down an issue on the point for trial under Section 566 of the Code

APPEAL against the order of W C Holmes, Acting District Judge of South Canara, in appeal suit No 233 of 1891, reversing the decree of U Babu Row, District Munsif of Udipi, in original suit No 387 of 1888

On appeal against the decree of the District Munsif in a suit for recovery of rent given in favour of the plaintiffs, the District Judge, having set aside the decree and ordered a new trial, directed the amendment of the plaint by the insertion of the exact boundaries of the land on which the plaintiffs claimed rent, a point on which there had been no dispute in the Lower Court

The plaintiffs preferred this appeal

Pattabhirama Ayyar, for appellants

The respondents were not represented

JUDGMENT

It the order is an order under Section 562 of the Code of Civil Procedure, as contended for by appellants, it is clearly bad, as the original Court had not disposed of the suit on a preliminary point The course the Judge should have adopted in order to ascertain the boundaries of the plaint land, if that information was necessary, was to have sent down an issue on the point for trial under Section 566 of the Code

It is however contended on the other side that the order was one merely for the amendment of the plaint in the matter of boundaries and was passed under Section 582 of the Code as an order that should have been passed by the original Court But the answer is that there was no dispute as to the boundaries of the land before the original Court, and, therefore, that that Court could have had no ground for returning the plaint for amendment We are of opinion that this fact takes the case out of the purview of Section 582 even if that section is at all applicable It follows that the remand must have been under Section 562, and as such it was an illegal order We, therefore, reverse it and direct the Judge to dispose of the appeal on its merits

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17 M. 189=4 M.L J. 79.

[189] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

NARAYANAN NAMBUDRI AND OTHERS (*Plaintiffs and first Plaintiff's Representative*), *Appellants* v DAMODARAN NAMBUDRI AND OTHERS (*Defendants Nos 1 and 3 to 5, 7, 8, and sixth Defendant's heir*), *Respondents*.* [10th February, 17th September and 23rd October, 1893]

Sale of land for arrears of revenue—Revenue Recovery Act—Madras Act II of 1864, *Section* 36, *Clause* 2 *and Section* 59—*Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale—Limitation Act—Act* XV *of* 1877, *Section* 8

When there are arrears of revenue so as to give jurisdiction to the Collector to sell under Madras Act II of 1864, the sale, however irregular, is a proceeding under that Act, for purposes of limitation, and is valid not only as between the Collector and the defaulter, but as between the Collector and the purchaser at the sale *Venkata* v *Chengadu* (1) and *Nilakandan* v. *Thandamma* (2) followed

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* Second Appeal No 1872 of 1891.

(1) 12 M. 168

(2) 9 M 460.

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17 M. 189 = 4 M. L. J. 79.

The mere fact that one of the plaintiffs, in a suit brought to set aside a sale under Madras Act II of 1864, is a minor is not sufficient to save the limitation bar under Section 59 of Madras Act II of 1864, when an alleged fraud affecting the sale came to the knowledge of the other plaintiffs who are majors and are jointly interested with the minor more than six months prior to the institution of the suit, Section 8 of the Limitation Act being inapplicable to such cases.

[**Diss.**, 28 C. 465 (470); **R.**, 25 M 431 (444)=12 M.L.J. 166; 24 M.L.J. 41; **D.**, 19 M. 243 (247).]

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 513 of 1890, affirming the appeal of P. Govinda Menon, District Munsif of Betutnad, in original suit No. 367 of 1889

The facts of this case appear sufficiently for the purpose of this report from the following judgments of the High Court.

Both the Lower Courts decreed in favour of the defendants.

The plaintiffs preferred this appeal.

Subramanya Ayyar and *Sundara Ayyar*, for appellants.

Govinda Menon, for respondent No. 6.

This second appeal coming on for hearing before Shephard and Best, JJ , on Friday the 10th day of February 1893, the Court made the following:

[**190**] ORDER.—" The Subordinate Judge has not considered the " question whether the sale was notified as required by the Act which was " the fourth ground of appeal before him. The District Munsif considered " this point and found on it in favour of the defendants.

" We must ask the Subordinate Judge to submit a finding on this " issue within one month from date of receipt of this order: and seven " days will be allowed for filing objections after the finding has been posted " up in this Court."

In compliance with the above order, the Subordinate Judge submitted the following

FINDING.—" I am directed to submit a finding on the point ' whether " 'the sale was notified as required by the Act?'

" The Revenue Recovery Act II of 1864, Section 36, Clause 2, pre- " scribes the mode of notifying sale under the Act. A notice of the sale " in English and in the language of the district shall be fixed up one " month at least before the sale in the Collector's office, in the taluk cut- " cherry, in the nearest police station and on some conspicuous part of " the land. There is no evidence whatever to prove such publication. " Instead of producing the process server's return or other record to show " that copies of the sale notice were affixed to the above-mentioned four " places, the seventh defendant's vakil refers me to a number of documents " and to the depositions of witnesses which do not support his case. The " exhibits referred to contain no evidence on the point. The evidence of " the Menon and the Adhikari (eighth defendant) examined as plaintiffs' " witnesses 15 and 18 is insufficient and unreliable. The Menon makes " the vague statement that ' there was a regular attachment.' The Adhi- " kari (eighth defendant) deposes that a copy of the notice of sale was " affixed to a conspicuous place, though he cannot say where. Bearing " in mind that this defendant, whom the plaintiff accuses to be the real " purchaser, took care not to affix to the land the copy of the attachment " notice, his statement that the sale notice had been affixed ' in some " ' conspicuous place ' is not entitled to weight. Defendants' second and " sixth witnesses are the Revenue Inspector and village peon respectively.

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APPELLATE CIVIL

17 M. 189 = 4 M. L. J 79.

" The former does not depose regarding the sale notice The latter states " that he served the notice by affixing a copy presumably to the plaintiffs' " house This is all the evidence referred to by the vakils

[191] " The plaintiffs' vakil points out that the attachment was not " effected in the only legal mode in which it could be effected under " Section 7 of the Act, viz , by affixing a copy of the notice to the land " attached and by notifying it by public proclamation on the land as well " as in the *District Gazette*. The omission to affix the copy to the land " is admitted by the Adhikari, the eighth defendant There is no evi- " dence that it was posted on the land Plaintiffs' vakil contends that " there can be no valid notification of sale without the preliminary process of " attachment, but I hardly think this objection can be considered in " deciding the point referred to me for a finding, *viz* , whether the sale " was *notified* as required by the Act

" I find that the sale was not notified as required by the Act "

This second appeal coming on again for final hearing on Tuesday, the 17th ultimo, on return to the order of this Court, dated 10th February, 1893, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT

MUTTUSAMI AYYAR, J —This was a suit to set aside a revenue sale held under Act II of 1864 The sale was held in June 1888 and this suit was brought on the 12th August 1889 It is found that at the date of sale there were arrears of revenue due to the Government to the extent of Rs 54-1-7, and it is clear that the Collector had jurisdiction to sell the land under Act II of 1864 It is found, however, by the Lower Appellate Court that the sale was not duly notified as required by the Act and to this extent the procedure followed by the Collector was irregular Both the Lower Courts find that the seventh defendant purchased the land *benami* for the eighth and ninth defendants, of whom the former is the Adhikari of the amsom wherein the land brought to sale is situated Appellants imputed fraud to the Adhikari, but the Courts below have negatived it It is further found that appellants were aware of the sale and its confirmation more than six months before suit The question for decision in this appeal is whether, upon the foregoing facts, the Courts below were correct in holding that the sale was a proceeding within the meaning of Section 59 of Act II of 1864 and that the suit was therefore barred by limitation The contention in second appeal is that the sale, though valid as between the Collector and appellants, is not so as between the latter and the purchaser on the [192] ground of fraud The decision of the Lower Courts is in accordance with the principles laid down in *Nilakandan* v *Thandamma* (1) and in *Venkata* v *Chengadu* (2). The decision in the last mentioned case is that of four Judges who held that the revenue sale in that case, however irregular it was, was a proceeding under the Act for purposes of limitation, as the Collector had jurisdiction to sell It was also pointed out in that case that the decision in *Nilakandan* v *Thandamma* (1) proceeded on the ground that there were really no arrears of revenue and that the sale was really without jurisdiction Both decisions recognize the general principle that a revenue sale is statutory sale and that when there are arrears of revenue so as to give jurisdic-

(1) 9 M 460. (2) 12 M 168.

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tion to the Collector to sell, the sale, however irregular, must be treated as a proceeding under the Act. I am unable to reconcile the contention of appellants' pleader with the principle that statutory sales depend for their validity upon the pre-requisites prescribed by the statute and not on matters which lie outside its purview. I would decline to order any further enquiry whether the price realized was adequate and whether any substantial injury resulted from the sale not having been duly notified, and dismiss the second appeal on the ground that the sale in this case was a proceeding under Section 59 of Act II of 1864 and that the suit is time-barred.

Best, J.—The finding on the issue sent for trial is that the sale was not notified as required by Act II of 1864. This is a finding of fact which we must accept. It is contended, however, on behalf of respondents that the suit is time-barred by Section 59 of the Act. The mere fact of second plaintiff being a minor is not sufficient to save the limitation bar when the alleged fraud came to the knowledge of others jointly interested with the minor more than six months prior to the institution of the suit; for, as observed in *Seshan* v. *Rajagopala* (1), Section 8 of the Limitation Act is inapplicable, the object of that section being the same as that of the corresponding Section 4 of the English Act, 3 and 4 William IV, Chapter 42, which, as remarked by Lord Kenyon in *Perry* v. *Jackson* (2), "was "introduced into the statute in order to protect [193] the interests of "those persons which there was no one of competent age, competent "understanding, or competent in point of residence in the country to protect." See also *Vigneswara* v. *Bapayya* (3). As was held in *Venkata* v. *Chengadu* (4), the period of limitation for a suit such as the present is six months from the date on which the fraud was discovered, and, as the present suit was brought more than six months after the alleged fraud came to the knowledge of plaintiffs' father and also of first plaintiff himself, it is clearly time-barred.

The appeal fails therefore and is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Davies.

Secretary of State for India (*Defendant*), *Appellant* v. Vydia Pillai and another (*Claimants*), *Respondents*.*
[14th July and 16th August, 1893.]

Madras Forest Act—Act V of 1882, Sections 2, 4, 10 and 14—Claim to percentage of forest income—The Pensions Act—Act XXIII of 1871, Section 4—'Civil Court'—Jurisdiction of Forest Settlement Officer—Jurisdiction of Appellate Court.

A claim to a percentage of forest income is not a claim to forest produce under Madras Act V of 1882, nor is it a claim to a right specified in Section 4 of that Act.

A Forest Settlement Officer has no jurisdiction to entertain a suit in which such a claim is made, and such a suit brought by discharged forest karnams is barred by Section 4 of the Pensions Act.

A Forest Settlement Officer is a 'Civil Court' for the purposes of the Pensions Act.

If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, the Court (if any) which exercises appellate

* Second Appeal No. 586 of 1892.

(1) 13 M. 236, (2) 4 T.R. 516 (519) (3) 16 M. 436 (4) 12 M. 168.

jurisdiction over it is bound to entertain an appeal preferred against the Lower Court's decision and to correct the error. 1893 Aug. 16.

A Court of competent appellate jurisdiction in such a case is not bound by an order made without jurisdiction by a Collector on an appeal to him in the same suit. Appellate Civil.

Submission by the parties to his jurisdiction cannot give a Forest Settlement Officer jurisdiction in a case where he has no inherent jurisdiction.

[R., 18 M 423 (433).]

[194] SECOND appeal against the decree of C. Ramachandra Iyer, District Judge of Nellore, in appeal suit No. 241 of 1890, confirming the decision of I. Sarabhalingham Naidu, Forest Settlement Officer of Nellore and Bellary, in claim No. 847 of 1887. 17 M. 193.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court. The Forest Settlement Officer decreed in favour of the plaintiff, and, on appeal by the defendant, the District Judge held that he had no jurisdiction to entertain the appeal, and dismissed it. The defendant preferred this appeal.

The Acting Government Pleader (*Subramanya Ayyar*), for appellant.

Seshagiri Ayyar, for respondents.

JUDGMENT.

This is a claim made to a percentage of the net revenue of the reserved forest at Sriharicotta under Madras Forest Act V of 1882. The appellant before us is the Secretary of State for India in Council represented by the District Forest Officer, and respondents are two mirasi karnams who had served as such in connection with the forest till 1884, when the Forest Officer dispensed with their services. The claimants stated that from time immemorial their family had been enjoying the *rusum* and rendering services as karnams in relation to the forest, and that in return a commission of Rs. 5-7-6 on every 100 rupees of the net income of the forest had been paid to them. The appellant repudiated the claim, but did not object to the jurisdiction of the Forest Settlement Officer. On the 31st May 1888, the Forest Settlement Officer held that he had no jurisdiction to entertain the claim, the right asserted by respondents being neither a right in and over the forest nor a right to forest produce. He further held that the claim was barred by Section 4 of the Pensions Act XXIII of 1871. The respondents appealed from this decision to the Collector of the district, who considered that the right set up by he claimants was not outside the provisions of the Forest Act, that the Forest Settlement Officer was not a Civil Court for the purposes of the Pensions Act, and that the G. O., No. 389, dated 26th May 1886, referred the claimants to the Forest Settlement Officer. The appellant denied the Collector's jurisdiction to entertain the appeal, but his objection was overruled, and in the result the Collector remanded the case for disposal on the merits. Thereupon, the Forest Settlement Officer investigated the merits [195] and decreed the claim. From his decision the Secretary of State preferred an appeal to the District Court, but the District Judge held that he had no jurisdiction to entertain the appeal and dismissed it with costs. Hence this second appeal.

The jurisdiction created by the Forest Act being a limited jurisdiction, the first question is whether, as held by the Judge, the right claimed is a right specified in Section 4 of the Forest Act. That section describes the right which the Forest Settlement Officer is authorized to deal with as

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rights in and over the land comprised within the limits of the forest or to any forest produce of such land. The Judge determines the question in the negative. Assuming that his decision is correct, it does not follow that he had no jurisdiction to entertain the appeal preferred by the appellant. If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, it is an error which the Court, if any, exercising appellate jurisdiction over it is bound to correct, as every Court of appeal has all the powers of a Court of revision. In the case before us, it is clear that the Forest Settlement Officer exercised jurisdiction by reason of the Collector Mr. Macleane's decision that the right in contest was not outside the provisions of the Forest Act. Under Section 14 of the Forest Act, the Collector has appellate jurisdiction only when the right adjudicated on by the Forest Settlement Officer is a right excepted from the provisions of Section 10 which, among other things, constitutes the District Court as the Court of appeal in regard to any right in and over the forest save the excepted rights. We agree with the Judge that the right claimed does not amount to an interest in land. It is not similar to the grant of melvaram right in land in the possession of the grantee, or of some one else as in the case of inams. But it is similar to the right to a mera to be paid to a karnam by the ryots of the village out of the produce of the lands in their possession, and it cannot be said that the right creates a joint interest on the part of the karnam in the holding of each ryot. Again, an agreement to pay a certain percentage of the profits of partnership as wages to a servant of the firm does not make him a partner. Looking to the relations of the parties as master and servant and to the character of the *rusum* as a money payment out of the income of the forest in the possession of the Government, it is not reasonable to impute any intention to create an interest in the lands.

[**196**] Another question for decision is whether the Collector had appellate jurisdiction in this case under Section 14 or whether the right adjudicated on is a right to forest produce. The Judge holds that it is not, and on referring to Section 2 which explains that right, we concur in his opinion. Section 2 describes the right as the right to certain specific forest products, which it enumerates, and the fact that the enumeration is not exhaustive can only justify other rights of the same description being included in the section. But the right asserted by the respondents is a right not to any specific jungle product, but to a percentage of the forest income from certain sources. In this connection, the Judge observes that he has no power to hear an appeal from the decision of the Collector. If the right claimed is not a right to forest produce and the Collector had no appellate jurisdiction, the order made by him is one made without jurisdiction, and it is not incompetent to a Court of competent appellate jurisdiction to say that it is not bound by an order made without jurisdiction by the Collector in the same suit. The Government denied his jurisdiction and cannot be said to have submitted to it. We are, therefore, of opinion that the Judge was in error in declining to entertain the appeal and that he ought to have entertained it and adjudicated thereon.

The Judge states that in his opinion the claim was also barred by the Pensions Act of 1871, though he does not rest his decision upon it. By Section 4 of that Act, no Civil Court shall entertain any suit relating to any grant of money or land revenue made by the British or any former Government, whatever may have been the consideration for any

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such grant and whatever may have been the nature of the payment, claim or right for which such grant may have been substituted Nor was any certificate produced before the Forest Settlement Officer as provided by Section 6 and the endorsement referred to by Mr Macleane cannot be treated as a certificate within the meaning of Section 6 The Judge is therefore well founded in saying that even if the right is a right in and over the land, the Pensions Act would be a bar The Collector is in error in saying that the Forest Settlement Officer is not a Civil Court for the purposes of the Pensions Act It is not necessary that the Forest Settlement Officer should be a Civil Court for all purposes, but it is sufficient if the jurisdiction exercised by a Civil Court over a civil right is transferred to him and he is authorized to exercise it as a subordinate tribunal in its place, though a special [197] procedure is prescribed for his guidance by a special Act Nor can submission give jurisdiction in a case like this, in which the Forest Settlement Officer has no inherent jurisdiction, but has only a limited jurisdiction as provided by the Forest Act

The conclusion we come to is that the District Judge should have adjudicated on the appeal and set aside the decree of the Foreset Settlement Officer on the ground that the suit was barred by the Pensions Act, and also that that officer had no jurisdiction to entertain it under the Forest Act As the question to be decided is one of law, we proceed to do what the District Judge ought to have done and accordingly we set aside the decrees of both the Courts below and dismiss the claim with costs throughout

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17 M. 197=4 M.L.J. 60.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr Justice Best.

MARIMUTHU PILLAI (*Defendant*), *Appellant* v KRISHNASAMI CHETTI AND OTHERS (*Plaintiffs Nos* 2, 3, 4), *Respondents* *
[5th and 6th December, 1893]

Negotiable Instruments Act—Act XXVI of 1881, Section 46—Effect of an invalid endorsement of a promissory note by payee—Note recovered by, but not re-indorsed to the payee

The defendant gave plaintiff a promissory note payable on demand The plaintiff endorsed the note to a third party, a creditor of his, who sued the defendant on the note on his refusal to pay The defendant pleaded that it had been agreed between the payee and himself that the note should not take effect until the payee had performed certain conditions which remained unperformed The suit was accordingly dismissed The plaintiff thereupon paid the endorsee and took back the note, which, however, was not re-indorsed, and instituted the present suit against the defendant, who pleaded that the property in the note was not vested in the original plaintiff so as to enable him to maintain the suit On the decease of the plaintiff before the trial his sons were substituted as plaintiffs:

Held, that, although the property in a promissory note payable to order on demand passes by endorsement and delivery (Act XXVI of 1881, Section 46), the endorsement in this case had been declared invalid in the suit referred to and must therefore be treated as cancelled, and consequently the property in the note was vested in the plaintiff at the date of the suit so as to enable him to maintain it

[Appr., 30 M 441 (443)=17 M L.J 414]

* Appeal No 25 of 1893.

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M. L. J.
60.

[198] APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 30 of 1890.

The suit was brought by one Lakshmana Chetti, the payee of a promissory note, and the respondents, his legal representatives, against the defendant-appellant, the maker of the note. The other facts of the case are stated sufficiently for the purpose of this report in the judgment of the High Court.

The District Judge decreed in favour of the plaintiffs and the defendant preferred this appeal.

Rama Rau, for appellant.

Bhashyam Ayyangar and *Tiruvenkata Chariar*, for respondents.

Krishnasami Ayyar, for respondent No. 1.

JUDGMENT.

The question is whether property in the promissory note vested in Lakshmana Chetti at the date of suit so as enable him to maintain it. The facts, so far as they bear on this point, are shortly these: Lakshmana Chetti endorsed the promissory note to one Patnam Subbaiyar, but appellant refused to pay when the note was presented for payment. Thereupon, Subbaiyar applied to a notary public at Trichonopoly for noting the dishonour and the note was accordingly protested. Thereupon the endorsee sued the maker in No. 37 of 1888 on the file of the District Court, but appellant pleaded the agreement now set up and contended further that the endorsee paid no consideration for the endorsement and that there was, therefore, no valid transfer of the promissory note. The District Judge upheld his contention and dismissed the suit without entering on the question whether any and what consideration passed from the payee to the maker. On the dismissal of this suit Lakshmana Chetti paid Subbaiyar and got back the note, but it was not re-indorsed in his favour. As appellant's fourth witness Subbaiyar states that the note was endorsed to him in part-payment of a debt due by Lakshmana Chetti, and that, when the suit failed, Lakshmana Chetti paid him the amount due under it and got back the dishonoured note, it is no doubt true, as argued by appellant's pleader, that the property in a promissory note payable to order on demand passes by endorsement and delivery. So it was held in *Pattat Ambadi Marar* v. *Krishnan* (1), and it is also expressly provided for by Section 46 of Act XXVI of 1881. But, in the case before us, the endorsement [199] in favour of Subbaiyar was declared by the decree in original suit No. 37 of 1888 invalid and must, therefore, be treated as cancelled. Moreover the payee of a promissory note is entitled to pay an endorsee when the note is dishonoured and, striking out the endorsement, to sue the maker for compensation or to re-issue the note. See Byles on *Bills of Exchange*, fourteenth edition, page 195. The objection that respondents have not taken out a certificate to collect the debts due to Lakshmana Chetti is not pressed, the certificate being produced before us.

The appeal fails and is dismissed with costs.

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(1) 11 M. 290.

17 M. 199.

APPELLATE CIVIL

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APPEL-LATE CIVIL

17 M. 199.

Before Mr. Justice Muttusami Ayyar and Mr Justice Best

VYTHILINGA PANDARA SANNADHI AND OTHERS (*Defendants*), *Appellants* v SOMASUNDARA MUDALIAR AND OTHERS (*plaintiffs*), *Respondents*.* [18th, 20th and 26th October, 1893]

Temple repairs—'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds

The 'panchayatdars' or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent Rs 10-8-0 in so doing from the funds of a 'katlai' or endowment of which they were managers They then sued the trustees of two other 'katlais' for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendants' income, and asked for a declaration that the duty of executing repairs fell upon the defendants' 'katlais'

Held that, in the absence of any endowment or trust-deed regarding the 'katlais,' the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their 'katlais' should permit

[R., 34 M 188 (206, 207)=8 Ind Cas 1072=21 M.L J 320=9 M.L T 235=(1910) M W N 799; 15 C P L R 85 (86)]

APPEAL against the decree of T Ramasami Ayyangar, Subordinate Judge of Negapatam, in original suit No. 45 of 1890

The defendants preferred this appeal

[200] The facts of this case appear sufficiently for the purposes of this report from the following judgments of the High Court —

JUDGMENT

MUTTUSAMI AYYAR, J —There is an ancient temple called Sri Tiyagaraja Swami temple in the town of Tiruvalur in the Negapatam taluk of the district of Tanjore Respondents are its 'panchayatdars' or managers, and appellants are trustees of two of the 'katlais' attached thereto called Abhisheka Katlai and Rajan *alias* Saba Katlai In ordinary parlance, the term 'katlai' as applied to temple endowments, signifies a special endowment for certain specific service or religious charity in the temple Ardajama Katlai or endowment for midnight service is an instance of the former and annadana Katlai or an endowment for distributing gratis food to the poor is an example of the latter In this sense, the word katlai is used in contradistinction to the endowment designed generally for the upkeep and maintenance of the temple In the case of some important temples, the sources of their income are classified into distinct endowments according to their importance, each endowment is placed under a separate trustee, and specific items of expenditure are assigned to it as legitimate charges to be paid therefrom Each of such endowments is called also a katlai and the trustee who administers it is called the katlaigar or the stanik of the particular katlai The term 'katlai' is used in the present suit in this sense and Exhibit R enumerates the several katlais that exist in connection with the temple at Tiruvalur together with their average income from fasli 1221 to fasli 1228. When the institution was under the immediate control of officers

* Appeal No. 64 of 1892

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of the Government, it appears from that exhibit that 'Abhisheka Katlai under first appellant's management had an average income per year of 8,734 pons 2⅝ fanams or Rs. 13,647-3-11, and that Rajan Katlai and Annadana Katlai, which are under second appellant's management, yielded an annual income of 10,208 pons 9 fanams or Rs. 15,951-6-6, while the ' Ulthurai Katlai ' which is under the direct management of the panchayatdars, produced an income of pons 6,247 or Rs. 9,760-15-0. It is these four katlais that are important, the other katlais having only small endowments whose average income is not likely to be in excess of their current expenses. The contest in this suit is as to appellants' liability to provide from the endowments in their charge for the necessary repairs of the temple and of the large tank outside called Kamalalayam which is attached to it.

[201] The facts which have given rise to this litigation are shortly these. Within the precincts of the temple there is a building, called the Kottaram, used as the store-room or store-house wherein provisions required for the use of the temple are usually secured by the panchayatdars About November 1887, it came to the knowledge of the Head Assistant Magistrate in charge of the Negapatam taluk that the gateway giving entrance into the store-room was in such a state of repair as to endanger the safety of persons using it or passing near it. He called upon appellants to remove this source of danger under Section 133 of the Criminal Procedure Code, but they alleged that respondents were the parties bound to execute the necessary repair according to the usage of the temple. After hearing both parties, the Magistrate declined to decide the question and held that the store-house being under the immediate control and in the charge of respondents as trustees of the Ulthurai Katlai, they were bound, under the Code of Criminal Procedure, to execute such repairs as were necessary to prevent danger to the public and made an order to that effect on the 23rd August 1888 From the 4th to the 7th October 1888 respondents spent Rs. 10-8-0 from the funds of the ' Ulthurai ' Katlai under their management and repaired the gateway in obedience to the above order. On the 10th December 1888 they instituted this suit to recover the amount so spent by them from the funds of the katlais under appellants' management Their case is that the two katlais under appellants' management consist of landed properties of the temple yielding an annual income of Rs. 30,000 and 20,000 respectively, that, by the usage of the institution, the cost of repairing the temple and the tank and of erecting necessary buildings is payable from that income, that appellants were bound to contribute to the cost of such repairs and structures in the proportion of two-thirds from the Abhisheka Katlai and one-third from the Rajan Katlai. They prayed for a decree directing appellants to pay them Rs. 10-8-0 with subsequent interest and costs, and declaring that the duty of executing repairs, as mentioned in the plaint, devolved on appellants by the usage of the temple. These, however, denied their liability and contended that there were various katlais attached to the temple in question, that they had separate buildings assigned to them within the precincts of the temple, and that it was the duty of katlaigars or trustees of the katlais to keep their own buildings in repair. They pleaded also to the [202] jurisdiction of the Subordinate Court alleging that the present suit was cognizable by a Small Cause Court and that the staniks of the Ulthurai Katlai should be co-plaintiffs. But they admitted that " on " certain occasions, when funds were available, certain repairs were " executed by them," adding that they were so executed at their will and

pleasure and that respondents had no right to compel them to execute such repairs

The two preliminary objections taken to this suit are that it is cognizable by a Court of Small Causes and that the staniks of the Ulthurai Katlai ought to have been made parties to it They form the subject of the first and fourth issues, which the Subordinate Judge has determined against appellants The plaint contains a prayer for a declaratory decree, which a Court of Small Causes is not competent to pass Nor is it shown that the staniks of the Ulthurai Katlai are not mere temple servants subordinate to the panchayatdars There is also no doubt that as dharmakartas respondents are bound to see that the temple is kept in proper repair by those who are bound to do so according to usage In my judgment the Subordinate Judge has properly disallowed both the preliminary objections Again, it is not seriously denied that Rs 10-8-0 have not been spent by respondents upon the repair of the Kottaram as found by the Subordinate Judge and the substantial question argued on appeal is as to appellants' liability to make the repair out of the funds of the katlais under their management This forms the subject of the second issue and the Subordinate Judge has determined it in favour of respondents No endowment or trust-deed is forthcoming in regard to the katlais and it is conceded that the rule of decision must be found in the usage of the temple The contention in appeal, therefore, is that the evidence does not warrant the finding of the Subordinate Judge in respondents' favour

In support of the finding there is first the admission made by appellants themselves In their written statements they averred that they executed repairs when funds were available Though they qualified this admission by stating that they were under no obligation to do so, I agree with the Subordinate Judge that this statement is entitled to no weight As katlaigars, appellants are trustees and they can only spend the income of the trust property upon the particular trusts attached to those katlais, and the explanation that they executed repairs *at their pleasure* is *not* intel-[203]ligible Further, the first defendant stated in his evidence that the lands under his management as katlaigar are properties originally granted for the use of the temple by former sovereigns of Tanjore and that their income is first applied to the expenses of daily worship and of festivals and that the surplus is then spent on repairs Adverting to a temple building called Porpandara, he deposed that it was in the exclusive possession of respondents and the expenses of its repair, as of several other buildings in the possession of respondents, were borne by the two katlais in the proportion of two-thirds and one-third Moreover, it is in evidence that the katlai lands were in the possession of the Collectors of the district till 1847, when they were formally made over to appellants' predecessors The muchalkas which these executed on that occasion contain a distinct acknowledgment that the katlai lands were originally granted to Sri Tiyagaraja Swami and an undertaking to apply the income derived therefrom to the said temple. This is significant as showing that the repair of the temple was a trust to which the surplus income had to be devoted according to the original grant I have already referred to Exhibit R and showed that, so far as the amount of average income is concerned, Abhishka Katlai, Rajan Katlai and Ulthurai Katlai are the most prominent as being in a position to have a surplus at their disposal. It appears, however, from the Sanad G and Exhibit T and it is also conceded for appellants that

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the mohini or money allowance paid by the Government to the panchayatdars which (as is seen from Exhibit N 1) forms the largest portion of the income of the Ulthurai Katlai is not chargeable with the cost of repairs, as it is an endowment for meeting certain defined items of expenditure. As argued by respondents' pleader, it is antecedently probable that if appellants' katlais alone bear the cost of repair, they do so because their large income is likely to leave a surplus available for being laid out on repairs.

Exhibit H1 is an account, dated July 1839, and it enumerates the various duties which devolve on the katlaigars and in the case of appellants looking after repairs is specified as one of them, whilst in the case of Ulthurai Katlai no similar duty is mentioned. Again, the same account shows that so early as 1829 an establishment for carrying out ordinary repairs was kept up by appellants' katlais and its cost was paid out of the funds of those katlais.

Another group of documents, Exhibits J to Q, is referred to by [204] the Subordinate Judge in paragraph 11 of his judgment as evidencing actual execution of repairs at the cost of appellants' katlais. Their genuineness is not questioned in appeal and their contents show that both appellants or one of them executed repairs from time to time in 1829, 1831 and 1832. It is argued on behalf of appellants that they merely superintended the execution of the repairs, but that they were paid for from the funds provided by the Collectors of the district as per estimates previously sanctioned by them. The exhibits specify the estimated amount sanctioned by the Collectors under it, the amount expended on repairs on each occasion and are signed by the staniks of both katlais or by one of them and countersigned by taluk officials. It is not explained why the representatives of these katlais were always selected to execute the repairs in preference to panchayatdars if their katlai funds were not spent under previously sanctioned estimates. The Subordinate Judge naturally presumes that the course of business consisted in the katlaigars submitting estimates of repairs, obtaining the Collector's sanction for the outlay from the katlai funds and then executing the repairs from such funds in accordance with the estimate I cannot say that this inference is, under the circumstances, unreasonable

Moreover, Exhibit Y shows that in 1849 the Collector sanctioned the expenditure of Rs. 10,000 upon repairs on applications and estimates submitted by the katlaigars. Though, as argued by appellants' pleader, the exhibit does not mention the names of the katlaigars, yet it is material in so far as sanction is sought for laying out the income of katlais on repairs.

It appears further from Exhibit D that so recently as 1886 the trustee of the Abhisheka Katlai corresponded with the Deputy Tahsildar of Tiruvarur acting on behalf Ulthurai Katlai on the subject of certain repairs.

It appears that first appellant did not repudiate his liability to repair, but entered into an explanation why it was not then necessary to do the repairs.

There is again Exhibit H which shows the amount required in August 1833 for consecrating an idol which was lost in 1802 and discovered in 1833. It purports to be a dittam or estimate of necessary expenses submitted to the Collector, and the amount entered as received from the Huzur is Rs. 586 which is divided [205] between the Abhisheka Katlai and Rajan Katlai, *viz.*, Rs. 386 for Abhiksheka Katlai and Rajan Katlai

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and Rs. 200 for Annandana Katlai It is clear that the Collector did not sanction the outlay from the public treasury; whence did he then get the necessary funds? It is not unreasonable to infer from Exhibit H 1 that the funds came from those katlais among the trusts of which the repair or Tiruppani of the temple finds a place

On the other hand, our attention is drawn to certain facts by appellants' pleader as favouring their contention The first fact to which reference is made is the preparation in 1820 of a new dittam or 'standing budget estimate' under the order of the Collector of Tanjore who then exercised control over the management of Hindu temples in the district By Exhibit T he directed that the various sources of income should be estimated and that 20 per cent should be deducted therefrom and kept as a reserve fund for meeting loss from floods, from withering of crops, from high prices and other unlooked for causes and observed that, even if there were no such loss, the reserve fund was needed for the purpose of repairing the temples and preserving them in the same condition Exhibits N1, O1, P and R enumerate the several sources of income for the three principal katlais and for the whole temple including all the katlais and the 20 per cent. deduction is entered against all sources of income except the mohini allowance paid by Government for the daily and festival expenses of the temple In Exhibit O1, which is the dittam account for the Abhisheka Katlai, there is an entry under the head of extra expenses in the column of remarks "cost of repairs not included in the new dittam Hence the decrease" This is referred to on respondents' behalf as suggesting the inference that, prior to the preparation of the new dittam account, such cost formed part of the old dittam of the katlai However this may be, these Exhibits do not throw light on the ancient usage of the temple before us The constitution of a reserve fund such as was suggested by the Collector might be an administrative improvement conducive to beneficial management Under what authority the Collector issued the Order T in regard to trust properties is not clear It had no especial reference to the temple at Tiruvarur nor was its primary object to create a fund for repairs or to supersede any pre-existing obligation in that respect There is further no evidence to show that a reserve fund was so constituted and since [206] kept up It is indeed suggested that it was not so kept up and the absence of allusion to it in the later accounts of 1830 favours the suggestion It is noteworthy that appellants did not refer to any such fund in their written statements, or say that repairs were to be made from that fund, their case being that the katlais in their charge were not responsible for undertaking temple repairs and *not* that they as well as the other katlais were bound to meet the cost of repairs in proportion to the income The contention, therefore, that the exhibits now under consideration negative appellants' liability appears to be an afterthought

Another matter on which appellants' pleader lays stress is that it is natural that each katlai should repair the buildings in its charge as alleged by them I am not prepared to attach importance to this contention, for Exhibits T to K show that appellants executed repairs to buildings in the temple which are not in their possession, but are in the immediate charge of the panchyatdars and among others to the kottaram or store-room now under consideration

Another piece of evidence is Exhibit VII referred to by the Subordinate Judge in paragraph 16 of his judgment There is no evidence to show when it was prepared, nor are we referred to any other document which refers to contribution by other katlais towards the cost of repairs

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On the whole, the weight of testimony appears to me to be in favour of the conclusion at which the Subordinate Judge has arrived. It is true that there is no endowment deed forthcoming. It is also true that no accounts are produced to show execution of repairs by appellants except for a few years. But it should be remembered that the accounts are with appellants and their omission to produce them is open to remark. But there is the fact that all the katlai lands are lands originally granted for the use of the temple and there is an undertaking to apply their income to the temple. There is next the admission that the surplus income was spent on repairs and there is also the presumption that, unless the execution of repairs was one of the trusts of the katlais, the surplus would not have been so spent. Having regard to the fact that the katlais under appellants contribute also to the daily and festival expenses, the statement that the surplus is alone utilized in carrying out repairs is not improbable. There is further the fact that looking after repairs is entered in H1 among the duties devolving on the [207] representatives of appellants' katlais. There is also positive evidence as to appellants having actually executed repairs to various temple buildings in 1829-31 and 1832 There is some evidence of conscious liability to execute the necessary repairs in 1849 and 1886. Whilst these facts convey the impression that the katlai funds were spent on repairs because there was an obligation so to spend them, there is no evidence of any other katlai besides having regularly contributed to the cost of the repair. Exhibit VII, which contains a single entry to that effect, is not sufficient evidence of the usage of the temple. The exemption of the mohini allowance from liability for the cost of the repair and a comparison of the average income of the various katlais mentioned in Exhibit R raise also a presumption that the liability devolved on the Atheenam Katlais by reason of their being able to command a surplus income. Again, the allusion to the reserve fund, which the Collector proposed to organize in 1820, is an after-thought. There is no evidence that such fund is in existence nor was it referred to by appellants in their written statements. The suggestion that each katlai repairs the buildings in its charge is incompatible with the documentary evidence, which shows that appellants' predecessors required various temple buildings which are not under their control and kept up a standing establishment for carrying out small repairs. There is no trace in the evidence of other katlais having regularly contributed to the cost of repairs. Under these circumstances, I am unable to accede to the contention that the finding of the Subordinate Judge on the second issue is contrary to the weight of evidence. The decree of the Subordinate Judge must therefore be affirmed, but a declaration must be added to the effect that defendants are liable for repairs to the temple so far as the surplus funds of their katlais shall permit. The appeal having substantially failed, appellants will pay respondents' costs and bear their own costs.

Best, J.—I concur.

17 M. 208=4 M.L.J. 62.

1893 Oct. 25.

APPELLATE CIVIL.

17 M 208=4 M. L. J. 62.

[208] APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best

NARANA MAIYA (*Defendant*), *Appellant* v VASTEVA KARANTA AND ANOTHER (*Plaintiffs*), *Respondents*.*
[25th October 1893.]

Widow in possession of her late husband's land—Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser.

A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinamah, one of the terms of which was that the widow should remain in possession of and enjoy the property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land being sold in execution, was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband.

Held, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the property. *Jugul Kishore* v *Jotendro Mohun* (1) distinguished, and the principle in *Baijun Doobey* v *Brij Bhookun Lall Awusti* (2) applied.

[**F.**, 10 O.C. 121 (125); **R.**, 27 B. 162 (184); **D.**, 26 M. 224 (228)=12 M.L.J. 380 (384).]

SECOND appeal against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 236 of 1891, reversing the decree of J. P. Fernandez, District Munsif of Kundapur, in original suit No. 152 of 1890.

The District Munsif decreed in favour of the defendant, but the District Judge on appeal by the plaintiffs reversed the decree.

The defendant preferred this appeal.

The facts of the case are stated above sufficiently for the purposes of this report.

Pattabhirama Ayyar, for appellant.

Madhava Rau, for respondents.

JUDGMENT

There is nothing to show that the decree was obtained against the widow Mahalakshmi as the representative of her husband's estate, nor are we referred to any proceedings in that suit showing that the decree was not a personal one simply.

[209] In *Jugal Kishore* v *Jotendro Mohun Tagore* (1), the decree was passed against the husband. In *Bisto Beharee Sahoy* v *Lalla Byjnath Pershad* (3) the husband's property was expressly made liable by the decree. Neither of these cases is, therefore, on all fours with the present one, which is governed by the principle laid down by the Privy Council in *Baijun Doobey* v *Brij Bhookun Lall Awusti* (2).

The razinamah does not, on its true construction, amount to a gift of an absolute estate to the widow. It merely recognizes the widow's right to possess the property during her life without making alienations.

* Second Appeal No 213 of 1893.

(1) 10 C. 985. (2) 2 I.A. 275=1 C. 133. (3) 16 W.R. 49.

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Oct. 25.

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17 M. 208 = 4 M. L. J. 62.

The dismissal of the claim petition cannot affect the plaintiffs' claim as reversioner, a claim which only became enforceable on the widow's death in 1888. Further, the claim was dismissed without inquiry.

It is finally contended that the debt in question was due from the husband, as is also found by the District Munsif, and that the District Court was wrong in considering this point immaterial.

This was not the case of a voluntary sale by a widow in discharge of her husband's debt, but of a Court-sale in execution of a personal decree obtained against the widow. The Judge is therefore right.

We dismiss the appeal with costs.

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17 M. 209=3 M.L.J. 289.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

Oula and others (*Counter-petitioners*), *Appellants v.* Beepathee and another (*Petitioners*), *Respondents.**
[15th and 18th September, 1893.]

Code of Civil Procedure—Act XIV of 1884, Sections 365, 367—Representation of a deceased plaintiff.

Section 365 of the Code of Civil Procedure presupposes that the party claiming to represent a deceased plaintiff is his legal representative, but, if the represen-[210]tative character is denied, or when two or more persons claim it, the procedure prescribed by Section 367 of the Code should be followed

Appeals against the orders of S. Subbayar, Subordinate Judge of South Canara, dated 18th January 1892, passed on civil miscellaneous petitions Nos. 572 and 573 of 1891.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court.

Ramachandra Rau Saheb and *Pattabhirama Ayyar*, for appellants.

Naraina Rau, for respondents.

JUDGMENT.

This was a suit brought by one Kutti Hammad upon a bond executed by his late uncle Abdul Rahiman Kutti. Hammad having since died, Bheepathee and Kunhipathu, claiming to be his sisters by adoption, applied to have their names entered on the record in place of the deceased plaintiff. The third defendant denied the adoptions, but the Subordinate Judge granted the application without proper inquiry, and ordered that the suit be proceeded with; hence this appeal. It is contended for the appellants that the Subordinate Judge gave them no opportunity to disprove the alleged adoptions, and that the admission made by the deceased plaintiff is not binding upon them. It is also urged that before respondents were admitted as supplemental plaintiffs the procedure prescribed by Section 367 had not been complied with and the factum of the adoptions determined. On the other hand, the contention for respondents is that the Subordinate Judge has acted in accordance with the provision of Section 365, and that no appeal lies from the order made under that section.

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* Appeal against Orders Nos. 65 and 66 of 1892.

1893 Sep. 18.

APPELLATE CIVIL.

17 M. 209 = 3 M. L. J. 289

As regards the preliminary objection that no appeal lies, it cannot be maintained In this case the third defendant denied that Beepathu and Kunhipathu were the legal representatives of the deceased plaintiff, and it falls, therefore, under Section 367 An appeal is allowed from the order made under that section by Section 588, Clause 18 I am unable to accede to the contention that Section 367 applies only when two or more persons claim to be legal representatives of the deceased plaintiff, and that it is not applicable where there is but one claimant, and the defendant denies his representative character Section 365 provides that in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall, there-[211]upon, enter his name accordingly and proceed with the suit The section presupposes that the claimant *is* the legal representative, and then prescribes the procedure which ought to be followed Section 367 enacts that, if any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit The language is wide enough to include a sole claimant, whose representative character is denied by the defendant Reading the two sections together, they show that when there is no dispute as to the applicant being the legal representative, the procedure prescribed by Section 365 is to be followed, and, either when the representative character is denied or when two more persons claim it, the procedure prescribed by Section 367 should be followed The bringing in of a representative on the record is not a mere formal act, and there must be a complete judicial inquiry and determination as to whether the claimant is the proper representative This is futher made clear by the procedure prescribed when the legal representative of a deceased sole defendant is brought on the record In that case the Court is bound to enter on the record the name of the person who is alleged by the plaintiff to be the legal representative, liberty being reserved to the person who is so made defendant to object that he is not the legal representative When the plaintiff makes the application and causes a new defendant to be put on the record, he does so at his own peril, and if the new defendant is not really the representative of the deceased defendant, the plaintiff will not be able to execute the decree On the other hand, when a person is substituted for the deceased plaintiff, it is the act of the Court and the substituted person realizes the deceased's estate. The Court must, therefore, satisfy itself that the substituted person is the real representative at or before the hearing of the suit and then deal with it according to law In the case before us, the Subordinate Judge admitted two documents and a judgment in evidence, and acted upon them without giving the defendants an opportunity to prove their allegation, and I cannot say that there was a proper judicial inquiry The order of the Subordinate Judge is set aside, and he is directed to hear all the evidence which the parties may adduce and, after holding a proper judicial inquiry [212] to determine whether petitioners are entitled to be admitted as the legal representatives of the deceased Kutti Hammad for the purpose of prosecuting the suit, and then deal with the suit according to law Costs of this appeal will abide and follow the result, and be provided for in the revised judgment or order.

1893 Dec. 21. — Appellate Civil. — 17 M. 212=4 M. L. J. 48.

17 M. 212=4 M.L.J. 48.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SHEIK DAVUD SAIBA AND OTHERS (*Plaintiffs Nos.* 1, 3 *and* 4), *Appellants v.* HUSSAIN SAIBA AND OTHERS (*Defendants*), *Respondents.** [28th September and 21st December, 1893.]

Religious Endowments Act—Act XX of 1863*—Regulation VII of* 1817, *Section* 13*—Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary—Trusts Act—Act* II *of* 1882, *Section* 49

A temple committee appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary, must be exercised reasonably and in good faith, and, according to the principle, which is applicable to be public trusts, embodied in Section 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction.

[R., 29 M 534 (538)=16 M L J 435=1 M.L.T 127; 34 M 375 (385)=10 Ind. Cas 301=21 M L.J. 305=(1911) M W.N 304.]

SECOND appeal against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 171 of 1891, reversing the decree of J. P. Fernandez, District Munsif of Coondapoor, in original suit No. 78 of 1890.

The plaintiffs were four or five trustees of a mosque. The eighth and ninth defendants were members of the committee who had appointed the first to sixth defendants additional trustees. The seventh defendant was the fifth original trustee and khazi of the mosque, who had been dismissed from his office by the four other trustees, a proceeding which, *inter alia*, gave rise to rioting, in which two of the plaintiffs took part The committee then appointed the additional trustees in order to counterbalance the influence of the plaintiff trustees in the management

[213] The District Munsif decreed that the appointment was unnecessary and collusively made by the eighth and ninth defendants, which decree was reversed on appeal by the defendants by the District Judge.

The plaintiffs preferred this appeal.

Ranga Rau, for appellants.

Pattabhirama Ayyar, for respondents Nos. 1, 2, 4 to 7 and 9.

JUDGMENT.

It is urged on appellants' behalf that the committee constituted under Act XX of 1863 acted *ultra vires* in appointing six additional trustees to the plaint temple without any necessity for so doing.

It is certainly competent to the committee, when here is no hereditary trustee, to add to the number of the existing trustees and it has the same powers which the Board of Revenue had under Regulation VII of 1817. Section 13 of that Regulation authorizes the Board of Revenue to make provision for the administration of religious and charitable endowments. It was also held by this Court in Regular Appeal 31 of 1888 that the committee might validly appoint new trustees where the right of management is not hereditary. It is then contended, with regard to the power conferred on the committee, that it is bound to exercise it reasonably and in good faith in futherance of beneficial administration, and

* Second Appeal No. 38 of 1893.

this contention is entitled to weight The power conferred on the committee is no doubt discretionary, but the principle embodied in Section 49 of the Indian Trusts Act, viz, that when such discretionary power is not exercised reasonably and in good faith, such power may be controlled by a Civil Court of original jurisdiction, is equally applicable to public trusts There is nothing in Act XX of 1863 or in Regulation VII of 1817 to support respondents' suggestion that the power is absolute

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The second issue raised the question and the District Munsif held that the committee exercised the power otherwise than reasonably and in good faith But the Judge has expressed no opinion Before disposing of this second appeal we shall ask the Judge to return a finding as to whether the appointment of the additional trustees was a reasonable *bona fide* exercise of their power conducive to beneficial management Additional evidence may be admitted

FINDING

In compliance with the above order, the District Judge returned a finding that the power had not been exercised unreasonably

FINAL JUDGMENT

MUTTUSAMI AYYAR and BEST, JJ —On receipt of this finding the Court dismissed this appeal with costs *

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17 M. 214=4 M L.J. 3

[214] APPELLATE CIVIL

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr Justice Shephard

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KOMAPPAN NAMBIAR AND OTHERS (*Plaintiffs*), *Appellants v.* UKKARAN NAMBIAR AND OTHERS (*Defendants Nos 1 to 6*), *Respondents* †
[22nd August and 5th September, 1893]

Civil Procedure Code—Act XIV of 1882, *Sections* 13, 30—'Res judicata'—*Representation.*

Although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad in a suit, the decree therein does not raise an absolute estoppel against members not actually brought on the record

Ittiachan v. *Vellappan* (1) and *Sri Devi* v *Kelu Eradi* (2) followed

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No 227 of 1892, reversing the decree of S Subramania Iyer, District Munsif of Payoli, in original suit No 13 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

The District Munsif decreed in favour of the plaintiffs, and the District Judge reversed the decree on appeal by the defendants The plaintiffs preferred this appeal

Sundara Ayyar, for appellants.

Narayana Rau, for respondents Nos 2 to 6

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* [Forms a portion of the judgment though omitted in the I L R—ED]

† Second Appeal No 1548 of 1892.

(1) 8 M. 484 (488). (2) 10 M 79

1893
SEP. 5.

APPELLATE CIVIL.

17 M. 214=4 M. L. J. 3.

JUDGMENT.

The present suit is brought by twelve persons alleged to belong with Chatu Nambiar, the twelfth defendant, to a branch tarwad. They claim a property held under lease by the thirteenth defendant. In 1887 the first defendant in the suit who is karnavan of the tarwad, brought a suit to recover the same property. In that suit the tenant was joined as first defendant and the other two defendants were the abovementioned Chathu Nambiar and another member of the branch, Raman Nambiar. The main contention in that suit was that these two, Chathu and [216] Raman, belonged to a branch having no community of interest with the main tarwad. That contention was overruled and a decree was passed in favour of the then plaintiff, the karnavan. This decree, it has been held by the District Judge, is binding on the present plaintiffs, because in the former suit they were represented by Chathu and Raman, respectively, the karnavan and senior anandravan of their branch. The District Judge held that the questions ought to be raised in the present suit is *res judicata*. In our opinion the judgment cannot be sustained. In the first place, the statement that the two members, Chathu and Raman, represented anybody but themselves seems to be a mere assumption. The only part of the record in the previous suit which is produced is the judgment, and from that it would be difficult to say that the then defendants were impleaded by the then plaintiff or put themselves forward in a representative character. At any rate, the mere fact that they are branch karnavan and senior anandravan is no ground for raising any inference. It must be remembered that the case for the then plaintiff was that there is no such thing as an independent branch existent and Chathu was joined as a defendant, because he happened to have taken a part in granting the demise.

Under these circumstances we are of opinion that there really is no foundation for the statement of the Judge on which he rests his conclusion as to the applicability of Section 30 of the Civil Procedure Code. In drawing that conclusion also the Judge is clearly in error. It has been more than once decided that although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad, the decree does not raise an absolute estoppel against members not actually brought on the record, see *Ittiachan* v. *Vellappan* (1), *Sri Devi* v. *Kelu Eradi* (2), and second appeal No. 93 of 1885.

We must, therefore, reverse the decree of the District Judge and remand the appeal for disposal. The plaintiffs are entitled to the costs of the appeal. For other costs provision will be made in the revised decree.

(1) 8 M. 484 (488.) (2) 10 M. 79.

17 M. 216=4 M.L.J. 70.

1893 Aug 22.

Appellate Civil.

17 M. 216=4 M. L. J. 70.

[216] APPELLATE CIVIL.

Before Sir Arthur J. H Collins, Kt, Chief Justice, and Mr Justice Shephard

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KRISHNASAMI CHETTI (*Plaintiff*), *Appellant* v THE NATAL EMIGRATION BOARD (*Defendants*), *Respondents*.*

[22nd August, 1893]

Transfer of Property Act—Act IV 1882, *of Section* 114—*Presidency Small Cause Courts Act—Act XV of* 1882, *Section* 22, 41

The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit Within seven days the defendants tendered rent, interest and costs. The plaintiff, nevertheless, filed this suit to eject the defendants The defendants subsequently paid the full amount due into Court

Held, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under Chapter VII, Section 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under Section 22 of that Act

Held, on appeal (1) that there having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under Section 114 of the Transfer of Property Act,

(2) that the suit not being cognizable by the Small Cause Court, Section 22 of Act XV of 1882 did not apply, an application under Chapter VII of that Act not being a suit under Section 22 thereof

APPEAL against the judgment of Wilkinson, J , sitting on the original side of the High Court in civil suit No 242 of 1892 The facts of the case appear sufficiently for the purpose of this report from the judgment delivered by Mr Justice Wilkinson

WILKINSON, J —" The plaintiff is one of three brothers, from whom " the defendant company leased certain property in 1887 There was " subsequently litigation between the brothers which terminated in plaint- " iff becoming the sole owner of the property Thereupon, in March 1891, " plaintiff applied to the defendants' head clerk for instruction as to the " form in which he should draw up the bills for rent First witness " supplied him with a form (II-A), and from the 18th March 1891 up to " 16th [217] March 1892 plaintiff duly presented a bill for rent on or about " the 15th of each month and was duly paid No bill was presented " in April 1892 for the rent due, and the defendants omitted to send a " cheque for it Thereupon the plaintiff, on the 10th May, sent a notice " to the defendant to quit, relying on a provision in the lease that ' if any " 'part of the rent reserved should be in arrear for 21 days, whether the " 'same shall have been legally demanded or not, the lessors may re-enter " 'and the demise shall absolutely determine ' On the 17th May, the " defendants through their attorneys tendered rent with interest and costs, " but the plaintiff refused to accept it and has filed the present suit in this " Court, notwithstanding the provisions of Section 41 of the Presidency " Small Cause Court Act The first question is whether there has been " any breach of the condition of the lease. Strictly speaking, there does " not appear to me to have been any such breach, for, according to the " terms of the lease, rent is payable on the 1st of each month and the " defendant has 21 days' grace The last cheque which the plaintiff accept- " ed was one dated 4th April The next cheque was dated 13th May It

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* Appeal No. 8 of 1893.

1893 AUG. 22. — APPELLATE CIVIL. — 17 M. 216=4 M. L. J. 70.

"was in time, but was refused. But it is argued that according to the "course of dealing which has grown up between the parties, as proved by "the evidence of the defendants' witness and by Exhibits II and III, ever "since the plaintiff has been sole owner, the custom has been for the "plaintiff to send or present his bill for rent on or about the 15th of the "month and for the defendants to issue a cheque on the day on which bill "was presented or the day after. Plaintiff having omitted to present his "bill on or about the 15th April, no cheque for the rent was issued, but "I do not think that the defendants are, therefore, liable to forfeiture. "The strict terms of the lease had, by the consent of the plaintiff, been "departed from, and as the defendants were always ready and willing to "pay, it would be most inequitable to hold that their omission to send a "cheque for the rent in April entitles plaintiff to cancel the lease. Admittedly the defendant company have always been most regular in the "payment of rent, and though, legally speaking, they were not entitled to "a bill, but were bound to pay rent as stipulated, yet I hold that, looking "at all the circumstances of the case, they would not be liable to forfeiture "even if they had been bound to pay on 15th April and had omitted to pay "till 10th May. The suit is one which ought to have been brought in the "Small Cause Court, [218] and in dismissing it with costs, I direct plaintiff "to pay defendants' costs as between attorney and client."

Krishnasami Chetti, for appellant.

Mr. *W. Grant*, for respondents.

JUDGMENT.

It appears that on 13th May 1892 there was a valid tender of rent, interest and costs, and that on 3rd November there was a payment into Court of the full amount due up to the 15th November. This being so, the defendants have brought themselves within the terms of Section 114 of the Transfer of Property Act. After the tender on the 13th May the plaintiff proceeded with the suit at his risk. The only other question is as to costs between Attorney and client given by the learned Judge. In our opinion this suit was not cognizable by the Small Cause Court and therefore Section 22 of the Act does not apply. An application under Chapter VII is not a suit within the meaning of Section 22.

We must vary the decree accordingly. Each party will bear his own costs of this appeal.

Wilson and King, Attorneys for respondents.

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17 M. 218=3 M.L.J. 287.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

UNHAMMA DEVI (*plaintiff*), *Appellant v.* VAIKUNTA HEGDE AND OTHERS (*Defendants*), *Respondents.**
[12th and 18th September, 1893.]

Notice to quit—Assertion of Mulgeni (permanent) tenure—Entitlement to notice

The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to a notice to quit in determination of the tenure.

* Second Appeal No. 34 of 1893.

[F., 31 M 261 (263)=18 M.L.J 153=3 M.L.T 265, 5 Ind Cas 924=20 M L J 415=7 M L T 173=(1910) M W N 158, 6 M L J 59 (61), R., 17 A 45 (46), 27 M. 23 (24); D. 9 C.W N 460 (463)=1 C.L J. 116]

1893 SEP. 18.

APPELLATE CIVIL.

17 M. 218=3 M. L. J. 287.

SECOND appeal against the decree of W. C Holmes, Acting District Judge of South Canara, in appeal suit No 405 of 1890, confirming the decree of S Raghunathaya, District Munsif of Karkal, in original suit No. 823 of 1889.

[**219**] The Lower Courts having decreed in favour of the defendants, the plaintiff preferred this appeal

The facts of the case appear sufficiently for the purpose of this report in the judgment of the High Court

Narayana Rau, for appellant

Madhava Rau, for respondents Nos 2, 4, 5, 6, 7 and 10.

JUDGMENT

This was a suit brought by appellant to eject respondents Both Courts concur in finding that respondents 2 to 4 are, and have long been, in possession as tenants Their case was that they were Mulgeni tenants and they set up their Mulgeni right in 1880, long prior to the suit The District Munsif considered that they did not prove the Mulgeni right but, on appeal, the Judge thought it unnecessary to determine the question. But both Courts found that no notice to quit had been served upon respondents 2 to 10, and upon that finding, the Judge dismissed the suit with costs For appellant it is contended that, as respondents set up a Mulgeni right, he was absolved from his obligation to give them notice to quit. There is no doubt that a tenant from year to year is entitled to reasonable notice, as was held in *Abdulla Rawutan* v *Subbarayyar* (1), the reason being that the duration of a tenancy from year to year is indefinite, and that it is part of the landlord's case to show that he had determined the tenancy prior to suit by sufficient notice to quit Nor is there any doubt that the tenant forfeits this right to notice by denying the landlord's title prior to suit It is also settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action, and subsequent denial of title, even if false, does not release the landlord from proving his case or amount to a waiver by the defendant of his right to notice, *Subba* v *Nagappa* (2) The question, therefore, arising for decision is whether setting up a Mulgeni right is a disclaimer of title such as disentitles to notice As far as we are aware, this is the first time this question arises in this Court When a Mulgeni right is set up, the landlord's title is, in fact, not denied, on the other hand, the relation of landlord and tenant is admitted, what is denied being the particular kind of tenancy under which the tenant holds possession This denial [**220**] includes no doubt a denial of the contract or the tenure under which the tenant commenced to hold, but it is not, we think, on that ground a denial of title As pointed out in Woodfall's *Landlord and Tenant*, page 325 (13th edition), there must be a direct repudiation of the relation of landlord and tenant or an assertion of facts which are, either expressly or by necessary implication, incompatible with the existence of such relation For the appellant, however, our attention is drawn to *Vivian* v *Moat* (3) and to the observations of Mr Justice Fry The ground of decision in that case was that the claim to hold at a customary rent was

(1) 2 M 346 (2) 12 M 353 (3) L R (1881) 16 Ch D 730.

1893 SEP. 18. APPELLATE CIVIL. 17 M. 218=3 M. L. J. 287.

inconsistent with the ordinary relationship of landlord and tenant, and that it amounted to a suggestion that the landlord was not an ordinary landlord, but either lord of the manor or owner of some other right which gave him a right to customary rent and to nothing more. We cannot say that in the case of a Mulgeni in South Canara, the landlord is in the position of a lord of the manor in England or that the rent reserved is not often substantial. The tenures are not alike, and we do not think it safe to extend the rule laid down in *Vivian* v. *Moat* (1) to this country, especially as the rule is substantially one of forfeiture. The High Court at Calcutta considered that *Vivian* v. *Moat* (1) was not applicable in Bengal in *Kali Krishna Tagore* v. *Golam Ally* (2). It was also held by the Bombay High Court in *Haji Sayyad* v. *Venkata* (3) that the defendants' unsuccessful attempt to prove himself a Mulgenidar did not exonerate the plaintiff from proving the lawful determination of the Chalgeni holding. The decision of the Judge is right, and we dismiss the second appeal with costs.

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17 M. 221.

[221] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SOBHANADRI APPA RAU (*Plaintiff*), *Petitioner* v.
SRIRAMULU (*Defendant*), *Respondent*.*
[22nd and 26th September, 1893.]

Guardian and ward—Guardian's power to acknowledge a debt due by the minor, when not barred by limitation at the date of the acknowledgment.

A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment. *Chinnayya* v. *Gurunatham* (5 M. 169) followed. *Wajibun* v. *Kadir Buksh* (13 C. 292) disapproved.

[**Diss.**, 20 B. 61 (74); **F.**, 18 M. 456 (457); **R.**, 30 A. 422=5 A.L.J. 375=A.W.N. (1908) 175=4 M.L.T. 49; 35 C. 320 (325)=12 C.W.N. 256=3 M.L.T. 156; 26 M 330 (331); 27 M. 243=14 M.L.J. 84 (86); 34 M. 221 (225)=6 Ind. Cas. 407 =20 M.L.J. 808=8 M.L.T. 105; 6 Ind. Cas. 760=20 M.L.J. 567 (568)=7 M. L.T. 383=(1910) M.W.N 194.]

PETITION under Section 25 of Act IX of 1887 praying the High Court to revise the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in Small Cause Suit No. 368 of 1891.

This was a suit to recover from the defendant (a minor) a sum of money on a bond executed by the mother of the defendant as his guardian in revival of an old debt due to the plaintiff's father, which debt was time-barred at the date of the suit. The Subordinate Judge, relying on *Wajibun* v. *Kadir Buksh* (4) held that the mother had no authority to make a fresh contract and give thereby a fresh cause of action for limitation to the original obligation, and dismissed the suit.

The plaintiff preferred this petition.

Subramanya Ayyar, for petitioner.

Respondent was not represented.

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* Civil Revision Petition No. 456 of 1892

(1) L.R. (1881) 16 Ch. D. 730. (2) 13 C. 248 (254).
(3) 15 B. 414-N. (4) 13 C. 292 (295).

1893 SEP. 26. — APPELLATE CIVIL. — 17 M. 221.

JUDGMENT

This was a suit upon a bond executed by the defendant's mother as his guardian in renewal of an old debt The Subordinate Judge dismissed the suit on the ground that, but for the new bond, the old debt would be barred by limitation at the date of suit, and that a guardian was not competent to make an acknowledgment on behalf of his ward so as to give a fresh start for the period of limitation The decision of the High Court at Calcutta in *Wajibun* v *Kadir Buksh* (1) is not consistent with [222] the principle and the decision of the Full Bench of this Court in *Chinnaya* v. *Gurunatham* (2). According to the last-mentioned decision, the manager of a joint Hindu family, in which there may be minors, has authority to acknowledge a debt, provided that it is not barred at the date of acknowledgment In my opinion such an acknowledgment may often be necessary to obtain an extension of time for payment of minor's debt and thereby prevent imminent presure on the minor's property, and I see no reason to think that it is not an act within the general power of a guardian to do what is either necessary in the interest of the minor or what is manifestly for his benefit Following the principle of the decision of the Full Bench of the Madras High Court, I set aside the decree of the Subordinate Judge and remand the case for disposal on the merits Costs incurred hitherto will abide and follow the result and be provided for in his revised judgment

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17 M. 222=4 M.L.J. 101.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr Justice Best

GANAPATI BHATTA (*Plaintiff*), *Appellant* v BHARATI SWAMI AND OTHERS (*Defendants*), *Respondents*.*

[14th November, 1893 and 7th February, 1894]

Hindu law—Powers of the head of a caste in respect of caste customs—Jurisdiction of the Civil Courts

In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere

A guru, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of caste according to recognised caste customs *The Queen* v *Sankara* (3) and *Murari* v *Suba* (4) cited and followed

[**R.**, 23 B 122 (125), 21 B 13 (22), 33 M 67 (70)=3 Ind Cas 955=19 M L J 714=6 M L T 290, U.B R (Civil) (1892—96) 72 (77), **D.**, 26 B 179 (185)=3 Bom L R 718]

SECOND appeal against the decree of S Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 37 of 1891, affirming the decree of M Mundappa Bangera, District Munsif of Mangalore, in original suit No 245 of 1889

[223] The Lower Courts decreed in favour of the defendants The plaintiff preferred this appeal.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court.

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* Second Appeal No. 1603 of 1892.

(1) 13 C 292 (295) (2) 5 M 169 (3) 6 M 381 (4) 6 B 725.

1893 FEB. 7. — APPELLATE CIVIL. — 17 M. 222=4 M. L. J. 101.

Pattabhirama Ayyar, for appellants.
Ramachandra Rau Saheb, for respondents.

JUDGMENT.

The parties to this appeal are Havik Brahmans, who form a sub-division of the Brahman community in South Canara. First respondent is the head or the ecclesiastical chief of the sub-caste; the second is his parupathyagar or manager; and appellant is a member of the caste subject to the spiritual jurisdiction of first respondent. On the 17th May 1887, first respondent issued against appellant a provisional order of ex-communication and communicated it to the Vaidikas and Grahastas, secular and lay Brahmans of Mangalore. Three caste offences are mentioned in the order. The first is that when the guru went to appellant's division or hobli, appellant neglected to visit him and pay the kanike or fee as other Havik Brahmans did, though he was duly apprised of first respondent's arrival; the second is that when the people of Vittal remonstrated with him against his conduct and advised him to see his guru, he referred to his disapproval of the excommunication of one Sham Bhatta and others of the Bayar village and to his promise to those persons to continue in caste communion with them, and declared that it was not necessary for him either to see the first respondent or to pay to him the arrears of kanike or fee. The third caste offence is that he associated with persons already excommunicated in defiance of first respondent's authority as the chief of his sub-caste. The order proceeds then to state that it shall be in force until appellant attends before first respondent and obtains an order disposing of the matters mentioned therein It purports to be signed by second respondent under the orders of first respondent.

Appellant brought this suit to have it declared that the order passed against him is unjust and invalid on the ground that it was issued without notice to him and that he suffered thereby both in his property and reputation. In defence respondents admitted the order, but alleged that it was only provisional and that it was fully competent to first respondent as the head and chief of his caste to issue such order. The District Munsif considered that first respondent was at liberty to deal with questions relating [224] to caste and religious usages, and that the Civil Courts ought not to interfere to prevent first respondent from correcting caste misconduct. On this view, the District Munsif dismissed the suit with costs; and on appeal the Subordinate Judge confirmed the decision. He observed (i) that the order was provisional in its nature; (ii) that the decisions marked as Exhibits I to III and VI and that reported in *The Queen* v. *Sankara* (1) showed that as guru first respondent had authority to inquire into the misconduct of his disciples and to punish them for caste offences and derelictions. He was also of opinion that appellant's liability to pay kanike or subscription or fee was a caste matter and that appellant had no right to complain unless the fee demanded was unreasonable or extortionate, which it was not in the case before us as evidenced by Exhibit XIV. He found further that due notice was given to appellant, and that if no inquiry was held, it was because of appellant's contumacious conduct in refusing to attend such inquiry. He also remarked that appellant asked but for a declaratory decree in regard to a temporary interdict or an *ad interim* order in respect of certain caste imputations, and that in his judgment this was a case in

(1) 6 M. 381.

which he, in the exercise of the discretion vesting in him under Section 42 of the Specific Relief Act, might properly refuse to pass a merely declaratory decree Hence this second appeal. 1893. FEB 7.

For appellant it is contended that upon the facts found, the decision of the Subordinate Judge is wrong in law, but we are unable to accede to this contention The relation between appellant and first respondent is that of a member and the ecclesiastical chief of his caste Whether the disciple should visit his guru and make his obeisance, whether the former should pay the latter a kanike or fee by virtue of the spiritual relation, and whether the disciple should abstain from intercourse with persons already excommunicated by his guru are matters relating to the autonomy of caste with which, as the head of the caste, first respondent has jurisdiction to deal according to recognized caste custom It was held in *The Queen* v *Sankara* (1) and *Murari* v *Suba* (2) that a guru's jurisdiction extends over such matters This being so, the facts found show that first respondent exercised his jurisdiction *bona fide* It is found that the fee demanded [**226**] was neither unreasonable nor extortionate It is not denied that appellant did violate the duty which he owed to first respondent by refusing to visit him The provisional nature of the order shows that care was taken to see that the punishment by way of excommunication which, as ecclesiastical chief, first respondent was competent to inflict, was not more extensive than was necessary to enforce obedience to caste duties As observed by the Subordinate Judge, if there has been no inquiry, its absence is due to appellant's contumacious refusal to attend for such inquiry In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere

APPELLATE CIVIL.

17 M. 222=4 M. L. J. 101.

The decision of the Courts below is open to no legal objection, and we dismiss this appeal with costs

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17 M. 225=4 M.L.J. 5.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar

SOBHANADRI APPA RAO (*Plaintiff*), *Petitioner* v. CHALAMANNA AND OTHERS (*Defendants*), *Respondents* *

[6th April and 12th September, 1893]

Rent Recovery Act (Madras)—Act VIII of 1865, *Section* 10—*Suit to recover arrears of rent due under a decree given under section* 10—*Limitation Act—Act XV of* 1877, *schedule* II, *Article* 110—*Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable*

In a suit for arrears of rent due under a decree given under Section 10 of the Rent Recovery Act (Madras Act VIII of 1865) the period of limitation in Article 100, Schedule II of the Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i e*, the date of the decree

[**Diss**, 19 M 21 (22), **R.**, 20 M 392 (394), 27 M 143=8 C W.N 162 (165)]

THESE were petitions under Section 25 of Act IX of 1887 praying the High Court to revise the decree of C Rangayya, District Munsif of Bezwada, in Small Cause Suits Nos 502, 503 and 505 to 511 of 1891.

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* Civil Revision Petitions Nos 42 to 50 of 1892

(1) 6 M 381 (2) 6 B 725

1893 SEP. 12. — APPELLATE CIVIL. — 17 M. 225=4 M. L. J. 5.

The facts of the case (petition No. 42 of 1892) which governed the other petitions were as follows.

[226] On the refusal of a tenant to accept a patta tendered by his landlord for fasli 1296, the latter instituted in 1886 a suit to enforce acceptance thereof. The suit was finally decided on 15th May 1888, a decree being given under Section 10 of the Rent Recovery Act modifying the terms of the patta. In the meanwhile the defendant had paid such rent from time to time as he thought he was bound to pay. On 15th May 1891 the landlord instituted the present suit to recover the difference between the rent due according to the amended patta and the amount paid by the defendant previous to the decree. The defendant pleaded that the suit was barred by limitation since it had been brought more than three years after the expiration of the dates upon which the rents should be paid according to the *kistbandi*. The District Munsif decided in favour of the defendant and the plaintiff preferred this petition.

Sundara Ayyar, for petitioner.

Respondents were not represented.

JUDGMENT.

JUDGMENT in Civil Revision Petition No. 42 of 1892.—The plaintiff is a minor zamindar under the care of the Court of Wards and the defendant is his tenant. The present suit was brought on the Small Cause side of the District Munsif's Court of Bezwada to recover the balance of kist due for fasli 1296. It was admitted by both parties that according to the *kistbandi*, rent was payable every year in instalments from October to March of each fasli. The plaintiff's father tendered patta for fasli 1296, but the defendant refused to accept it. Thereupon the plaintiff's father instituted a suit in the Revenue Court to enforce acceptance of the patta and the parties joined issue on the question whether the patta tendered was proper or such as the tenant was bound to accept. It was only in May 1888 that the summary suit instituted in 1886, before the Head Assistant Collector was dealt with by the District Judge on appeal. He held that the patta tendered was not a proper one and passed a decree under Section 10 of Act VIII of 1865. In accordance with the provisions of that section, he declared the terms of the patta which ought to be offered, and passed a judgment ordering the defendant to execute a muchilka in accordance with it. The plaintiff then brought this suit to recover the difference between the rent due according to the patta as amended by the decree and the payments made on account of rent by the defendant previous to the decree. The defendant [227] resisted the claim and pleaded, *inter alia*, that it was barred by limitation. The District Munsif upheld the defendant's contention and dismissed the suit with costs. It is argued in revision that the suit was not barred by limitation and, in support of the contention, reliance is placed on the decisions in *Court of Wards* v. *Darmalinga* (1), *Kullayappa* v. *Lakshmipathi* (2) and *Appayasami* v. *Subba* (3).

As observed by the District Munsif, the petitioner is not entitled to any deduction of time under Sections 14 and 15 of the Limitation Act. The cases contemplated by those sections are those in which a former suit failed from defect of jurisdiction or other cause of a like nature, or the former suit was stayed by injunction or order. In the case before me, the summary suit did not fail but was adjudicated upon. Nor was the cause of

(1) 8 M. 2. (2) 12 M. 467. (3) 13 M. 463.

1893 Sep. 12 — Appellate Civil. — 17 M. 225=4 M. L. J. 5.

action or the relief claimed in the former suit the same as in the present suit The District Munsif is also right in holding that the suit to recover arrears of rent is governed by Article 110 of the Limitation Act, which prescribes three years from the time when the arrears become due. The substantial question, therefore, is when did the arrears become due and whether it was from the date when they should be paid according to the *kistbandi*, or from the date on which the plaintiff was in a position to sue for rent

In *Court of Wards* v *Darmalinga* (1) it was held that the landholder is not bound to tender a patta for acceptance as amended by the decree before suing to enforce the terms thereof, and no question of limitation arose in that suit The point determined in *Kullayappa* v *Lakshmipathi* (2) was that a landlord could not attach the saleable interest of a defaulting tenant under Section 38 of Act VIII of 1865 until the expiry of the current revenue year The decision in *Appayasami* v *Subba* (3) is only an authority for the proposition that the unit for the special rule of limitation prescribed by the Rent Recovery Act, Section 2, for proceedings by the landlord was the aggregate rent in arrears at the end of the fasli This is not a suit falling under Section 2 of Act VIII of 1865, and none of the cases cited appear to me to be in point

The real question, as already observed, is when did the arrears of rent claimed by petitioner become due By Section 7 no suit [228] can be sustained to recover rent until a patta is tendered and accepted or a proper patta is tendered, and the tender of a proper patta is a condition precedent to the contract between the parties becoming actionable It is a contradiction in terms to say that rent is due before the landlord is in a position to sue When the landlord may sue for rent must depend on the terms of the contract in each case, and when the Legislature renders any contract actionable only on the occurrence of a particular event, no obligation can arise till that event occurs By Section 10 the amended patta relates back to the date of the suit brought for the enforcement of acceptance of the patta In cases in which the landlord sues in time to enforce the acceptance of a patta, the landlord is not in a position to sue for rent until the decree passed under Section 10 either amends the patta or declares it to be a proper patta Otherwise a suit to enforce the acceptance of a proper patta may be pending in a Revenue Court for several years, and the claim for rent may be barred before the landlord acquires a right of action

I am therefore of opinion that this suit is not barred I set aside the decree of the District Munsif and remand the case for disposal on the merits The costs hitherto incurred will abide and follow the result and be provided for in the revised judgment

Civil Revision Petitions Nos 43 to 50 follow

(1) 8 M. 2 (2) 12 M 467 (3) 13 M 463

1893 SEP. 25.

APPELLATE CIVIL.

17 M. 228=3 M. L. J. 293.

17 M. 228=3 M.L.J. 293.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SUDARA GOPALAN (*Defendant*), *Petitioner v.* VENKATAVARADA AYYANGAR AND ANOTHER (*Plaintiff and his Representative*); *Respondents.** [22nd and 25th September, 1893.]

Execution sale—Portion of the property sold belonging to a stranger—Civil Procedure Code—Act XIV of 1882, *Section* 313, 315 *and* 316*—Rights of a purchaser in an execution sale*

Where a Court sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by Section 315 of the [229] Civil Procedure Code. The effect of Sections 313, 315 and 316 of the Code is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court sale subject, however, to the condition that the purchaser may recover back his purchase-money when he finds that the judgment-debtor has no saleable interest at all

The implied warranty of title in respect of sales by private contract cannot be extended to Court sales except so far as such extension is justified by the processual law in India, *viz*, by Section 315 of the Civil Procedure Code

Dorab Ally Khan v. *Abdool Azeez* (5 I.A. 116), followed.

[**F.**, 28 C. 235 (238); 37 C 67=10 C.L.J. 558=13 C.W.N. 1080=2 Ind. Cas. 559; 5 L.B.R. 58 (59); **Rel.**, 16 Ind. Cas., 215 (216); **R.**, 23 A. 355 (357); 21 B 424 (448); 35 B 29 (33)=12 Bom. L.R 723=7 Ind. Cas. 955; 15 Bom. L.R 41 (53); **D.**, 12 C.P.L.R. 49 (51).]

PETITION under Section 25 of Act IX of 1887 praying the High Court to revise the decree of P. Narayanasami, Subordinate Judge of Madura (West) in Small Cause Suit No. 950 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court. The Lower Court decreed in favour of the plaintiffs, and the defendant preferred this petition.

Sundara Ayyar, for petitioner.

Bihgiri Ayyangar, for respondent.

JUDGMENT.

The petitioner is the judgment-creditor in original suit No. 25 of 1881 on the file of the Subordinate Court (West) at Madura, and the counter-petitioner is the purchaser at the Court sale held in execution of the decree passed therein against one B. Krishnasami Chetty. The auction sale was held on the 27th July 1885, and it was since found that a portion of the property sold, valued at Rs. 60, belonged to one Velayudam at the date of the sale The counter-petitioner thereupon claimed a refund of the purchase money, and the Subordinate Judge decreed the claim on the Small Cause side. It is contended for the petitioner that as Krishnasamy Chetty had some saleable interest in the property sold, the counter-petitioner is entitled to no refund at all. It is true that in *Kunhamed* v. *Chathu* (1), it was held that where the judgment-debtor had some saleable interest in the property sold the Court had no jurisdiction to make an order under Section 315 for refund of the purchase money or any part thereof, but the question that now arises for determination is

* Civil Revision Petition No. 458 of 1892.

(1) 9 M. 437.

1893. Sep. 25.

APPELLATE CIVIL.

17 M 228 3 M. L. J. 293

whether the purchaser may, in a regular suit, claim a refund in proportion to the extent to which the judgment-debtor had no interest in the property sold With reference to a Sheriff's sale the Privy Council held in *Dorab Ally Khan* v *Abdool Azeez* (1) that in India the vendor's liability to refund the purchase money in respect of a private sale is [**230**] governed by the English law relating to the sale of chattels and that law, as laid down in *Eichholz* v *Bannister* (2), is that there is an implied warranty on the part of the seller that he is the owner of the goods This is in accordance with the law as laid down in Section 55, sub-Section 2 of Act IV of 1882 But in the case before me, the sale was not a sale by private contract, but a sale in *invitum*, and under legal process it must therefore, be governed by rules applicable to execution sales The effect of a Court sale, as stated in Section 316, Code of Civil Procedure, is that "so far as regards the parties to the suit and persons claiming through "or under them, the title to the property sold vests in the purchaser," etc The Court sale then is a sale of the judgment-debtor's interest such it was at the date of the sale according to Section 316 By Section 313, however, the purchaser is enabled to apply to the Court to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court is authorized to make such order as it thinks fit By Section 315 it is provided that when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest) from any person to whom the purchase money has been paid The result of the above-mentioned sections is that what passes to the purchaser at a Court sale is the right, title and interest of the judgment-debtor subject, however, to this condition, *viz*, that the purchaser may recover back his purchase money when he finds that the judgment-debtor had no saleable interest at all The English rule, as stated by Lord St Leonards, is that if a conveyance of real property is actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover back the purchase money either at law or in equity, and referring to that rule as governing all sales by private contract, the Privy Council point out in the case cited above that it is not applicable to a Sheriff's sale under a *fieri facias* in which the sale, as regards the owner of the thing sold, is in *invitum*, and made under colour of legal process They say that a purchaser at a Sheriff's sale has at least very inadequate means of investigating the title of the Judg-[**231**]ment-debtor, all that is sold and brought is the right, title and interest of the judgment-debtor with all its defects, and the Sheriff who sells and executes the bill of sale is never called upon, and, if called upon, would refuse to execute any covenant of title They observed then "it "is perfectly clear that when the property has been sold under a regular "execution and the purchaser is evicted afterwards under a title paramount "to that of the judgment-debtor, he has no remedy either against the "Sheriff or the judgment-debtor" Such being the law of England applicable to Sheriff's sales under a *fieri facias*, the question is whether it is not applicable in India by reason of the fact that there is an implied warranty of title in India as is the case in the sale of chattels in England The decision of the Privy Council seems to me to be an authority for the

(1) 5 I A. 116, (2) 34 L J C B. 105

1893 Sep. 25.

APPELLATE CIVIL.

17 M. 228 = 3 M. L. J. 293.

proposition that the implied warranty of title in respect of sales by private contract cannot be extended to Court sales, except so far as such extension is justified by the processual law in India.

I do not desire to be understood as suggesting that in case of fraud there would be no remedy, but this is not that case. What I hold is that where the Court sale is not vitiated by fraud, the only extent, to which the purchaser can claim relief, is that indicated by Section 315 which recognizes the equity on which *Hitchock* v. *Gidings* (1) was decided, *viz.*, that the sale may be rescinded on the ground of mistake whether there was no saleable interest at all, even after a conveyance has been executed.

It follows, therefore, that the judgment-creditor cannot be treated as if he was the vendor, and the Court sale cannot be treated as if there was an implied warranty of title as in a private sale, except so far as is warranted by the language of Section 315. The decree of the Subordinate Judge is set aside and the suit is dismissed with costs throughout.

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17 M. 232.

[232] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PADAMMAH AND OTHERS (*Defendants Nos. 2 to 7*) *Appellants* v. THEMANA AMMAH AND OTHERS (*Plaintiffs*), *Respondents.**
[21st November, 1893 and 19th February, 1894.]

Specific Relief Act—Act I of 1877, Section 42—Consequential relief—Suit by a member of a tarwad for a decree declaratory of the invalidity of a kanom granted to other members by the karnavan of the tarwad.

Where a kanom of tarwad property is granted by the karnavan to members of the tarwad and the property in question remains in the possession of the karnavan on behalf of the tarwad, all that is necessary for a junior member to do in order to prevent the possession becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the cause of adverse possession is invalid. But if the kanom is granted to a stranger to the family, who is in possession, possession must then be sought for as relief consequent on the declaration.

An attornment of tenants to the kanomdars does not operate as a transfer of possession from the tarwad to the kanomdars. *Subramanyan* v. *Paramaswaran* (2) followed; and *Bikutti* v. *Kalendan* (3), *Abdulkadar* v. *Mahomed* (4) and *Narayana* v. *Shankunni* (5) distinguished.

17 Ind. Cas. 987 (988)=23 M.L.J. 652=12 M.L.T. 579.]

SECOND appeal against the decree of E. K. Krishnan, Subordinate [Judg]e of South Malabar, in appeal suit No. 562 of 1881, confirming the [decre]e of O. Chandu Menon, Principal District Munsif of Calicut, in [origi]nal suit No. 670 of 1890.

The first defendant was the karanavati of a tarwad. On the 4th [Augu]st 1890 she granted a kanom of Rs. 479-10-0 in respect of 45 parcels [of la]nd belonging to the tarwad in favour of her younger daughters, second [and] third defendants, and her grand-daughter, fourth defendant.

The plaintiffs, who were the first defendant's eldest daughter and her [child]ren, contended that the kanom was not granted for proper purposes of the tarwad and sought for a declaration that it was null and void as

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* Second Appeal No. 422 of 1893.

(1) 4 Price, 135. (2) 11 M. 116. (3) 14 M. 267.
(4) 15 M. 15. (5) 15 M. 255.

against the tarwad The suit was resisted by the defendants who contended that the grant was a proper and [233] *bona fide* one, and that the suit was one in which consequential relief in the shape of possession of the properties comprised in the kanom grant ought to have been sought and the Court fee on the value of such properties paid This point was decided by the lower Courts against the defendants, the Subordinate Judge holding that the possession of the properties was in the tarwad, of which the management vested in the first defendant as karnavati, that the plaintiffs had no objection to her possession as karnavati; and that if the second to fourth defendants had, since the grant of the kanom complained of, obtained attornment from tenants, it was an attornment on a title viciously acquired

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The defendants preferred this appeal

Sankara Menon, for appellants

Sundara Ayyar, for respondents

JUDGMENT (PRELIMINARY)

This was a suit to have it declared that a kanom granted by the first defendant to second and third defendants was not binding on the plaintiffs' tarwad The first defendant, since deceased, was the karnavati of the tarwad and both appellants and respondents were her anandravars It was contended for defendants, *inter alia*, that a suit for merely a declaratory decree could not be maintained and both the Courts below disallowed the contention The District Munsif observed that as the first defendant was karnavati, the plaintiffs were not entitled to possession and that possession really remained where it was before the demise on kanom The Subordinate Judge found that possession of the properties demised on kanom was held by the first defendant on behalf of the tarwad, that the plaintiffs had no objection to her possession, and that if second and third defendants obtained attornment from tarwad tenants subsequent to the kanom, it was inoperative as an attornment acquired ' on a vicious title ' The contention on appellants' behalf is that such attornment operates as a transfer of possession from the tarwad to the kanomdars and that the plaintiffs ought to have sued to recover possession, and not merely for a declaration, under Section 42 of Specific Relief Act, but we do not consider that this view can be supported So long as the property continues in the possession of the karnavan as a member of the tarwad, it is *prima facie* that of the tarwad, and all that is necessary for a junior member to do in order to prevent its becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the [234] cause of adverse possession is invalid When the kanom is granted to a stranger to the family and he is in possession, the doctrine of unity of possession is not applicable and possession must then be sued for as relief consequent on the declaration Our attention is called to the decisions in *Subramanyan* v *Parameswaran* (1), *Bikuthti* v *Kalendan* (2), *Abdulkadar* v *Mahomed* (3), and *Narayana* v *Shankunni* (4) It was held in *Subramanyan* v *Parameswaran* (1) that where a title is in dispute, there may be third parties who are honestly in doubt and ready to acknowledge the title of either claimant, or who, having attorned to one, may be ready to acknowledge the person declared by the Court to have the title, and that in such a case, a suit for a declaratory decree will lie The decision is against the appellants In *Bikutti* v *Kalendan* (2), it was held that according to the plaintiffs' case, the land being in the possession of

(1) 11 M 116 (2) 14 M 267 (3) 15 M 15. (4) 15 M 255

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strangers, it was clearly the right of the plaintiff, as of the other members of the tarwad, to have the land restored to the possession of the tarwad. The decision in *Abdulkadar* v. *Mahomed* (1) proceeded on the ground that the office of Sheik and its emoluments were in the possession of the defendant and the doctrine of unity of possession had no application. Nor is the decision in *Narayana* v. *Shankunni* (2) in point.

Another contention on appellants' behalf is that the consideration for the kanom was in part-payment of tarwad debts and our attention is drawn in this connection to Exhibit IX and other documents. The Subordinate Judge observes in his judgment that if the appellants have paid any premium for the kanom grant, they may have a lien to that extent on the property Though respondents may be entitled to have the kanom declared not binding on the tarwad, appellants are entitled to have any part of the consideration, which benefited the tarwad, or extinguished any of its debts, declared a charge in their favour. The Subordinate Judge has not come to any finding on this point. He is directed to try the following issue, *viz.*, whether any, and what, debts due by the tarwad were discharged by the kanomdars from their private funds?

In compliance with the above order the Subordinate Judge [**235**] having returned a finding to the effect that tarwad debts had been discharged by the kanomdars to the extent of Rs. 695 from their private funds, the High Court delivered judgment as follows:—

JUDGMENT (FINAL)

The finding being one of fact must be accepted. We, therefore, modify the decree of the Courts below by declaring the kanom by first defendant to defendants 2 to 4 to be invalid, but that these defendants have a charge on the property to the extent of Rs. 695 with interest thereon at 6 per cent. per annum from the several dates of payment particularized in the finding.

Plaintiffs must pay the costs of the defendants 2 to 4 on the issue sent for trial. In other respects, the appeal is dismissed with costs.

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17 M. 235 (F.B.).

APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr Justice Muttusami Ayyar, and Mr. Justice Shephard.

THAPITA PETER (*Plaintiff*), *Appellant* v. THAPITA LAKSHMI AND ANOTHER (*Defendants*), *Respondents*.*
[23rd November, 1893 and 26th January, 1894.]

Divorce—Divorce Act IV of 1869, Section 7—Nature of the marriages contemplated by the Act—Monogamous marriage.

The petitioner and his wife married according to the rites of the Hindu religion The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage:

Held that, having regard to Section 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one

*Referred (Matrimonial) Case No. 5 of 1893

(1) 15 M. 15. (2) 15 M. 255.

woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one *Hyde* v *Hyde* (1) and *Brinkley* v *Attorney-General* (2) cited and followed *Gobardhan Dass* v *Jasadamoni Dassi* (3) dissented from

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FULL BENCH.

17 M 235 (F.B.)

[F., 8 Bom L.R 856 (857); R., 15 Bom L R 593 (598)]

CASE referred under Section 17, Act IV of 1869, by G T Mackenzie, District Judge of Kistna, for confirmation of his decree in original [236] suit No 1 of 1893 declaring the marriage of the plaintiff with defendant No 1 to be dissolved, subject to confirmation by the High Court

The facts of the case appear sufficiently for the purposes of this report from the judgments delivered by the High Court

Parties were not represented

JUDGMENT

COLLINS, C J —Thapita Peter brought a suit against Thapita Lakshmi, his wife, alleging her adultery with Lunkapalli Gauth, and praying, therefore, that his marriage may be dissolved The District Judge of Kistna granted a decree dissolving the marriage under the provisions of Act IV of 1869, and the decree now comes before the High Court for confirmation under Section 17 of Act IV of 1869

The peitioner and his wife were married according to the rites of the Hindu religion in 1879, petitioner and his wife being Hindus at that time About a year after the marriage the petitioner's wife left him and has since been living in adultery with the second respondent In 1882 the petitioner became a Christian, and about 1890 his wife and the second respondent also became Christians The question to be decided is—can the Courts of this country pass a decree dissolving his marriage under Act IV of 1869

Section 1 of the Act enables relief to be granted where the petitioner professes the Christian religion

Section 7 directs that the Courts in India shall act and give relief in all suits and proceedings hereunder on principles and rules which, in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief

Divorce is unknown to the Hindu law, but it is clear that if Act IV of 1869 was intended to apply to Hindu marriages, the petitioner would be entitled to relief Act XXI of 1866 has no application to this case That Act provides a relief from the marriage tie when one of the parties becomes a Christian, the other still remaining a Hindu

A Hindu marriage is not a monogamous one The man may lawfully be the husband of many wives at the same time It is therefore a ceremony inconsistent with marriage as understood in Christendom that the husband should have more than one wife If the Act IV of 1869 applies to Hindu marriages, a case may [237] arise where a Hindu with more wives than one becomes a Christian and his wives also embrace Christianity. In that case could one of the wives sue her husband for a divorce because he continues to cohabit with one or more of his other wives, as the conversion of the parties to Christianity would not dissolve or make void the husband's previous marriages, or could the Christian husband

(1) L R 1 P. & D 130 (2) L R 15 P D 76. (3) 18 C 252

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sue for a divorce from one of his wives on the ground that she had committed adultery.

The point to be decided is not without difficulty, but I think that if marriages celebrated according to Hindu rites were intended to be within the scope of the Act, express provision would have been made to meet the difficulties that must arise owing to the fact that the Hindu marriage is not a monogamous one. There are two English cases which serve to illustrate in what cases the English Divorce Court will give relief. In *Brinkley* v. *Attorney-General* (1), a British subject married a Japanese woman in Japan according to the forms required by the law of that country, and it was proved that by such a marriage the husband was precluded from marrying any other woman during the subsistence of the marriage. A declaration was granted by the President of the Probate Division declaring (under 21 and 22 Vic., Cap. 93) that such marriage was a valid one. In the judgment the President says. "marriage must be that of "one man and one woman to the exclusion of all others. Throughout "the judgments that have been given on this subject the phrase 'Christian "marriage' 'marriage in Christendom' or some equivalent phrase has "been used· that has only been for convenience to express the idea. "But the idea that was to be expressed was this that the only marriage "recognized in Christian countries and in Christendom is the marriage "of the exclusive kind mentioned."

In *Hyde* v. *Hyde* (2), the petitioner, an English subject, married in Utah in the United States of America a Miss Hawkins according to the rites of the Mormons. At the time of the celebration of the marriage, polygamy was a part of the Mormon doctrine and was the common custom in Utah. The marriage was a valid marriage according to the *lex loci* and polygamy was then lawful in Utah. The petitioner and his wife were both single and the petitioner had never taken a second wife. The petitioner [238] sometime after the marriage renounced Mormonism, was excommunicated, and his wife declared free to marry again. The wife did marry again and the petitioner then petitioned the Divorce Court for a dissolution of his marriage on account of his wife's adultery. The counsel for the petitioner argued, *inter alia*, that this was not a polygamous marriage, for both the parties were single at the time when it was contracted; but the Judge Ordinary observed that it would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage by an English Court, and held that marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

By Section 7 of Act IV of 1869 the High Court and District Courts *shall* act and give relief on principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief. It is clear to my mind that the Divorce Court would not grant the relief the petitioner prays for, on the ground that the marriage being a polygamous one cannot be recognized as a marriage by that Court; and, being also of opinion that Act IV of 1869 does not contemplate relief in cases where the parties have been married under the rites and ceremonies of Hindu law, I hold that the District Court had no jurisdiction to entertain this suit, and I would dismiss it. I am aware that the Judges of the Calcutta High Court have arrived at a different conclusion; (see *Gobardhan Dass* v. *Jasadamoni Dassi* (3). Section 7 of Act IV of 1869 does

(1) L.R. 15 P.D. 76. (2) L.R. 1 P. & D. 130. (3) 18 C. 252.

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not seem to have been specially brought to the notice of the Court, as the judgment is silent upon the principles and rules on which the Courts shall give relief. However, be that as it may, I am unable, with the greatest respect to the learned Judges, to agree with them, and therefore decline to follow the case in *Gobardhan Dass* v *Jasadamoni Dassi* (1)

MUTTUSAMI AYYAR, J —The question which it is necessary to determine in this suit is whether the plaintiff is entitled to a decree for divorce on the ground of his wife's adultery under Act IV of 1869. The facts which give rise to this question are shortly these. The plaintiff was born in 1862. In 1879 he married the first defendant by Hindu rites, both being then Hindus by religion. In 1880 the wife left her husband and commenced to live in [239] adultery with the second defendant, to whom she has since borne four children. In 1882 the plaintiff embraced Christianity, and about two years prior to this suit, which was brought in 1893, the defendants also became Christians. After her conversion to Christianity, the first defendant continued to live with the second defendant and repeat her adultery with him till date of suit. Upon these facts, it is clear that the plaintiff would be entitled to a decree for divorce if Act IV of 1869 applied to this case. The real question is whether the Act is applicable to a Hindu marriage after both parties to such marriage have become Christians.

In connection with a Hindu marriage, there are several legal incidents as to which no doubt can possibly exist. The first is that such marriage is in its nature *not* monogamous, and is not the voluntary union for life of one man with one woman to the exclusion of all others. It is true that as regards the Hindu wife, her union with her husband is a voluntary union for her life with one man to the exclusion of all others, but the Hindu husband may marry several wives at one and the same time, or may marry two or more wives during the lifetime of the first wife. The real point for consideration, therefore, is whether the Act is applicable to a Hindu marriage.

Another matter as to which there is also no doubt is that conversion to Christianity does not dissolve the prior Hindu marriage, and that the latter continues to be valid even after the parties to it become Christians for many purposes. So it was held in *Administrator-General of Madras* v *Anandachari* (2) and in other cases to which it is hardly necessary to refer. Act XXI of 1866 is framed on the view that a marriage, though contracted by Hindu rites, is binding upon the parties to it even after they become Christians, and prescribes a procedure whereby a decree for dissolution of such marriage may be obtained in certain cases. That Act is applicable to cases in which the husband or the wife continues to be a Hindu by religion whilst the other has become a Christian.

It was further held in *Perianayakam* v *Pottukanni* (3), that a pariah who was converted to Christianity was not entitled to a decree for divorce on the ground of adultery committed by his wife before his conversion, and that the Court had no jurisdiction to entertain his petition under Act IV of 1869. The ground of [240] decision was that the Act applied only to Christian marriages. Having regard to the decision in *Brinkley* v *Attorney-General* (4) the expression 'Christian marriages' must be taken to convey the idea, *not* that the parties must profess Christianity, but that the marriage must be of a kind recognized in Christian countries, *viz* , that the marriage must be that of one man and

(1) 18 C. 252. (2) 9 M 466 (3) 14 M 382 (4) L R 15 P D 76.

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one woman for life to the exclusion of all others. That was a case in which the petitioner was a British subject with an Irish domicile of origin. When he temporarily resided in Japan, he married a Japanese woman in Japan according to the forms required by the law of that country. It was proved in that case that according to the law of Japan, it was a valid marriage, and by that law the petitioner was also precluded from marrying any other woman during the subsistence of that marriage. The learned Judge recognized the Japanese marriage as valid under the Legitimacy Declaration Act (21 and 22 Vic., cap. 93) and explained the ground of decision in these terms: "This case is clear from the difficulties which "arose in the Mormon case and in the South African case, because in both "these cases there was an attempt to establish as a valid marriage a "marriage with another person than the first spouse. The principle laid "down by these cases is that a marriage which is not that of one man "and one woman to the exclusion of all others, though it may pass by "the name of marriage, is not the status which the English law con-"templates when dealing with the subject of marriage." But in this case, it has been proved by the law of Japan, "marriage does involve this idea, "*viz.*, that one man unites himself to one woman to the exclusion of all "others. Therefore, though throughout the judgments which have been "given on the subject, the phrase Christian marriage, or marriage in "Christendom or some equivalent expression has been used, that has "been used, only for the sake of convenience, and the idea which has to "be expressed was this—that the only marriage recognized in Christian "countries or in Christendom is the marriage of the exclusive kind." This decision is clear authority on the one hand for construing the expression 'Christian marriage' used in *Perianayakam* v. *Pottukanni* (1) in the sense indicated above, and on the other, for the opinion that the Court for Divorce and Matrimonial Causes in England gives relief in such causes subject to two conditions, *viz.*, [**241**] that the marriage is valid according to the *lex loci*, and that the idea of the union of one man and one woman to the exclusion of others is present in it, as in marriages between persons professing the Christian religion and thereby implies the status contemplated by the English law whilst dealing with the subject of marriage. Turning to the case before us, I do not think that the Act is applicable to it. In a Hindu marriage the idea of the exclusive union of one man and one woman for life is not present as in a marriage recognized by the Court for Divorce and Matrimonial Causes in England, and Section 7 of Act IV of 1869 directs that we should give relief under Act IV of 1869 on principles and rules which may be conformable to the principles and rules by which that Court gives relief. The preamble of the Act states that it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and the second paragraph of Section 2 declares that nothing herein contained shall authorize any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion. These provisions render it probable that the marriage which the Act purported to deal with was marriage founded on the Christian principle. Again in Section 2, Clause 8, marriage with another woman is stated to mean marriage of any person being married during the life of the former wife, and it is provided by Section 18 that a marriage may be declared null and void on the ground, *inter alia*, that the former wife was living at the time of the marriage and that the marriage with the former wife was then in force.

(1) 14 M. 382.

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Take for instance the case of a Hindu with two or more wives becoming Christians, and suing under the Act to have it declared that all his marriages but one are null and void Are we to pass a decision in his favour? If so, which of his several marriages is to be declared null, and if we are to declare all marriages except the first null and void, are we not acting in contravention of the rule that conversion to Christianity does not dissolve prior marriages valid by the *lex loci*? If the legislature had intended to bring Hindu marriages within the scope of the Act, they would probably have inserted express provisions relating to questions which arise from their polygamous character. It is true that the plaintiff has married only one wife, though whilst a Hindu he was at liberty to have married several wives at the same time, and it may be suggested that the particular Hindu marriage now before us may be treated as monogamous in [**242**] fact, entitling the plaintiff to the relief claimed There are two objections to the adoption of this suggestion The first is that what we have to consider is, the status consequent on a marriage as regulated by the *lex loci* or the legal conception of the marriage, and *not* whether the plaintiff in a given case has in fact married one wife or several wives Another objection is that the suggestion is not the natural result of interpretation which can be put on the Act, though it may form an appropriate subject of legislation I do not see my way to hold that Hindu marriages are marriages contemplated by the Act

As for the argument that it is hard that the legislature should have intended to place Hindu husbands who become Christians at a disadvantage, I am not prepared to attach much weight to it Divorce affects the wife as well as the husband, and no such thing as divorce is known to the Hindu law Thus wives other than the *first* might justly complain if their marriages were declared invalid by reason of the conversion as polygamous and their intercourse with their husbands characterised as adulterous, since divorce was not in their contemplation as a possible incident of their marriages when they were contracted. Possibly on this ground the legislature did not intend to include such marriages in the Act However this may be, I am aware of no decided case in India which is on all fours with this case except the one reported in *Gobardhan Dass* v. *Jasadamoni Dassi* (1), wherein the difficulties that arise from considering the Act to be applicable to a marriage such as the one before us are not considered and explained The point decided in the matter of *Ram Kumari* (2) is that a Hindu wife who first embraces Mahomedanism and then marries a Mahomedan husband without notice to her Hindu husband is guilty of bigamy, and it is not therefore a case in point Relying, therefore, on the English decision already cited and on the construction of Act IV of 1869, I hold that the Act is not applicable to Hindu marriages

SHEPHARD, J —This is a suit by the husband for the divorce of his wife on the ground of her adultery At the date of their marriage the parties were Hindus, and the Judge finds that the marriage was solemnized according to Hindu custom Since that date both husband and wife have become Christians

[**243**] The question is whether the marriage being a marriage of Hindus according to the Hindu rites is of such a character as to entitle the husband to a decree of dissolution of it under the provisions of Act IV of 1869.

(1) 18 C. 252 (2) 18 C. 264

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The authorities are conflicting: on the one hand, the decision of the High Court of Bengal, *Gobardhan Dass* v. *Jasadamoni Dassi* (1); on the other hand, a decision of the North-West Provinces High Court, *Moola* v. *Nundy* (2), and one of this Court in which I took part. The facts in this latter case differ materially from those with which we have now to deal.

The Act distinctly requires that any person seeking for relief under it shall, at the time when his or her petition is presented, profess the Christian religion. The Act does not require in terms that the parties or either of them shall have been Christians at the time of the solemnization of the marriage. There are provisions in the Act which presupposes Christianity as the religion of the parties at the time of the marriage, but it cannot be said that adherence to that religion at that time is made a condition precedent to the obtaining of relief under the Act. It by no means follows that the provisions of the Act can be made applicable to any marriage between non-Christians, although it may be a marriage which, according to the law governing them, is valid and legal. In applying the provisions of the Act, Section 7 directs that the Court shall act and give relief on principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

In my opinion, the direction given in this Section has to be kept in view by the Court when considering whether a given marriage should be recognized as such for the purposes of the Act. The question then is whether on a petition for divorce by the husband a marriage of Hindus according to Hindu ritual could be recognized by the English Divorce Court Now, in order to satisfy the English Divorce Court, while it is not necessary to prove that the marriage was celebrated with any specifically Christian ceremonies, or even that both the parties were Christians, it is necessary to show that the union was a union for life of one man with one woman to the exclusion of others. That is what is meant by a [244] Christian marriage or a marriage in Christendom. See *Hyde* v. *Hyde* (3) and *Brinkley* v. *Attorney-General* (4).

This definition of marriage clearly excludes from the category of marriage as understood for the purposes of the Divorce Court alliances such as the one which took place between the parties to the present suit, for according to Hindu law and custom, by which at the time they were governed, it was permissible to the husband to take a second wife. As far as he was concerned the marriage did not possess that character of exclusiveness which the law of Christendom presupposes in the institution of marriage.

It may be suggested that although the husband might, as a Hindu, have contracted a second marriage, he did not in fact do so and could not lawfully have done so after he became a Christian. It may be said that in consequence of the conversion of the parties to Christianity the marriage has come to acquire the necessary character of exclusiveness which it did not possess before.

Similar arguments were used in the arguments in *Hyde* v. *Hyde* (3) and considered by Lord Penzance. It was proved in that case that the petitioner's marriage in Utah would, if valid in Utah, be recognized as valid by the Supreme Court of the United States, and it had been

(1) 18 C. 252. (2) 4 N.W.P. 109
(3) L.R. 1 P. & D. 130. (4) L.R. 15 P.D. 76.

argued that the Matrimonial law of England might properly be applied to the first of a series of Mormon marriages Lord Penzance deals with this argument and points out the inconsistencies that might result if it were adopted

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In the present case it is true that the petitioner had married only one wife Let it be supposed, however, that either when he married the respondent he already had a wife living, or that after so marrying her he had taken a second wife

In the first case there can be no doubt that the marriage of the respondent could not be recognized, at least for the purposes of the Divorce Act, whether or not the first wife were still alive when the suit was brought

Nor, it is conceived, could the second wife come into Court to ask that her marriage be declared void on the ground that her husband's former wife was alive at the date of the marriage for Section 19 of the Act relates to cases in which the marriage is void *ab initio*, and in the case supposed the marriage would not have been so void In the other case supposed, the first wife, if she is [245] to be deemed the legal wife for all the purposes of the Act, would under Section 10 be entitled to treat her husband's second marriage as bigamous and on the strength of it to seek dissolution of her marriage on the ground of a connection which at the time it was formed, was perfectly lawful

No doubt it is true that persons who have married as Hindus and subsequently become Christians subject themselves to the law prevailing among Christians, so that the husband may be convicted of bigamy if he goes through a form of marriage with another woman In re *Millard* (1) In the matter of *Ram Kumari* (2), see minute of Sir H Maine Ceasing to be a Hindu or Mahomedan as the case may be and becoming a Christian he sacrifices the liberty which heretofore he had according to the law of his birth—certainly the liberty of taking another wife and presumably the liberty of divorce, which if he had been Mahomedan, the Mahomedan law gave him See *Lopez* v *Lopez* (3)

It does not, however, follow that the convert is, in compensation for his sacrifice, entitled to a relief under the Act or to any divorce except under the provisions of Act XXI of 1866

Any argument founded on the circumstance that the Hindu or Mahomedan marriage is, for some purposes, recognized after the parties became Christians really proves too much, for I conceive that the second of two wives married at the same time would, if she survived the first and became a Christian with her husband, be recognized as his lawful wife and her children would be legitimate, see Mayne's Hindu Law, para 55 What would become of the second wife if both being alive, either or both of them became Christians with the husband it would be difficult to say Assuming that the 2nd wife only survived, I apprehend, as already observed, that there is no doubt that her marriage contracted in the lifetime of another wife would not be recognized for the purposes of the Act

Again if a marriage, according to the Hindu custom, may be dissolved under the Act, it may also be declared null and void for any of the reasons mentioned in Section 19 One of the reasons there specified is that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity Those [246] words, which, excepting the bracketed words, are to be found in the Marriage Act,

(1) 10 M 218. (2) 18 C 264 (269). (3) 12 C 706

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Section 48, are words habitually used in connection with Christian marriages, although it may be correct to hold that they do not involve the application of English rules to all Christians; see *Lopez* v. *Lopez* (1). If it be right to hold that the liberty of choice possessed by Hindus adopting Christianity extends to the law relating to marriage (*Lopez* v. *Lopez* (1),) the Court might have to apply either the rules of Hindu law or the English rules of prohibited degrees in determining whether a marriage was valid or not. It would be a strange consequence if the Court constituted to administer the law in matters matrimonial to persons professing the Christian religion had to declare void a marriage which according to Christian usage was valid or to declare void a marriage which was valid according to the law governing the parties at the time of its solemnization.

The origin of the jurisdiction must not be lost sight of. As the English Divorce Court exercises the jurisdiction originally vested in the Ecclesiastical Court, so the jurisdiction exercised by the Supreme Court sitting on the ecclesiastical side is extended under certain conditions to the District Courts. See *Lopez* v. *Lopez* (1). There is no reason whatever for holding that this matrimonial jurisdiction, for which a new forum was thus created, was intended to be enlarged, so as to include marriages which would not come within the scope of the English Act. See *Ardaser Cursetjee* v. *Perozeboye* (2) as to the law before the Act.

In the present case, there being no evidence of any marriage except a marriage according to Hindu rites, I am of opinion that the Act does not apply, and that the District Court had no jurisdiction to decree dissolution.

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17 M. 247=4 M.L.J. 73.

[247] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SRINIVASA THATHACHAR (*Defendant*), *Appellant* v. RAMA AYYAN AND ANOTHER (*Plaintiff and Defendant No.* 85), *Respondents* *
[23rd March and 7th September, 1893.]

Revenue Recovery Act—(Madras) Act II of 1864, Section 35—Payment of arrears of village revenue by the assignee of a mortgagee of portion of the village property—'Defaulter'—Registered and real owners.

The plaintiff was assignee of a mortgagee of 38⅛th pangus in a village consisting of 51⅛th pangus Having sued the executants of the mortgage and obtained a decree in 1885, he in 1887 and 1888, paid certain arrears of revenue due from the village, in order to prevent its sale. In 1888, the plaintiff's 38⅛th pangus were sold in execution of the decree of 1885 to the 85th defendant subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos 1 to 84 personally the amount of these arrears:

Held, that the 85th defendant, as also the 38⅛th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under Section 35 of the Revenue Recovery Act;

that not only registered proprietors but real owners and their holdings may be treated as defaulters within the meaning of Section 35 of that Act. *Seshagiri* v. *Pichu*, 11 M. 452 followed.

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* Appeal No. 151 of 1891.

(1) 12 C. 706. (2) 10 Moor P. C. 375.

[R. 34 M 520 (525)=9 Ind Cas 643=21 M L J 662=9 M L T 367=(1911) 1 M W N 257, 19 M L J. 275 (277)=4 M L T 469]

1893 SEP. 7.

APPELLATE CIVIL

17 M. 247=4 M. L. J. 73.

APPEAL against the decree of L A Campbell District Judge of Salem, in original suit No 9 of 1890

The District Judge decreed in favour of the plaintiff and the 85th defendant, and dismissed the suit as against certain other defendants The remaining defendants preferred this appeal

The facts of the case appear sufficiently for the purpose of this report from the judgment delivered by the High Court

Pattabhirama Ayyar, for appellants

Govinda Menon, for respondent No. 2

Parthasaradhi Ayyangar and *Tiruvenkatachariar*, for respondent No 1

JUDGMENT

BEST, J —The following are the facts of the case The plaintiff (now respondent) was assignee of the mortgagee of 38⅛th [248] out of 51⅛th pangus of the agraharam of Byrojee effected by some of the pangudars on 8th January 1881 for a sum of Rs 8,245-7-5, borrowed to pay off the assessment, &c , due on the whole agraharam As such assignee plaintiff brought a suit (original suit No 2 of 1884) against the executants of the mortgage and obtained a decree on 22nd June 1885 While the above suit was pending, the agraharam was again advertised for sale for arrears of revenue, &c , which plaintiff paid off and instituted original suit No 2 of 1886 for recovery of the amount so paid and obtained a decree for the same with interest on 27th August 1888 While original suit No 2 of 1886 was pending arrears accrued for subsequent faslis, and to prevent the sale of the properties for such arrears plaintiff paid a sum of Rs 3,618-2-7 on the 13th April 1887 and a further sum of Rs. 1,707-7-0 on the 4th May 1888 In execution of the decree in original suit No 2 of 1884, the 38⅛th pangus were sold on 24th September 1888, when 85th defendant purchased the same for Rs 11,000 The suit, out of which the present appeal has arisen, was instituted by plaintiff in 1890 to recover from the entire agraharam and from defendants 1 to 84 personally the amounts paid in 1887 and 1888, with interest, costs and further interest

The District Judge has found some of the defendants to have no interest in the agraharam and therefore to be not liable, but against the rest, except the 85th defendant, he has given a personal dercee He has also exempted from liability for the debt the 38⅛th pangus purchased by 85th defendant at the sale in execution of the decree in original suit No 2 of 1884, but has made the debt a charge on the remaining 13 pangus Hence this appeal by defendants 1, 4, 5, 16, 17, 58 to 62, 66, 69, 74, 78 and 81

The first objection urged on behalf of the appellants is that in purchasing the 38⅛th pangus at the sale in execution of the decree in original suit No 2 of 1884, 85th defendant was merely a benamidar for the plaintiff, and that the latter being the real purchaser, the charge is extinguished under Section 101 of the Transfer of Property Act On the issue whether the plaintiff was the real purchaser of the 38⅛th shares, the District Judge's finding is that, though there are reasonable grounds for the defendants suspecting such to be the case, they have failed to prove it Such also is our finding after a careful consideration of the [249]

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evidence on both sides. It is, therefore, unnecessary to consider the question raised with reference to Section 101 of the Transfer of Property Act.

Other contentions on behalf of the appellants are (i) that none but registered holders of shares in the agraharam can be held personally liable for the claim of the plaintiffs, and (ii) that the District Judge has erred in exonerating from such liability the 85th defendant and the 38⅛th shares of the village purchased in his name.

The District Judge's finding is that the 38⅛th shares were sold subject to these encumbrances, but that nevertheless the shares must be held to be not liable for the same. His reasons for this finding are as follows:—A payment made by a mortgagee or other incumbrancer to save lands from sale for arrears of assessment is declared by Section 35 of Act II of 1864 (Madras) to be a charge upon the land which should "only take priority "over other charges according to the date at which the payment was "made." Plaintiff is, therefore, *qua* such payment in the position of a mortgagee, and the decision in *Shaik Abdulla Saiba* v. *Haji Abdulla* (1) is authority for the position that what is sold by the Court in such cases is the right, title, and interest of the mortgagor as it stood at the date of the mortgage, and such being the case, it cannot be affected by the statement in the sale proclamation that the auction sale was subject to such incumbrances. It is difficult to follow the Judge's reasoning. It being found as a fact that the 38⅛th shares were sold subject to the charge, there seems no reason why the purchaser at such sale should be allowed to hold the same free of the charge.

As the arrears were due on these 38⅛th shares as well, there is no reason whatever for exonerating them from liability for a proportionate share of the charge in any case

As to the contention that only registered owners can be treated as defaulters within the meaning of Section 25 of the Revenue Recovery Act, and consequently, the Lower Court's decree is bad in so far as it makes defendants who are not registered holders also liable for the money due to plaintiff, the answer is to be found in *Seshagiri* v. *Pichu* (2). As there pointed out, the right which the Government has to proceed against the registered pro-[**250**] prietor in no way alters the liability of the real owner or of his holding for the arrears of revenue. Registered holders and their property are declared liable at the option of Government, in order that Government may not be hampered in the collection of revenue by being compelled to hold complicated inquiries as to real ownership. But, nevertheless, the revenue is a debt due from the real defaulter and a charge on the holding.

The remaining question is whether the decree is correct in so far as it makes the defaulters jointly and severally liable. As the entire holding was liable for the revenue to Government, it must, I think, be held to be similarly liable to the plaintiff who has, by payment of the arrears, acquired a charge upon the land under the provisions of Section 35 of the Revenue Recovery Act.

As to the liability of defendants 58 to 60 (appellants Nos. 6 to 8) no issue appears to have been asked for in the Lower Court.

The result is that the 85th defendant, as also the 38⅛th shares purchased by him, must be held liable for the decree debt conjointly with the remaining shares and the other defendants. The Lower Court's decree will be modified accordingly.

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(1) 5 B. 8 (13). (2) 11 M 452.

The appellants must pay the 1st respondent's (plaintiff's) costs of this appeal They are entitled to their costs on the 38¼th shares from second respondent (85th defendant) and must themselves bear the rest of their costs

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As to the memorandum of objections, I find the Judge has given no reasons for disallowing interest subsequent to the date of the suit

I am of opinion that plaintiff is entitled to interest at 12 per cent per annum till the date of decree, and at 6 per cent per annum from that date to date of payment on the amount decreed, including costs

The decree will be further modified accordingly.

MUTTUSAMI AYYAR, J —I concur

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17 M. 251.

[251] APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt, Chief Justice, and Mr Justice Davies

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PERUMAL UDAYAR AND ANOTHER (*Plaintiffs*), *Appellants* v KRISHNAMA CHETTYAR AND ANOTHER (*Defendants*), *Respondents* *
[29th January and 6th March, 1894]

Revenue Recovery Act—Madras Act II of 1864—Liability of purchaser at a sale, who enters into possession of the purchased property, to account for mesne profits to the person in whose favour the decree is subsequently reversed.

A purchaser of property at a sale under the Revenue Recovery Act, who enters into possession thereof, is in rightful possession until the decree is set aside He is not, therefore, a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession; but he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property *Dakshina Mohun Roy Chowdhry* v *Saroda Mohun Roy Chowdhry* (1) cited and followed

APPEAL against the decree of P Dorasawmy Ayyar, Subordinate Judge of Salem, in original suit No 13 of 1891

The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court

The Subordinate Judge dismissed the suit, and the plaintiffs preferred this appeal

The Advocate-General (Hon Mr *Spring Branson*), Mr *Norton* and *Subramanya Ayyar*, for appellants

Bhashyam Ayyangar and *Desikachariar*, for respondents

JUDGMENT

The defendants were in possession of the mittah of Sundamangalam for the faslis 1293 to 1298 as purchasers in a sale made under the Revenue Recovery Act It was ultimately held in a suit brought by the plaintiffs that the sale was irregular, and they were reinstated in the mittah as part-proprietors thereof They now sue for their share of the mesne profits derived while the defendants were in possession

The Subordinate Judge found that they were entitled to recover the same, but, on taking accounts, it was found that defendants [252] had realized no net profits, their expenses having exceeded their receipts, and plaintiffs' claim was therefore dismissed

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* Appeal No. 24 of 1893

(1) 20 I A 160

1894 MARCH 6. — APPELLATE CIVIL. — 17 M. 251.

Plaintiffs appeal on two main grounds. The first is a point of law, that defendants were in the position of trespassers and wrong-doers, and were, therefore, liable to account to plaintiffs for such loss as they sustained by being kept out of possession, and the question was not what amount of profits the defendants had actually realized, but what they might and ought to have realized. The learned Advocate-General, in support of the plaintiffs' contention, first referred to Mayne *On Damages* (page 417) for the authority that an " action for mesne profits is in origin an action of " trespass brought after a judgment in ejectment to recover damages for " the previous occupation of the land." And he then referred to several decided cases *Byjnath Pershad* v. *Badhoo Singh* (1), *Hurruc Lall Shaha* v. *Sreenibash Karmottar* (2), *Ghoogly Sahoo* v. *Chundee Pershad Misser* (3), *Tiluck Chand* v *Soudamini Dasi* (4), *Brojendro Coomar Roy* v. *Madhub Chunder Ghose* (5), and *Shitab Dei* v. *Ajudhia Prasad* (6), where it has been held that the possession of a party who had no right to possession was the possession of a wrong-doer, and that the party entitled to the possession was entitled to recover as mesne profits all loss sustained by him by being kept out of possession whether or not the party in possession had himself derived profits. But we are referred, on the other hand, to a late ruling of the Privy Council where a different view of the matter is taken *Dakshina Mohun Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry* (7). In that case it was held that the party in possession was in *bona fide* possession, because he was in possession under a decree of Court, and, until that decree was reversed, he was in rightful possession. In this case the defendants' possession was obtained from the Revenue authorities and it was confirmed by a decree of the Salem District Court. They were, therefore, in rightful possession untill that decree was reversed, as it was by this Court on appeal, not however on the merits, but on a technical irregularity in the sale. Their Lordships then lay down this rule: " Of " course he is bound to account for mesne profits, for all rents and " [253] profits which he has received or which without wilfull default he " might have received. But if owing to circumstances beyond his control, " and still more if, in consequence of some wrongful conduct on the " part of his opponent, he has received less than what he has had to " pay for the preservation of the estate, it would seem to be in accordance " with justice, equity and good conscience, there being no specific rule " to the contrary, that he should recover the difference on the final " adjustment of accounts." This is a clear exposition of the law applicable to this case, and the question therefore is not what damages are plaintiffs entitled to, but whether the defendants have conducted themselves properly in their stewardship. That is the second main ground of the appeal. It is contended that as regards collections the defendants were negligent, and as regards expenses were extravagant. Nothing has been urged to convince us that the Subordinate Judge was wrong in his conclusion that the defendants used all due diligence to collect the rents. His reasons are stated in paragraphs 14 to 16 of his judgment, and we concur in them. The defendants were Chettis who had paid a large sum for the mitta, and it stands to reason that, for their own benefit, they would have done their best to get every penny they could out of the ryots, and if they did not get more it was due to the obstruction caused by the plaintiffs themselves, who it is said, instigated the tenants by various means

(1) 10 W.R. 486. (2) 15 W.R. 428. (3) 21 W.R. 246.
(4) 4 C. 566. (5) 8 C. 343 (6) 10 A. 13.
(7) 20 I.A. 160.

1894 March 6. — APPELLATE CIVIL. — 17 M. 251.

to resist the defendants and put difficulties in their way (*Vide* the evidence of the second defendant as defence sixth witness and of the defence seventh witness, one of the mittadars) Moreover it would appear that the collections made by the plaintiffs since they have been in possession do not on an average nearly come up to those made by the defendants The defendants admit a sum of Rs 32,000 odd as their collections for the six years they were in occupation, and the correctness of this sum has not been seriously impugned, but it seems that during the three years the plaintiffs have regained possession only Rs 8,000 have been collected (see second defendant's evidence), which is on an average only half the amount that was collected by the defendants per annum, and this is a favourable estimate, for plaintiffs' own twelfth witness says the plaintiffs' half share of the collections for the three years has been only Rs 3,200, making a total collection of only Rs 6,400 in three years as compared with the defendant's collection of Rs 32,000 in six years So that there is no ground whatever for holding [**254**] that the defendants were remiss in gathering in the rents As regards the expenses, objection is chiefly taken to the law charges which defendants put down at Rs 6,208-9-8 The Subordinate Judge, disallowing certain items, reduced the claim by some Rs 1,500 to Rs 4,725-15-10 We have no reason to consider the amount allowed to be excessive The defendants were bound to exchange pattahs and muchilikas with the tenants before they could recover their rents, and it was owing to the contumaciousness of the tenants, instigated in some instances by the plaintiffs, that these expenses in litigation were incurred Considering that the cases went to three Courts—the Revenue Court, the District Court and the High Court—the amount allowed as proved to have been spent was not unreasonable Whether they were suits rightly brought or wrongly brought it is now impossible to decide, for in the second appeal to the High Court they were thrown out on the single ground that the defendants had been held in the other suit not to be the landlords There is nothing to show that the defendants were not justified in bringing these suits, and it is highly probable that if they had not brought them, they would not have collected as much as they did, and then the plaintiffs would have turned round and charged them, and perhaps rightly charged them, with wilful default The charges incurred for establishments were also objected to, but they were pretty much the same as had hitherto been incurred, and were found to be reasonable and necessary. We therefore disallow the appeal on the merits also

A plea of bar by limitation to the plaintiffs' suit was overruled by the Lower Court, but was again urged in this Court We agree with the Subordinate Judge that the decision of the point in question, namely, the year of age at which first plaintiff was to be considered as having attained his majority, is governed by the case cited, *Rudra Prokash Misser* v *Bhola Nath Mukherjee* (1), and that there was, therefore, no bar to his suit The result, however, is that the appeal fails and it is dismissed with costs

(1) 12 C 612

1893
DEC. 22.

APPEL-
LATE
CIVIL.

17 M. 255

17 M. 255.

[255] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

ORR AND OTHERS (*Defendants*), *Appellants v.* SUNDRA PANDIA (*Plaintiff*), *Respondent.** [12th and 22nd December, 1893.]

Limitation—Limitation Act—Act XV of 1877, Section 28—Limitation in relation to persons in undisturbed possession.

The law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. Section 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession.

[F., 20 M 305 (311); R., 20 B 270 (277)]

SECOND APPEAL against the decree of T Weir, District Judge of Madura, in appeal suit No. 16 of 1892, reversing the decree of Venkata Rengaiyar Avergal, Subordinate Judge of Madura (East), in original suit No. 38 of 1890.

The plaintiff in this suit sued for possession of a certain village which he alleged had been leased to him by the zemindar in 1883. The defendants, the lessees of the zemindari, alleged that the lease had been obtained by fraud. The Subordinate Judge dismissed the plaintiff's suit, but the District Judge reversed the decree and gave a decree in favour of the plaintiff, on the ground that the zemindar, from whom the defendants derived their rights, had failed to obtain the cancellation of the plaintiff's lease on the ground of fraud within three years of its execution, and that the defendants were barred by the Limitation Act from contesting the suit on the ground of fraud.

Hence this appeal by the defendants.

Bhashyam Ayyangar, for appellant.

Mr. *K. Brown,* for respondent.

JUDGMENT.

The District Judge has disposed of the appeal on a point of law without deciding the issues of fact which are raised. Assuming that the execution of the lease by the late zemindar [256] in the plaintiff's favour was obtained by fraud, he has held that, with reference to the fifth issue, it is not open to the defendants now to raise the plea of fraud, because a suit by them to set aside the plaintiff's lease would be barred by limitation.

The case cited by the District Judge certainly furnishes some authority for the view adopted by him—*Jugaldas* v. *Ambashankar* (1), *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai* (2), and *Sundaram* v. *Sithammal* (3). In our opinion, however, this view involving the proposition that a party in possession may be affected prejudicially by the law of limitation is unsound and cannot be maintained.

The Act XV of 1877 is an Act relating to the limitation of suits and does not in terms refer to defences. Section 28 presupposes a person who by force of limitation has already lost his remedy by suit for possession, for such a person it declares that his right to the property shall be extinguished. To persons who are in possession and have had no occasion

* Second Appeal No. 406 of 1893.

(1) 12 B 501. (2) 14 B. 222. (3) 16 M. 311.

to sue for recovery of it, the section can have no application. If it was intended that the right to property should be lost in all cases where the time for enforcing the remedy had expired, Section 28 would have been unnecessary or would have been differently worded In addition to the circumstance that defences are not generally brought within the scope of the Act (see *In re Marshfield* (1)), the case of set off being an exceptional one, the principles on which the law of limitation is founded do not justify its extension to a case like the present (*Edmunds* v *Waugh* (2)) Generally the law of limitation operates against parties who have been guilty of delay and in favour of persons in possession One of the main objects of the law is to quiet long-continued possession and to obviate the injustice which may ensue upon the enforcement of stale demands Here the defendants, who for the purposes of this judgment may be identified with the zemindar, are in possession Being in full enjoyment of the property, and not being attacked by the plaintiff, they had no occasion to seek for the judicial cancelment of the lease under which the plaintiff claims If either party can be said to have been guilty of delay in prosecuting his remedy, it certainly was not the defendants, and it is they, rather than the plaintiff, who are likely to suffer by the lapse of time for the burden of **[257]** proving the fraud, and thereby displacing the plaintiff's title rests on the defendants. The construction which it is sought to put on the Limitation Act would tend to defeat the policy of the Act and to disturb rather than quiet possession (see remarks of JARDINE, J , in *Hargovandas Lakhmidas* v *Bajibhai Jijibhai* (3)) In our opinion the defence which the defendants raise is not affected by the Act of Limitation and therefore the appeal must be remanded for trial on the merits We must point out that the acts of the zemindar after the execution of the lease to the defendants can have no material bearing on the case The question is whether after having notice of the fraud and before executing that lease, he elected to avoid the lease to the plaintiff or not to avoid it If he made no election, the right to rescind remained to him (*Clough* v *London and North-Western Railway Company* (4) and *The Lindsay petroleum Company* v *Hurd* (5)) The decree must be reversed and the appeal remanded. Costs to abide result

1893 DEC. 22.

APPELLATE CIVIL.

17 M. 255.

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17 M. 257.

APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt , Chief Justice, and Mr Justice Shephard

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BRANSON (*Plaintiff*), *Appellant v.* APPASAMI AND OTHERS (*Defendants*), *Respondents.** [22nd, and 23rd February, 1894.]

Infant—Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority.

A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them

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* Original Special Appeal No 16 of 1893.

(1) L R 34 Ch D 721 (2) L R. 1 Eq 418 (3) 14 B. 222
(4) L.R. 7 Ex 35 (5) L R 5 P C 221.

1894 Feb. 23. — Appellate Civil. — 17 M. 251.

Assuming that the legal proceedings were in the nature of necessaries, the next friend is the person responsible to the solicitor *Watkins* v. *Dhunnoo Baboo* (1) distinguished.

[R., 22 M. 314 (316)]

Appeal against the decree of Mr. Justice Wilkinson sitting on the original side of the High Court in civil suit No. 126 of 1891.

[258] The facts of the case appear sufficiently for the purpose of this report from the judgment of the Appellate Court.

The Advocate-General (Honorable Mr. *Spring Branson*), for appellant.

Mr. *K. Brown*, for respondents.

JUDGMENT.

This is an action by a solicitor to recover from the defendant costs incurred by the next friend of the defendant in litigation undertaken on his behalf. The principal suit thus prosecuted in the interests of the defendant was instituted in 1882, and was still pending in 1887, when, in the month of November, the defendant came of age. In January 1888 the defendant having resolved to abandon the suit, caused an application to be made by other solicitors for the dismissal of the suit. The learned Judge, who tried the case now under appeal, found with regard to the first issue that it was not shown that the proceedings undertaken on the defendant's behalf were necessary and proper for the protection of his interest, and it was argued before us that this finding was contrary to the weight of evidence. In the view taken by us it is not necessary to discuss this question, for assuming that the circumstances relating to the defendants' estate were such as to justify and require the proceedings taken by the next friend, we are of opinion that the present action at the suit of the solicitor against the defendant cannot be maintained. It must be observed that no question arises as to the rights of the next friend against the *quondam* minor plaintiff, nor as to the right of the solicitor against the next friend. In the order made on the application of the present respondent dismissing the suit of 1883, provision was made in accordance with the terms of Section 452 of the Civil Procedure Code for the payment by him of the costs which might have been paid by his next friend. It is not necessary for us to say whether under any circumstances the next friend might, notwithstanding the language of that section, be entitled to any further rights against the *quondam* minor. On the other hand, as regards the right of the solicitor against the next friend, there can be no doubt, and he has in fact obtained a decree against him in the present suit. Not contented with that, he also asks for relief against the *quondam* minor. We are at a loss to understand on what principle a person who has contracted with A can have a right of action against B when it appears that, at the time of the contract, B was not competent to appoint an agent; and, moreover, [259] that immediately on attaining majority, he has repudiated the acts of A. The general rule is that "liabilities are not to be forced on "a man behind his back"—per Bowen, L. J., in *Flacke* v. *Scottish Imperial Insurance Company* (2), and the present case cannot be brought within the case provided for by Section 70 of the Contract Act, to which section indeed, no reference was made in the argument. It was contended that the services rendered by the plaintiff to the minor were in the nature of necessaries and that, therefore, the action would lie, but there is really no analogy between the cases, for here there was the next friend responsible to

(1) 7 C 140. (2) L.R. 34 Ch. D. 248.

1894 Oct. 23 — Appellate Civil. — 17 M. 257

the plaintiff and from him, if necessary, funds might have been obtained The fact that he was unwilling or unable to supply funds is no reason for giving the plaintiff a supplementary right of action against another person The decision in *Watkins* v *Dhunnoo Baboo* (1) has no bearing on the present case, for there the defendant was still a minor, and there had been no repudiation of the acts done for the protection of his estate Seeing that there was not, and in point of law could not be, any relation of contract between the plaintiff and the defendant, and that there was such relation between the plaintiff and another person, and considering moreover that the services in respect of which the act is brought were not accepted, but repudiated by the defendant on his attaining majority, we are of opinion that no obligation to pay the plaintiff in respect of those services has been established In addition it appears that any cause of action which the plaintiff might have had is barred by limitation As has been shown notice of the defendants' resolve to abandon the litigation was given in January 1888, and the present suit was not brought till April 1891 By that notice in our judgment there was effected a determination of the suit or business within the meaning of Article 84 of the Schedule to the Limitation Act It is immaterial that the order passed on the defendants' application was not issued till a later date For these reasons we think the suit was rightly dismissed and we dismiss the appeal with costs

Grant, attorney for plaintiff

Champion & Bilgiri, attorneys for defendants

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17 M 260=2 Weir 641=4 M.L.J 83

[260] APPELLATE CRIMINAL

Before Mr. Justice Muttusami Ayyar and Mr Justice Best

QUEEN-EMPRESS v MANNATHA ACHARI * [27th October, 1893]

Criminal Procedure Code—Act X of 1882, *Sections* 4, 488—'*Adultery*'—*Indian Penal Code—Act XLV of* 1860, *Section* 497

A wife petitioned for maintenance for herself and child against her husband under Section 488 of the Criminal Procedure Code The husband did not refuse to maintain his wife, but the petitioner refused to live with him as he kept a concubine

Held, that the word 'adultery' in Section 488 of the Criminal Procedure Code must, by virtue of Section 4 of the Code, be construed with reference to the definition of the term in Section 497 of the Indian Penal Code Consequently a husband's immorality which does not amount to 'adultery' or involve the degradation of a married woman being brought into the society of a con cubine is not sufficient ground for a wife's refusal to live with her husband

An offer to maintain a wife must be an offer to maintain with the consideration due to her position as a wife *Marakkal* v *Kandappa* (2) cited

Per BEST J—It is very doubtful if the framers of Section 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in the Penal Code The wrong done to the wife is in no way affected by the circumstance of her husband's concubine being married or unmarried or, in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage In face however of Section 4 of the Criminal Procedure Code, no other interpretation of the term 'adultery' is possible than the limited interpretation contained in the Penal Code

[Overruled, 20 M 470 **(F.B.)**=7 M L J 303=2 Weir 645]

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* Criminal Revision Case No 499 of 1893

(1) 7 C 140 (2) 6 M 371

1893 Oct. 27.

APPELLATE CRIMINAL

17 M. 260=2 Weir 641-4 M. L. J. 83.

CASE referred for the orders of the High Court under Section 488 of the Criminal Procedure Code by M. Hammick, Acting District Magistrate of South Arcot.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court.

Parties were not represented.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The term 'adultery' in Section 488, Criminal Procedure Code, must be construed with reference to its definition in Section 497 of the Indian Penal Code. There is no [261] finding in the present case that the concubine is a married woman, and the Joint Magistrate seems to suppose that every illicit connection with a woman, whether she is married or not, and whether, if married with her husband's consent or connivance or not, is adulterous. This view cannot be accepted as the legal conception of adultery, and the ground on which the Joint Magistrate rests his decision cannot be supported without further inquiry. The complainant stated in her evidence that her husband insisted on her getting her meals from the concubine, and it was held in *Marakkal* v. *Kandappa* (1) that the offer to maintain must be an offer to maintain with the consideration due to her position as wife. A question may therefore arise, if the complaint is well founded, whether the offer made is sufficient within the meaning of the proviso of Section 488. In his explanation to the District Magistrate the Joint Magistrate states that he has never followed the ruling of the High Court in criminal revision case No. 574 of 1884, because, in his opinion, it is directly opposed to the wording of the section and has always seemed to him unintelligible. I would here point out to the Joint Magistrate that it was his duty to have either followed the ruling of the High Court, or if he doubted its correctness, to have referred the matter to that Court for reconsideration. There may be cases in which the husband may not bring the concubine into the family house, or may arrange for the concubine not coming into contact with his wife and for the society of the former not being forced on the latter. I am not prepared to hold that either the husband's immorality, which does not amount to adultery or involve the degradation of a married woman being brought into the society of a concubine, is sufficient ground for the wife's refusal to live with her husband. I would set aside the order of the Joint Magistrate and direct him to re-hear the case and pass fresh orders with reference to the foregoing observations.

BEST, J.—It seems to me to be very doubtful if the framers of Section 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in defining the offence of adultery in the Penal Code. The offence is against the husband, as is recognized in Section 199 of the Code of Criminal Procedure, which prohibits the Court from [262] taking cognizance of such offence except in the complaint of the husband or of some person on his behalf. Hence the necessity for the existence of a husband and absence of consent or connivance on his part to constitute such offence. But so far as a wife seeking an order for maintenance under Chapter XXXVI of the Code of Criminal Procedure is concerned, the wrong done to her is in no way affected by the circumstance of her husband's concubine being married or unmarried, or in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage.

(1) 6 M. 371.

However, any other than the limited interpretation of the word as defined in the Penal Code is impossible in the face of the concluding clause of Section 4 of the Code of Criminal Procedure, which directs that "all "words and expressions used herein and defined in the Indian Penal Code "and not hereinbefore defined (and the word adultery is not one of those "hereinbefore defined) shall be deemed to have the meanings respectively "attributed to them by that Code."

I concur, therefore, in the order proposed by my learned colleague.

1893 Oct 2. — Appellate Criminal.

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17 M. 262.

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best

17 M. 260-2 Weir 641=4 M.L.J. 83.

PALANIAPPA CHETTI AND ANOTHER (*Defendants*), *Appellants* v. PERIAKARUPPAN CHETTI (*Plaintiff*), *Respondent*.*

[18th January, 1894]

Contract—Promissory note or bond executed in Foreign State—Liability determined by lex loci contractus—*Suit upon consideration for the document*—Lex fori.

Where, according to the *lex loci contractus*, a promissory note or bond cannot, in the absence of registration, be a source of legal right, no action on an unregistered note or bond can be maintained. Whether a suit will lie upon the consideration for the instrument is a question of procedure, to be governed by the *lex fori* and in British India such a claim must either be stated in the plaint as an independent ground of claim, or treated as such and an issue taken at the first hearing *Valiappa* v. *Mohommed Khasim* (1) cited and followed

[263] SECOND appeal against the decree of T Weir, District Judge of Madura, in appeal suit No. 1 of 1892, confirming the decree of S. Gopala Chariar, Subordinate Judge of Madura (East), in original suit No 8 of 1890.

Suit to recover Rs. 2,793-13-6, being principal and balance of interest due on a plain cadjan kaikkanakku alleged to have been executed to the plaintiff by the first defendant, the undivided father of defendants 2 and 3, on 16th Kartigai of Sarvajittu (30th November 1887) for Rs 2,587-0-6, after deducting Rs. 5 said to have been paid on account of interest on 22nd Thai of Virothi (2nd February 1890).

The instrument in question was as follows.—

Received from Kulupirai Nachiappa Chetti's son Peria Karuppan by Palaniappan, son of Sevvalpatti Murugappan, on 16th Kartigai of Sarvajittu year (30th November 1887). On looking into the account in respect of the memorandum of interest which had been executed on 20th Arpisi of Tarana last (3rd November 1884), the sum found due (to you by me) is Rs (2,587-0-6) two thousand five hundred and eighty-seven and pies six I shall pay this principal sum, together with interest thereon, at the rate of $\frac{5}{16}$ per cent per mensem within the limited time of twelve months from this date and get back this memorandum of interest. To this effect

(Signed) PALANIAPPAN

Witness—

(,,) KULIPARAI,
Pa. La. Vi. Ra.

(,,) CHIDAMBARAM CHETTI,
I know.

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* Second Appeal No 797 of 1893.

(1) 5 M. 166

1894
JAN. 18.
APPELLATE
CIVIL.
17 M. 262.

The Lower Courts decreed in favour of the plaintiff and the defendants preferred this second appeal.

Mahadeva Ayyar, for appellants.

Bhashyam Ayyangar and *Thiruvenkatachariar*, for respondent.

JUDGMENT.

We agree with the Judge that the document is not an account stated, but a promissory note or bond. The balance acknowledged to be due upon the memorandum of interest is referred to therein only as the consideration for the promise to pay it with interest within twelve months after date. It is the *lex loci contractus* that determines the validity of a contract made in a foreign State. The document being executed in the Puducotta [264] territory, and no bond or promissory note being, according to the law of that State, operative for the purpose of creating any legal right unless it is registered, the suit cannot be supported as an action on the document

The only other question which arises for decision is whether the decree can be supported by treating the suit as one brought upon the consideration for the document It is not necessary to decide for our present purpose whether it is a bond or promissory note. In either case it is not, in the absence of registration, a source of legal right according to the law of Puducotta. We are of opinion that the question whether a judgment may be given for respondent upon the consideration for the document is one of procedure governed by the *lex fori*. Though the account stated is mentioned in the plaint, it is mentioned as a part of transaction evidenced by the document and not as a distinct ground of claim, the date on which the cause of action arose being described as the date mentioned for payment in the document. But it is argued that a judgment may be given upon the consideration, though the plaint does not refer to it as a distinct count or as an additional ground of claim, and though no issue was taken in regard to it.

According to English practice, a common count upon the consideration and special count on the bill are inserted in the declaration; but in India we are not governed by technical rules of pleadings. It is, however, necessary that it should be either stated in the plaint as an independent ground of claim or treated as such and an issue taken at the first hearing.

As the plaintiff did neither in this case, the decree could not be supported as a decree upon the case disclosed by the plaint or as amended by the issues on which the parties proceeded to trial. This view is in accordance with the decision in *Valiappu* v *Mahommed Khasim* (1). We allow the appeal and, setting aside the decrees of the Courts below, direct that the suit be dismissed.

Under the circumstances of this case we order that each party do bear his costs throughout.

(1) 5 M. 166.

17 M. 265

1894
JAN 23.

APPELLATE
CIVIL.

17 M.
265

[265] APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr Justice Best

SYED HUSSAIN (*Plaintiff*), *Appellant v.* MADA KHAN AND OTHERS (*Defendants*), *Respondents* * [22nd and 23rd January]

Civil Procedure Code—Act XIV of 1882, *Section* 544—'*Any ground common to all the plaintiffs or to all the defendants*'

Section 544 of the Civil Procedure Code presupposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect Thus a District Judge has no power under this section to reverse the decree of a Lower Court, given for a plaintiff in favour of a defendant who did not appeal and, in respect to property in which the other defendants who did appeal disclaim all interest *Sriram Ghatak* v *Braga Mohan Ghosal* (1) and *Appa Rau* v *Ratnam* (2) cited and followed *Seshadri* v *Krishnan* (3) and *Nagamma* v *Subba* (4) distinguished

[**Overruled**, 30 M 470 (472) (**F B.**)=17 M L J 119=2 M L T 104, **Diss**, 30 C 429 (432), **D.**, 28 M 122 (124)=15 M L J 28]

SECOND appeal against the decree of Manavedan Raja, Acting District Judge of Kurnool, in appeal suit No 64 of 1892, reversing the decree of V. Ranga Row in original suit No 79 of 1891

The plaintiff sued to establish his right to certain property and to recover from the defendants possession of the same The property consisted of two plots of ground marked respectively A and C in the survey of the village All the defendants except the sixth defendant laid claim to plot A only, whilst the sixth defendant laid claim to plots A and C The plaintiff claimed the property on the ground that his late father had purchased it from the former owner, and the District Munsif decreed in his favour All the defendants except the sixth thereupon appealed, and the District Judge reversed the decree of the Lower Court in respect to the whole property on the ground that the alleged sale to the plaintiff's father had not been established

The plaintiff preferred this appeal

Venkatasubbayyar, for appellant

Ramachandra Rau Saheb, *Sriramulu Sastriar* and *Venkatrama Sarma*, for respondents

JUDGMENT

[**266**] The Judge's finding is that there was no completed sale He gives his reasons for so finding, and it is not open to us in second appeal to consider that question of fact This appeal, so far as the plot A is concerned, must therefore fail

It is contended further with regard to the plot C, in which the other respondents disclaim all interest, that sixth defendant not having appealed from the District Munsif's decree, the District Judge could not disturb that decree so far as it affected this plot C On the other hand the fifth respondent's vakil refers to the cases in *Seshadri* v *Krishnan* (3) and *Nagamma* v *Subba* (4) and urges that when the ground of decision is common, the Court is entitled under Section 544 of the Code of Civil Procedure to alter a decree in favour of a party who has not appealed,

* Second Appeal No 1470 of 1893

(1) 3 B L R App. 41. (2) 13 M 249.
(3) 8 M 192. (4) 11 M. 197

1894 JAN. 23. — APPELLATE CIVIL. — 17 M. 265.

even in respect of property in which those who have appealed disclaim all interest. We are not prepared to accept this contention. Section 544 appears to us to presuppose a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest either direct or indirect. This was the ground on which the decisions proceed in the two cases cited. The present case is on all fours with that in *Appa Rau* v. *Ratnam* (1). The principle is that laid down by Jackson, J., in *Sriram Ghatak* v. *Braga Mohan Ghosal* (2) that the section applies only to decrees incapable of division and relates to property in which all the plaintiffs or all the defendants are interested.

We therefore set aside the Lower Appellate Court's decree so for as the land C is concerned and affirm it with regard to the land A.

Appellant must pay the costs in this Court of the respondents other than the sixth defendant, who and appellant will bear their own costs.

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17 M. 267.

[267] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KORA NAYAR (*Plaintiff*), *Appellant v.* RAMAPPA (*Defendant*), *Respondent.** [7th December, 1893.]

Transfer of Property Act—Act IV of 1882, Section 83—Deposit in Court by mortgagor—Full and unconditional tender.

The fact that a certain sum of money tendered under Section 83 of the Transfer of Property Act, and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount, and that the tender is accompanied by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds does not render the tender conditional and therefore invalid. *Nanu* v. *Manchu* (3) distinguished.

SECOND appeal against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 137 of 1882, reversing the decree of J. Lobo, District Munsif of Kassargod, in original suit No. 329 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court.

The District Judge, setting aside the decree of the District Munsif in favour of the plaintiff, passed a decree for the defendant.

The plaintiff preferred this appeal.

Narayana Rau, for appellant.

Madava Rau, for respondent.

JUDGMENT.

The Judge's finding that the full amount was not tendered cannot be accepted. It is clear from the plaintiff's petition that the amount of Rs. 674-3-9 was tendered in full discharge of what was due under the mortgage. Defendant agreed to accept the amount and to pass a receipt. He did not then say that the tender was deficient by annas 4-4 as is now pleaded. Reading the two petitions togeher, the reasonable inference is that defendant agreed to accept the tender in full satisfaction as provided

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* Second Appeal No. 437 of 1893.

(1) 13 M. 249. (2) 3 B.L.R. App. 41. (3) 14 M. 49.

1893 Dec. 7.

Appellate Civil.

17 M. 267.

in Section 88 of the Transfer of Property Act. That such was the case is clear from the receipt registered by him on the [268] day that the present suit was brought, in which he has accepted this very amount in full discharge of the mortgage.

It is next argued that the tender was conditional No doubt Section 83 is silent as to a receipt But defendant not only waived the objection to this demand, but acceding to it, produced a draft receipt for approval. Nor do we think that the request for return of the title-deeds was a condition vitiating the tender, as the section requires that the title-deeds should be deposited before the mortgagee takes out the money.

As to the case in *Nanu* v *Manchu* (1) the mortgagor in that case appears to have insisted on the return of documents other than those which the mortgagee was bound to deposit under Section 83

We therefore set aside the decree of the Lower Appellate Court and restore that of the District Munsif

Respondent must pay appellant's costs in this Court and in the Lower Appellate Court.

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17 M. 268.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr Justice Best

BHAGIRATHI (*Plaintiff*), *Appellant* v ANANTHA CHARIA AND OTHERS (*Defendants*), *Respondents* * [2nd October and 22nd December, 1893]

Hindu law—Maintenance—Suit to recover arrears of maintenance due under a personal decree, and to establish a charge for future maintenance on the family property.

A Hindu widow obtained a personal decree against her father-in-law for maintenance Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made a charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due, and the widow instituted the present suit, in which she asked for a decree establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property·

Held, (1) that the maintenance not having been declared a charge upon the portion of the property which had been alienated, this property was free of any charge for her maintenance;

[269] (2) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandsons (the defendants) incurred his liability on his decease and were bound to discharge the same out of the family property;

(3) that the right to maintenance being enforceable against the defendants, the right to have it made a charge on the family property was enforceable along with it.

SECOND appeal against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 131 of 1892, reversing the decree of U. Babu Row, District Munsif of Udipi, in original suit No 335 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

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* Second Appeal No. 304 of 1893

(1) 14 M 49

1893 Dec. 22. — APPEL-LATE CIVIL. — 17 M. 268.

The District Munsif decreed in favour of the plaintiff, but the District Judge reversed the decree. The plaintiff preferred this appeal.

Narayana Rau, for appellant.

Ramachandra Rau Saheb, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—Appellant is a Hindu widow and defendants 1 to 16 are her husband's brothers and nephews. In original suit No. 137 of 1870 the former obtained a personal decree against Vadiraja Charia, her father-in-law, for maintenance at the rate of Rs. 30 per annum. To that suit her husband's five brothers were also made parties, but there was no personal decree against them. Nor did appellant then ask that her maintenance be made a charge on ancestral or family property. Vadiraja Charia died since and defendants 1 to 16 repudiated their liability to pay maintenance under the decree passed against him. On the death of Vadiraja Charia, the family property devolved on respondents, and at the date of the suit there were arrears of maintenance under the former decree to the extent of Rs 90. The first 16 defendants sold items of property 3 and 4 to the 17th defendant, and appellant's case is that the alienation can only be upheld subject to her claim for maintenance. The plaint prayed for a decree establishing her right to receive maintenance for her life at the rate of Rs. 30 per annum as per decree in original suit No. 137 of 1870, and Rs. 90 for arrears of maintenance on the responsibility and by the sale of the properties 1 to 4 mentioned in Schedule A attached to the plaint, and such other relief as the Court might deem fit to grant in the circumstances of this case. The District Judge considered that, [270] appellant was bound to have asked in the former suit that her maintenance be made a charge on the family property, and held that the present suit was barred by Section 43 of the Code of Civil Procedure. The District Judge further held that appellant's claim against the 17th defendant must fail, and in support of his opinion he relied upon the decisions in *Saminatha* v. *Rangathammal* (1) and *Rangamma* v. *Vohalayya* (2). I do not think that the decision of the Judge can be supported except so far as it relates to the 17th defendant.

Appellant's maintenance has not been declared a charge on the property alienated, and the District Judge was right in upholding the alienation against her claim. I am also of opinion that neither of the cases relied on by the Judge is in point. In *Saminatha* v. *Rangathammal* (1), both suits were brought against the same person, and it was held that no second suit should be brought to recover arrears of maintenance which might have been recovered in execution of the decree passed in the prior suit. The point decided in *Rangamma* v. *Vohalayya* (2) was that a personal decree for maintenance and a declaration that it is a charge on family property are two remedies referable to the same cause of action, *viz.*, the right to receive maintenance, and that two separate suits cannot be brought in respect of the two remedies against the same defendant.

In the present case appellant rests her claim to arrears on the ground that they constitute a personal debt of Vadiraja Charia and his sons and grandsons. Defendants 1 to 16 are bound to discharge it under Hindu Law from the family property which has devolved on them by right of survivorship. Their liability to pay their father's and grandfather's debt arose only on the death of Vadiraja Charia.

(1) 12 M. 285. (2) 11 M. 127.

As regards plaintiff's claim to future maintenance, it is tenable against defendants 1 to 16, the ancestral property surviving to them and passing into their management only on the death of Vadiraja Charia The right to maintenance being enforceable against them, the right to have it made a charge on family property is also enforceable along with it

1893 DEC. 22. — APPELLATE CIVIL. — 17 M. 268.

Though several grounds of claim are united in this suit, each ground of claim is good as against all respondents It is urged on respondent's behalf that the suit is framed as if it was a suit [271] to execute the decree already passed in original suit No 137 of 1870, but the clause in the plaint which contains the prayer is open to the construction that it prays for relief similar to those in the former decree I would, therefore, set aside the decree of the Judge and remand the case for disposal on the merits The costs incurred in this Court will abide and follow the result and be provided for in the revised decree.

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17 M. 271.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

ACHUTAN NAYAR (*Defendant No* 4), *Appellant* v KESHAVAN (*Plaintiff*), *Respondent* * [8th November, 1893]

Mortgage—Right of a jenmi, who is a judgment-creditor, to sell the kanom right before the expiry of twelve years

A jenmi, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution sale

SECOND appeal against the decree of A Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No 374 of 1892, modifying the decree of J F Pereira, District Munsif of Angadipuram, in original suit No 45 of 1892

This was a suit to recover the sum of Rs 63-14-2, being principal and interest on account of arrears of porapad for the years 1065, 1066 and a portion of 1067, alleged to be due by the defendants on a kanom kychit executed by the first defendant to plaintiff's elder brother, the late Neelakandan Musad, on the 7th Edavom 1048 (19th May 1883)

The plaintiff sued to recover the aforesaid arrears from first defendant personally, from the properties of first to third defendants' tarwad, and by the sale of the kanom and value of improvements on the properties demised

Defendants 1 to 3 and 5 were *ex parte*.

The fourth defendant answered that the demise sued upon was [272] true, that the kychit simply provides for the payment of arrears of porapad with interest, that the value of kuyikoor improvements being an unascertained amount could not be sold for arrears of porapad, that first to third defendants and others mortgaged the plaint properties on a panayom right of 324 rupees and 528 paras of paddy to him (fourth defendant) on the 6th April 1884, and on a further panyom rights of 174 paras of paddy on the 18th April 1887; that, these rights were admitted by the plaintiff in the matter of the execution of decree in original

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* Second Appeal No. 417 of 1893.

1893 Nov. 8. — APPELLATE CIVIL. — 17 M. 271.

suit No. 70 of 1889; that, therefore, the kanom and the value of improvements were liable in the first instance for the above debts; that plaintiff could not have the kanom right sold before the expiry of twelve years allowed by the demise.

The District Munsif decreed in favour of the plaintiff, but dismissed the suit against the fourth defendant. The Subordinate Judge set aside the decree dismissing the suit as against the fourth defendant, and decreed that in default of the defendants paying the amount awarded by the Lower Courts, the plaintiff should recover the same by the sale of the first to third defendants' interest as mortgagees under the plaintiff, free of the encumbrance created by the first defendant in favour of the fourth defendant, as well as from the first defendant personally, and from first to third defendants' tarwad properties.

The fourth defendant preferred this appeal.

Sankara Menon, for appellant.

Kannan Nambiar, for respondent.

JUDGMENT.

It is contended that the kanom right is not liable to be sold in satisfaction of the decree before the expiry of twelve years from the date of the kanom to first defendant. No doubt, according to the custom of the country, a kanom is, in the absence of a contract to the contrary, redeemable only after the expiry of the period of twelve years. But this custom cannot supersede the general rule of processual law that a judgment-creditor is entitled to attach and sell the judgment-debtor's property. It is not denied that an ordinary judgment-creditor, who is not the jenmi, would be entitled to bring the kanom right to sale even before the expiry of twelve years. We see no reason why a jenmi, who is a judgment-creditor, should be in a different position. The right to set off arrears of rent against the kanom debt and value of improvements when the kanom becomes redeemable is [273] an additional security for the benefit of the jenmi, but it does not follow that he cannot sell the kanom at an earlier date if he has obtained a decree for arrears of rent. Such sale will not ordinarily put an end to the kanom, but only transfer the kanomdar's interest, such as it is, to the purchaser at the execution sale. If the jenmi himself becomes the purchaser, he will be in no better position, except in that he will have a priority of claim as against fourth defendant's panayams for arrears of rent, one of the customary incidents of the kanom.

The decree of the Lower Appellante Court must be modified by striking out the words "free of the encumbrance created by first defendant in "favour of fourth defendant." In other respects the decree is affirmed.

The cases referred to at the hearing, *viz.*, *Achuta* v. *Kali* (1) and *Kanna Pisharodi* v. *Kombi Achen* (2) and *Unnian* v. *Rama* (3) are not in point, inasmuch as the question here did not arise in those cases.

Under the circumstances of this case we direct each party to bear his own costs of this appeal.

(1) 7 M. 545 (547). (2) 8 M. 381. (3) 8 M. 415.

17 M. 273.

1894 MARCH 12.

APPELLATE CIVIL.

17 M. 273

APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt, Chief Justice, and Mr Justice Shephard

SUBBAMMAL (*Plaintiff*), *Appellant* v HUDDLESTON AND OTHERS (*Defendants*), *Respondents* * [7th and 12th March, 1894]

Civil Procedure Code—Act XIV of 1882, *Section* 13—'*Court of competent jurisdiction*'

The term 'competent jurisdiction' in Section 13 of the Civil Procedure Code has regard to the pecuniary limit as well as to the subject-matter There is no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court. *Misir Raghobardial* v *Sheo Buksh Singh* (1) cited and followed *Vithilinga Padayachi* v. *Vithilinga Mudali* (2) qualified.

[**Overruled**, 29 M 195 (200) (**F B.**)=16 M L J 41=1 M.L T 25, **F.**, 24 M 444 (447), 13 M L J 134, **R.**, L B R (Civil) (1893—1900) 653]

[**274**] APPEAL against the decree of E K Krishnan, Subordinate Judge of Malabar, in original suit No 26 of 1891

The plaintiff in this suit sued to recover certain land and mesne profits, resting his title thereto on a karar dated 14th July 1864 In a former suit in the same Court between the plaintiff and the first defendant it had been decided that the karar in question was a forgery, and the Subordinate Judge held that the present suit was barred by Section 13 of the Civil Procedure Code and dismissed the suit

The plaintiff preferred this appeal

Anandacharlu, for appellant

Mr *Gover*, for respondents

JUDGMENT

We fully agree with the Subordinate Judge that the plaintiff is not entitled to any relief except with reference to the allegations made in the plaint In the plaint the plaintiff alleges as his title to the land, in respect of which he sues, a karar executed on the 14th of July 1864. If the plaintiff fails, or is unable to prove the execution of this karar by his lessor, it is clear that the suit must be dismissed. It is pleaded by the defendants that the question of the genuineness of this karar has already been decided in a suit between plaintiff and the first defendant, and that therefore it is not now open to the plaintiff to rely on that title The former suit was brought in the same Court and the issue tried with regard to this karar was identically the same as that raised in the present suit It is objected, however, on behalf of the appellant that the Court which heard the former suit was not competent to try the present suit, because in the former suit the value of the subject-matter was such that an appeal lay not to this Court, but to the District Court In support of this objection, we are referred to certain decisions in which it has been held that the judgment in a suit cognizable as a Small Cause Court suit is not binding in a regular suit between the same parties subsequently brought with regard to the same matter In the present case, where it was the very same Court that heard the two suits, we do not think that those decisions are applicable In *Vithilinga Padayachi* v *Vithilinga Mudali* (2)

* Appeal No 66 of 1893

(1) 9 C. 439

(2) 15 M 111,

1894 MARCH 12. — APPELLATE CIVIL. — 17 M. 273.

reference is made to the language of the Judicial Committee in the case in *Misar Raghobardial* v. *Sheo Buksh Singh* (1). It appears to have been [275] thought that, in considering the question of the competency of a Court within the meaning of Section 13 of the Code, the Judicial Committee had regard to the question as to the tribunal to which an appeal would lie from such Court. We do not think that the language of the Judicial Committee really bears this meaning. In their judgment reference is made to the anomaly which would arise if the decree of the District Munsif were held to be binding on a superior Court, and it is observed that this anomaly would not be removed by the fact that from both the Courts there would be an appeal, because from the judgment of the Munsif the appeal would lie to the District Court, and a second appeal only on questions of law would lie to the High Court. In the next sentence of the judgment their Lordships explain the meaning of the expression 'concurrent or competent jurisdiction.' The term has regard to the pecuniary limit as well as the subject-matter, and with respect to both those conditions it is plain that in the present case the Court which heard the former suit was equally competent to hear the present suit. There is no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court. In our opinion the suit was rightly dismissed. The appeal fails and is dismissed with costs.

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17 M. 275.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Davies.

SEETHARAMA RAJU (*Defendant*), *Appellant v.* BAYANNA PANTULU (*Plaintiff*), *Respondent*.* [27th February, 1894.]

Contract—Undue influence—Acquiescence by conduct—Lease for one year at a rental of more than Rs 100*—Registration—Registration Act—Act III of* 1877, *Section* 17*—Transfer of Property Act—Act IV of* 1882, *Sections* 4 *and* 107.

Where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and [276] retains the rents of the land he has acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence

The fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create an interest in land of Rs. 100 and more in value so as to necessitate registration of the lease under Section 17 of the Registration Act. Such a lease falls under Section 107 of the Transfer of Property Act, the provisions of which section are, by Section 4 of the Act, supplemental to the Registration Act.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 33 of 1891.

The District Judge decreed in favour of the plaintiff and the defendant preferred this appeal.

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* Appeal No. 71 of 1893.

(1) 9 C. 439.

1894 Feb 27.

Appellate Civil.

17 M. 275.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Ramachandra Rau Saheb, for appellant

Mr *Wedderburn* and *Rangacharıar*, for respondent

JUDGMENT

The defendant owned some land called Burripollem Agraharam, which, in 1875, he exchanged, for the plaint land situated in the village of Thandrangi In 1888 a re-exchange of these same lands was made between the defendant and the plaintiff, but the defendant then took upon lease for one year the Thandrangi lands, the ownership of which he had parted with in the re-exchange, and executed a cowle to the plaintiff, agreeing to give the land up if so required at the end of his year's lease, which expired on the 31st March 1889 Defendant having failed either to take a fresh lease of the land or to vacate it, this suit was brought for the recovery of its possession, together with the mesne profits for the two years for which the defendant had held over The Lower Court decreed for the plaintiff as prayed

Defendant appeals on several grounds, his chief contention being that he was not willing to make the re-exchange, and that the cowle he executed, admitting his tenancy of the plaint land for one year only, was obtained from him by the undue influence of the plaintiff and his servants, and he is, therefore, not bound by it He further contends that it is not admissible in evidence, not being registered The lease being set at naught on these grounds, he contends that he is entitled to retain possession of the plaint land, because he had been in adverse possession of it for [277] more than twelve years in 1888 even should the exchange of 1875 be found not to have been operative

There are two grounds on which it is urged that the cowle is inadmissible for want of registration The first is that the document must be treated as evidencing the re-exchange of the lands, and as such it creates a title in land of Rs 100 in value But we cannot accept this view of the document, which is nothing more than it purports to be, namely, a lease for one year The reference to the exchange is merely a recital therein as to how the plaintiff obtained his title as landlord from the defendant The actual exchange of the lands is not effected by this document The second objection is that, although the lease is only for a year, yet as it creates an interest in land of Rs 100 and more in value, the amount of the rent being Rs 206-4-0, it requires to be registered under Section 17 of the Registration Act But Section 107 of the Transfer of Property Act disposes of this objection After laying down that leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument it provides that "all other leases of immoveable property may be made either by an instrument or by oral agreement " Section 4 of that Act declares that this section 107 shall be read as supplemental to the Registration Act It follows that the lease in this case did not require to be registered

As to the allegation of 'undue influence' which the defendant urges as voiding his execution of the cowle, he certainly has adduced evidence showing that pressure was brought to bear upon him It is highly probable too that it was not with his full and free consent that he gave way to the wishes of the plaintiff, a powerful landholder, in whose employ he also was at the time A contract made under such pressure is, however, not void, but only voidable Had the defendant done nothing beyond

1894 FEB. 27. — APPELLATE CIVIL. — 17 M. 275.

executing the lease deed, we should probably have found him entitled to relief on this score. But instead of attempting to repudiate it by not acting up to it or by other means, we find the defendant not only paid the rent due under it for the whole year, but he also received and kept the rents of the Burripollem land. All this indicates so complete an acquiescence in the arrangements that had been made subsequent thereto, that we are unable to declare that the defendant is not now bound by them for want of [278] his consent. A great deal of argument was expended both in this and in the lower Court as to whether the defendant was or was not estopped under Section 116 of the Evidence Act from denying the plaintiff's title. It was contended on the strength of the decision in *Lal Mahomed* v. *Kallanus* (1) that that section applied only to cases in which the tenants had been put into possession of the tenancy by the person to whom they have attorned and not to a case such as this, in which the tenant was previously in possession. We are, however, not called opon to decide the question, which is one not altogether free from difficulty, for we find that as a fact the defendant became the tenant of the plaintiff under the document. So that even if the defendant were allowed to dispute the plaintiff's title, it would be found against him as a matter of fact that the plaintiff was his landlord.

Another objection taken to the suit that it was not brought in the name of the Maharajah of Vizianagram, but of his agent, is frivolous, for we find the plaint is actually signed by the Maharajah. The appeal accordingly fails and it is dismissed with costs.

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17 M. 278=1 Weir 839.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMPRESS *v.* FAKRUDEEN.* [25th January, 1894.]

Police (Madras) Act XXIV of 1859, *Sections* 10 *and* 44—*Departmental punishment and prosecution under the Act.*

In the absence of any rules framed by Government under Section 10 of the Madras Police Act, a departmental punishment inflicted under that section is no bar to a prosecution under Section 44 of that Act.

CASE referred for the orders of the High Court under Section 438 of the Criminal Procedure Code by K. C. Manavedan Raja, Acting District Magistrate of Anantapur.

[279] The case stated was as follows:—

" The accused, a police constable attached to the Guntakul junction " station, was on sentry duty on the night of the 9th July 1893 from 12 " to 3 A.M. guarding the road goods consisting of 88 articles received that " night into the station at about 9 P.M. At the end of the period of his " watch it was his duty to awake his successor to get himself-relieved " and to hand over charge of the articles to the relieving officer, but, " instead of doing this, he fell asleep and failed, therefore, to discharge " the above duties. Next morning, on examination of the articles by the " road goods clerk, it was found that a portion of a bag of jaggery had " been extracted. This was alleged to be due to the wilful neglect of

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* Criminal Revision Case No. 614 of 1893.

(1) 11 C. 519.

"the sentinel The Taluk Magistrate who tried the case acquitted the "accused under Section 245, Criminal Procedure Code, on the sole ground "that the man had already been punished departmentally by the Superin-"tendent of Police by receiving a black mark

"Whether he ought to receive double punishment was not the question "for the Magistrate to decide Having received one punishment, it "may not seem to be necessary that he should be charged in a Magis-"trate's Court But the charge having been brought, the Sub Magis-"trate should have taken evidence and disposed of it on its merits

"It has been further held by the High Court in its proceedings "No 1074 of 13th June 1872 that a conviction of a police constable under "Section 44, Act XXIV of 1859, for going to sleep on duty is legal on "the ground that the violation of duty was of a class which was not and "could not be provided for by rules framed under Section 10 of the Act "(Also High Court's Proceedings, No 1601, dated 3rd October 1878)"

Mr *Wedderburn*, for the Crown

JUDGMENT

BEST, J —No rules sanctioned by Government under Section 10 of Act XXIV of 1859 have been brought to our notice, and in the absence of such rules the accused is liable to be prosecuted under Section 44 The mere fact of a departmental punishment having been awarded is not sufficient to exonerate from liability under Section 44, though the circumstance may be taken into consideration in passing sentence. I would set aside the order of acquittal and direct the Magistrate to dispose of the case on its merits

[280] MUTTUSAMI AYYAR, J —I am also of the same opinion In the absence of any rules framed by Government, the departmental punishment inflicted on the accused under Section 10 of Act XXIV of 1859 does not bar his prosecution under Section 44 of the same Act, unless the Magistrate thinks that the breach of duty is not grave but trival It is a grave violation of duty on the part of a police officer to go to sleep whilst on guard, and I would follow the principle laid down by this Court in its proceedings, dated the 3rd October 1878, No 1601 Weir, p 569 I would *also* set aside the order of acquittal and order a re-trial with reference to the foregoing observations

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17 M. 280 (F.B.)=4 M.L.J. 104.

APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J H Collins, Kt., Chief Justice, Mr Justice Muttusami Ayyar, Mr Justice Shephard, Mr Justice Best and Mr. Justice Davies

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REFERENCE UNDER STAMP ACT, SECTION 46 *

[1st March, 1894]

Stamp Act—Act I of 1879. Schedule I, Article 4—'Agreement to lease.'

An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment, after obtaining a certificate from the Court under Section 305 of the Civil Procedure Code, is an 'agreement to lease' under Article 4, Schedule I of the Stamp Act

[R., 33 5 M 63 (70)=21 M L J 44=9 M L T 142, 8 Ind Cas 520]

* Referred Case No 4 of 1894

1894
MAR 1.

FULL BENCH.

17 M. 280. (F.B.) = 4 M. L. J. 104.

CASE referred for the decision of the High Court under Section 46 of Act I of 1879 by the Board of Revenue, Madras. The case stated was as follows:—

"On the 11th January 1886, the Zamindar of Sivaganga entered "into an agreement (marked A) with the Rajah of Nilambur and another "to lease the zamindari to the latter in consideration of his debts, to the "extent of 16 lakhs of rupees, being discharged by them. At the time of "the agreement the zemindari was under attachment and the zamindar "undertook to execute a formal deed of lease after obtaining a certificate "from the Court under Section 305 of the Civil Procedure Code. The "agreement in question was engrossed on an eight-anna stamp paper, "[281] apparently under Article 5 (c) of Schedule I. The question at "issue is whether the stamp was sufficient, and if not, under what article "of Schedule I the instrument ought to have been stamped?

"The main grounds on which it is contended that the agreement was "properly stamped are that as the zemindari was under attachment, the "document was not and could never have been intended to operate as a "lease, and that the subsequent conduct of the parties resulting even-"tually in the execution of a formal and duly stamped deed of lease makes "it clear that the agreement of the 11th January 1886 was intended as a "mere agreement and nothing else.

"The Board, while conceding that the agreement was not intended "to operate as a lease, is unable to accept the conclusion that it is, there-"fore, not liable to duty under Article 4, Schedule I of the Stamp Act "In that article it is clearly stated that an agreement to lease is chargeable "with the same duty as a lease, and there is no saving clause to indicate "that the intention (which in the present case may be admitted) subse-"quently to execute a regular lease makes any difference. The charge "of the full duty both on an agreement to lease and on a lease executed "in pursuance thereof is guarded against by the proviso to Article "39. The Board considers that the law may be read as meaning that "an agreement to lease is chargeable as a lease, whether an actual "lease is subsequently executed or not and notwithstanding any *bona* "*fide* intention on the part of the executants of the former subsequently "to execute the latter; otherwise the proviso to Article 39 would be "superfluous."

The Government Pleader (Mr *E. B Powell*), for the Crown.

Mr. *W. Grant*, for plaintiff.

JUDGMENT.

We are of opinion that the document is an agreement for a lease, and that it must be stamped as such under Article 4 notwithstanding that another instrument was intended to be executed.

17 M. 282=4 M.L.J. 64.

1893
Oct 11.

APPELLATE CIVIL.

17 M. 282=4 M. L. J. 64.

[282] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

SANKUNNI NAYAR (*Defendant No.* 2), *Appellant in Special Appeal No.* 779 *of* 1892 *v* NARAYANAN NAMBUDRI AND ANOTHER (*Plaintiff and Defendant No* 1), *Respondents* *

RAMAN NAMBIAR (*Defendant No.* 1), *Appellant in Special Appeal No.* 943 *of* 1892 *v* NARAYANAN NAMBUDRI AND ANOTHER (*Plaintiff and Defendant No* 2), *Respondents* * [17th March, and 11th October, 1893]

Civil Procedure Code—Act XLV of 1882, *Section* 317—*Effect of benami purchase, and purchase as execution-debtor's agent*

Where the purchaser at an execution sale is the agent of the execution-debtor and buys the property as such, though he advances the purchase money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former Such a transaction is not a mere *benami* purchase, and is not a bar to such a suit under Section 317 of the Civil Procedure Code

[**F**, 18 M 436 (437), **Appr.**, 10 A L J 97=16 Ind Cas 489 (491), **R**, 20 M 349 (353), 5 Bom L R. 329 (332), **D**, 22 A 434 (439)]

SECOND appeal against the decrees of E K Krishnan, Subordinate Judge of South Malabar, in appeal suits Nos 1064 and 1065 of 1890, confirming the decree of U Achutan Nayar, District Munsif of Nedunganad, in original suit No 339 of 1889

The facts of the case appear sufficiently for the purpose of this report from the judgments delivered by the High Court

Sundara Ayyar, for appellant in No 779

Govinda Menon, for respondents in No 779

Sankaran Nayar, for appellant in No 943

Bhashyam Ayyangar, for respondents in No 943

JUDGMENT

BEST, J —These two appeals are against the same decree, the appellant in No 779 being the second defendant, and appellant in No 943 the first defendant

[283] The suit was brought by plaintiff for possession of two items of land alleged to be the jenm property of plaintiff's house and demised by plaintiff's ancestor on kanom for Rs 412-9-2 to a former karnavan of defendants 2 to 15 in Kollam 1040 (1864-65) Plaintiff's case is that on the land being sold (in 1874) in execution of decree in original suit No 232 of 1868, obtained against plaintiff's father, it was purchased by first defendant's late karnavan Raman Nambiar *benami* for plaintiff's mana (house), the said Raman Nambiar having been appointed by plaintiff's mother manager of plaintiff's mana, plaintiff being an infant aged two years in 1048 (1872-73) when his father died; that Raman Nambiar continued as such manager till 1054 (1878-79), when first defendant was appointed as his successor and is still the karyastan, that in 1064 (1888-89) when the kanom was renewed to second defendant at the advice of the first defendant, the plaint items were fraudulently excluded Hence this suit

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* Special Appeals Nos. 779 and 943 of 1892,

1893 Oct. 11. — Appellate Civil. — 17 M. 282=4 M. L. J. 64.

The first defendant denied that either his karnavan or himself ever managed on behalf of plaintiff's mana, and pleaded that the purchase in 1874 was made by his karnavan with his own money and on account of his own tarwad and not *benami* for plaintiff; that the suit was opposed to Sections 30 and 317 of the Code of Civil Procedure, and also bad for misjoinder of causes of action; further, that it was time-barred, and that plaintiff attained his majority more than three years before the institution of the suit.

Defendants 2 to 5 supported first defendant, and the other defendants allowed the suit to proceed *ex parte* as far as they were concerned.

The two lower Courts have concurred in finding that at the date of the purchase of the plaint property, first defendant's karnavan was managing on behalf of plaintiff's mana; that he did in fact purchase the property for the plaintiff's illom, though the money paid was first defendant's karnavan's own; that there was no adverse possession till January, 1889 when plaintiff granted the renewal kanom and first defendant executed the kanom deed XXIII shortly after for the plaint land; also, that the suit is brought withn ithree years of plaintiff's attainment of majority, and that the cause of action did not arise till January 1889 It has further been found that the suit is not bad either for misjoinder of causes of action or under Section 30 of the Code of Civil Procedure

[284] The principal contention before this Court is that the suit is bad as being opposed to Section 317 of the Code of Civil Procedure, which declares that " no suit shall be maintained against the certified " purchaser (at a Court sale) on the ground that the purchase was made " on behalf of any other person, or on behalf of some one through whom " such other person claims."

The District. Munsif held the above section to be no bar to the suit, because " the auction was held and the sale certificate granted before the " new Act (X of 1877) came into force and the provisions of Section 317 " apply to a certified purchaser under the Act." But, as well observed by Mahmood, J., in *Aldwell* v. *Ilahi Baksh* (1) Section 317 of the present Civil Procedure Code has not altered in principle the rule of law contained in Section 260 of the old code (VIII of 1859). The Subordinate Judge's reason for holding this suit not to fall within the prohibition contained in Section 317 is because it was held in *Sohun Lall* v. *Lala Gya Pershad* (2) that Section 260 of Act VIII of 1859 did not preclude a suit by a decree-holder against the certified purchaser for the purpose of establishing his right to bring the property to sale in execution as the property of the judgment-debtor, and " if so," says the Subordinate Judge " I do " not see why the judgment-debtor himself cannot bring a suit for a " declaration that the property was purchased by his agent *benami* for " himself." I imagine, however, that it is this latter case that the legislature had expressly in view in enacting Section 317. As observed by the Chief Justice and Handley, J., in *Rama Kurup* v. *Sridevi* (3) " the object of the section is to put a stop to *benami* purchases at execu- " tion sales, and this object can only be carried out by enforcing it in all " cases without regard to consequences." As further observed in the same judgment, " It is not a sufficient reason for declining to carry " out the express terms of the section; that to do so would be to allow a fraud to be perpetrated. The person in whose

(1) 5 A. 478. (2) 6 N.W.P. 265. (3) 16 M. 290

"name a purchase has been made for the benefit and with the money "of another, of course, commits a fraud in claiming the property as his "own. Nevertheless, the law says that a suit shall not be maintained "against him on the ground that the purchase was *benami* and thus "provides that his fraud [285] shall prevail" As was also remarked in *Ramakrishnappa* v. *Adinarayana* (1) "the effect of Section 317 can only "be taken to be to enable certified purchasers and those claiming under "them to avoid any arrangement made with them in regard to the "purchase in the nature of a trust."

The present, however, is not a case of benamidar pure and simple It is found that Raman Nambiar was, at the time of the purchase, manager on behalf of plaintiff, who was an infant, and that other would-be purchasers of the property abstained from bidding, because they were given to understand that the purchase by Raman Nambiar was being made by him as such manager and on behalf of the minor Consequently, property worth Rs 2,000 was allowed to be knocked down for Rs 230 Moreover, Raman Nambiar never set up any claim to the property as his own Such being the case, I do not think the first defendant can be allowed to succeed in his attempt to secure the property for himself under colour of Section 317 of the Civil Procedure Code

But first defendant is entitled to interest on the Rs 230 decreed to him from 25th July 1874, the date of sale * The Lower Courts' decrees will, therefore, be modified by directing plaintiff to pay to first defendant interest at 6 per cent. per annum from 25th July 1874 to date of payment on the Rs 230 decreed to first defendant Plaintiff and first defendant will pay each other costs of the appeal proportionate to the amount allowed and disallowed.

Second defendant's appeal No 779 is dismissed with costs

MUTTUSAMI AYYAR, J —I come to the same conclusion The question for determination in these second appeals is whether upon the facts found the decision of the Courts below is correct The substantial parties to this suit are the son of execution-debtor in original suit No 232 of 1868 and the representative of the certified purchaser at the Court sale held in execution of the decree passed therein It is provided by Section 317 of the Civil Procedure Code that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or of some one through whom such other person claims Although Act VIII of 1859 was in force when the sale took place in the present case, Section 317 has not,[286] as observed in *Aldwell* v. *Ilahi Bakhsh* (2) altered in principle the rule of law contained in Section 260 of Act VIII of 1859 That rule is *not* that a *benami* purchase is void altogether, but that it shall not be available as a ground of action against a certified purchaser The Privy Council held in *Lokhee Narain Roy Chowdhry* v *Kalypuddo Bandopadhya and Shamapuddo Bandopadhya* (3) that when the certified purchaser is the plaintiff, the real owner, if in possession, and if he honestly obtained that possession, may rely on the *benami* purchase as a ground of defence It was also pointed out by this Court in *Ramakrishnappa* v *Adinarayana* (1) that a *benami* purchase is not invalid even as a ground of claim as against defendants who are neither certified purchasers nor claim under them Another limitation of the rule is that indicated by the second paragraph of Section 317, *viz*, that

* Vide Ex XX Ed

(1) 8 M. 511. (2) 5 A. 478. (3) 2 I A. 154

1893 Oct. 11. — Appellate Civil. — 17 M. 282 = 4 M. L. J. 64.

the protection vouchsafed to a certified purchaser does not extend to cases of fraud. The suit from which these second appeals arise was brought against the anandravan of the certified purchaser, and the ground on which the Courts below rest their decision is that the plaintiff is the beneficial owner, and that the certified purchaser under whom the first defendant claims is *benami* purchaser or his trustee. This ground of decision is inconsistent with the effect of section 317 which is described in *Ramakrishnappa* v. *Adinarayana* (1) as enabling the person claiming under the certified purchaser to avoid any arrangement made regarding the *benami* purchase. If the facts found disclosed a *benami* purchase and nothing more, the appeals must prevail. But it is also found that Raman Nambiar was, at the time of the Court sale, managing the affairs of respondent's illom as its agent and that he bought the land as such, though he advanced the purchase money, on the understanding that he was to be repaid. It is also found, as a fact, that the market value of the land in dispute was Rs. 2,000, whilst it was brought at the Court sale for Rs. 230. The District Munsif observes that there is strong evidence to show that numerous persons who went to bid at the Court sale were dissuaded from doing so by Raman Nambiar, who represented to them that he was buying the land for the use of respondent's illom. It is also found that Raman Nambiar continued to be the [287] agent of the illom till his death, and that after him, the first defendant was agent until the date of the controversy which resulted in this litigation. Until 1889, the kanom originally granted by the illom was outstanding, and it does not appear that Raman Nambiar ever asserted his title to the land in dispute, or that the first defendant asserted the right of his tarwad to it prior to 1889. Under these circumstances, I consider that the decision of the Courts below can be supported on the ground that Raman Nambiar brought the land as agent of plaintiff's illom subject to a charge in his favour for the amount advanced by him, and that until 1889 the land was treated as the property of the illom; otherwise an agent would be enabled to make a profit out of his principal's property, which he intended to deal with as agent, and contniued to do so till 1889, and thereby to turn the understanding on which his name was inserted in the certificate and the land was since held into a means of perpetrating fraud on his principal. I also think that interest should be awarded on Rs. 230 in the decree proposed.

I concur with my learned colleague on the other questions raised on second appeal and in the decree proposed by him.

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(1) 8 M. 511.

17 M. 287

1893 Dec. 12.

APPELLATE CIVIL.

17 M. 287.

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NARASIMHA RAZU (*Plaintiff No. 1*), *Appellant v.* VEERABHADRA RAZU AND OTHERS (*Defendants Nos. 2 and 3 and Plaintiff No. 2*), *Respondents* * [1st, 2nd, 3rd November and 12th December, 1893.]

Hindu law—Inheritance—Illatom adoption—Sapratibandha property.

There is no evidence that the custom of *illatom* adoption exists among the Kondaraazu caste of the Vizagapatam district. *Sapratibandha* (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir.

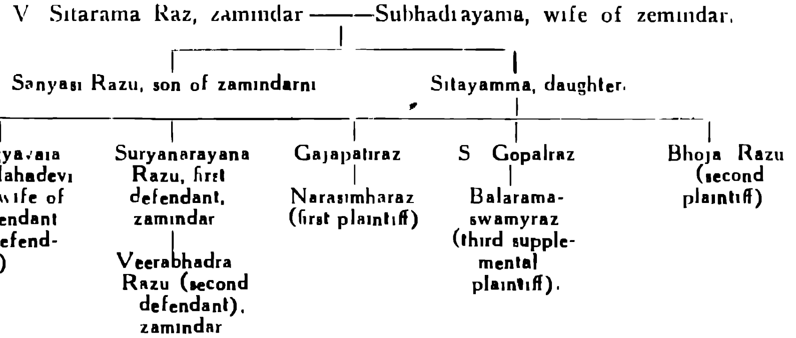
[R., 20 M. 207 (217).]

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 3 of 1890.

[288] The facts of the case appear sufficiently for the purpose of this report in the following judgment of the District Judge:—

" The facts of the case as set forth in the plaint are as follows:

" The parties to the suit are related as shown in the pedigree given " below.



" Sri Rajah Vyricherla Sitaramarazu Garu possessed the zemindari " estate of Kurupam and some moveable property and died in 1830. At " the time of his death there were living his widow Sitayama, his son " Sanyasi Razu, and two daughters Sitayama and Gangayama. This " Sanyasi Razu lived only for fifteen days after the death of his father. " The whole of the Kurupam zamindari, therefore, vested in his mother, " who died in 1841, being in possession of the estate until the date of her " death. In 1835, Subhadrayama Garu married her daughter Sitayama " Garu to one Silavamsam Sanyasi Razu Garu, an inhabitant of Pachi-" penta. She constituted him her *illatom* son-in-law, and as such his " sons would be heirs to the family property.

" At the time of the death of Subhadrayama Garu, the first defendant " had been to Sitayama Garu, subsequently Gajapati Raz, father of " first plaintiff, the second plaintiff, and one Gopal Razu were born. This " Gopal Razu died without issue. As the 1st defendant was, at the time " of the death of Subhadrayama Garu (1841) a minor, the estate was " taken under the Court of Wards, and was managed by them until 1856,

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* Appeal No. 85 of 1892.

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APPEL-LATE CIVIL.

17 M. 287.

"when the estate was handed over to the first defendant, he having then "attained majority and as he was the senior member of the family.

"Since 1856, first defendant, as the head of the family, has managed "the estate. Plaintiffs were living jointly with the defendants. About "seven or eight months ago first defendant [289] purchased the Chemudu "zamindari, and got the sale-deed executed in the name of his son, the "2nd defendant. This property having been purchased with joint funds, "all the members of the family are entitled to a share in it. Accordingly "first plaintiff demanded a share in this, as well as in the other pro-"perties, but the first defendant refused to give any share. The second "plaintiff brought a pauper suit in respect of the share due to him in "original suit No. 19 of 1879 on the file of this Court; but his suit failed, "as second plaintiff was found not to be a pauper. Hence the suit for "partition of the properties mentioned in the schedules annexed to the "plaint.

"First defendant's answer is.—The zamindari of Kurupam is an "impartible zamindari, governed by the rule of primogeniture. The late "Subhadrayama took the first defendant in adoption in 1839, with the "permission of her late husband, and plaintiffs are not entitled to any "share.

"As at the time of the death of Subhadrayama, there were no *sapin-"das* or *samanodakas* belonging to the *legitimate* branch of the Vyricherla "family; first defendant as the only sister's son of the last full owner "then in existence had the exclusive right to inherit the zamindari, "irrespective of his right as the adopted son.

"Subhadrayama never married her daughter to Sanyasi Razu Garu "with the object that he should be her *illatom* son-in-law, and that his "issue should inherit the zemindari. Even if she had such an inten-"tion, it cannot have any effect, being opposed to custom and Hindu law.

"Plaintiffs and first defendant never constituted an undivided family. "The purchase referred to in paragraph 10 of the plaint was from second "defendant's own funds. Even if that is not proved, plaintiffs cannot "claim anything in this, enough they may be found entitled to the other "estate, inasmuch as the purchase was made from the savings of the "zamindari, and so formed the exclusive property of the first defendant. "The suit is barred by limitation. This Court has no jurisdiction to try "the suit in respect of Gumma Mutta and Konda Mutta. The schedules "are incorrect. The plaint is not properly stamped. The suit so far as "second plaintiff is concerned is *res judicata*. The suit is barred by "limitation The second defendant contended that there is no cause of "action against him, and the third defendant disclaimed [290] all interest, "and stated that she merely acted as guardian of the second defendant, "her son.

"The following issues were framed:—

"(1) Is the suit barred by limitation?

"(2) Is the claim of second plaintiff *res judicata*?

"(3) Was first defendant adopted by Subhadrayama Garu as "alleged in paragraph 3 of first defendant's written statement, "and if so, is such adoption invalid for the reasons stated by "the plaintiff?

"(4) In case the *factum* of adoption is proved, are plaintiffs "entitled to question the validity of this adoption, or are they "precluded from doing so, either by estoppel, by conduct or by "lapse of time?

"(5) In the event of its being found that the first defendant was "not duly adopted, whether the right under which first "defendant succeeded to the Kurupam zemindari, which "vested in first defendant in 1841 was partially divested by "the subsequent birth of brothers, in other words, did the "brothers become, on their birth, co-parceners with him (first "defendant)?

"(6) Is there a valid custom among the Kondarazu caste of the "Vizagapatam district to take an *illatam* son-in-law as "alleged by plaintiff?

"(7) Did Subhadrayama take Silavamsam Sanyasi Razu in 1835 "as an *illatam* son-in-law in accordance with such custom?

"(8) Is the zemindari partible and governed by the ordinary Hindu "law, or is it impartible and governed by the rule of primo-"geniture?

"(9) Has the Court jurisdiction with regard to the plaint Muttahs "—Gumma Mutta and Conda Mutta—situated in the juris-"diction of the Agent to the Governor at Vizagapatam?"

On the fifth issue the District Judge found that the right under which the first defendant succeeded to the zemindari was not partially divested by the subsequent birth of brothers, and that under Hindu law an estate cannot be thus divested when the estate is taken by obstructed inheritance On the sixth and seventh issues the Judge found in the absence of evidence that no such [**291**] custom as that alleged by the plaintiff existed, and dismissed the suit

The first plaintiff preferred this appeal

Mr *Michell* and *Rama Rau*, for appellant

Subramanya Ayyar, for respondents Nos 1 and 2

JUDGMENT

We are of opinion that the findings of the District Judge on the fifth, sixth and seventh issues recorded by him are correct and sufficient for the dismissal of the plaintiff's suit

These issues are as follows —

"(5) In the event of its being found that the first defendant was "not duly adopted, whether the right under which first defend-"ant succeeded to the Kurupam zemindari, which vested in "first defendant in 1841 was partially divested by the sub-"sequent birth of brothers, in other words did the brothers "become on their birth co-parceners with first defendant?

"(6) Is there a valid custom among the Kondarazu caste of the "Vizagapatam district to take an *illatam* son-in-law as "alleged by plaintiff?

"(7) Did Subhadrayama take Silavamsam Sanyasi Razu in 1835 "as an *illatam* son-in-law in accordance with such custom?"

As to the sixth issue there is no evidence whatever and no attempt has been made by the plaintiffs to prove that the custom of *illatam* exists among the Kondarazu caste of the Vizagapatam district Plaintiff's first witness says, however, that before the marriage of Sanyasi Razu with Sitayama, the daughter of Subhadrayama (the widow of the former zemindar) Subhadrayama told Sanyasi Razu that "if his wife had male "child she would hand over the zemindari to that child" Our attention is called to a statement recorded as made by second defendant's third witness Gattupalli Jagamma in the following words —"Sitayama's

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" husband alone was taken as *illatam*. Gangayama's husband was not " taken as *illatam*." Ganyama was, it must here be observed, the younger sister of Sitayama. This statement in record is made in answer to the Court's question " was Gangayama's husband also taken as " *illatam*." This is in a deposition taken by the District Munsif of Parvatipur. The witness was a woman and uneducated. She had not stated that Sitayama's husband was taken as *illatam*. It is therefore difficult to understand how the witness came to be [292] asked if Gangayama's husband was *also* taken as *illatam* and this after her examination had been closed As is contended on behalf of first and second respondents, the conduct of the parties has been quite inconsistent with that custom of *illatam;* for if Sanyasi Raju had been in fact adopted under that custom he himself should have succeeded to the zemindari which he admittedly never claimed to have done even as against Subhadrayama. There can be little doubt, we think, that the alleged taking of Sanyasi Razu as an *illatam* son-in-law is not true.

Failing this contention, it is clear that, if plaintiffs are entitled at all, it is as the last zemindar's sister's son, *i.e.*, as *bandhus*, who take by inheritance and not by survivorship. The property was, therefore, *Sapratibandha* (liable to obstruction) which vests in the heirs *in existence at the time when the inheritance opened* and is not subject to variation by the subsequent birth of any co-heir. The case in *Krishna* v. *Sami* (1) referred to by the appellant's counsel was one relating to *Apratibandha* or unobstructed property.

It is clear from the plaint that when the suit was instituted the plaintiffs had overlooked this obstacle in their way; for in paragraph 7 they speak of first defendant alone having been born before Subhadrayama's death, and of first plaintiff's father and his other two brothers and sisters as born subsequently. That such was the fact is also seen from Exhibit LXVI, a petition presented by Sitayama to the Governor's Agent on 21st September 1841, in which she speaks of herself as the mother of *one son alone* (*eka putra*). This is evidence entitled to more weight than the statements of plaintiffs' first and second witnesses. The worthlessness of the evidence of plaintiffs' first witness is moreover apparent from the answers given by him in cross-examination.

As to the adoption of first defendant by Subhadrayama, the evidence as to her being authorized by her husband to make the adoption is very far from satisfactory. Moreover, her husband was not the last male owner as his son (a child of four years) survived him for a month (more or less). There can be no doubt, however that Subhadrayama did herself take the first defendant and treat him as the heir to the zemindari. Though it may be doubted whether this adoption was made under legal authority, there can be no doubt that it was recognized, and that the late first [293] defendant was in possession on the strength of it from the date of Subhadrayama's death in 1841 till the institution of the present suit in 1890. According to first plaintiff's own evidence the property which stood in his father's name came to himself *exclusively* and first defendant was given no share in it. First plaintiff admits further that till the institution of this suit he described himself by his father's house name Silavamsam, and not as Vyricherla which is the description applicable to the zemindar's family Plaintiff's third witness, who speaks to the maintenance of the late first defendant's brothers and sisters by that defendant, says that each

(1) 9 M. 64.

of the brothers got half a measure of rice daily which first defendant "-stopped when he was displeased," and that "some servants got rations like "the brothers" There is no evidence on behalf of plaintiffs that this maintenance was claimed as a right and that the grant of it was not an act of brotherly kindness on the part of first defendant The Judge is right, therefore, in holding the suit to be time-barred

1893, DEC. 12. APPELLATE CIVIL. 17 M. 287.

A consideration of the issue whether the zemindari is partible is unnecesary under these circumstances, as on the finding that first plaintiff (the only appellant) was not born when the property vested in the late first defendant, plaintiffs' suit must fail First defendant thus became the exclusive owner and on his death the property belongs to his son, now the sole respondent, as the nearer heir than appellant

The appeal must be dismissed with costs

17 M. 293=4 M. L J. 140

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

VELU PILLAI AND OTHERS (*Plaintiffs*), *Appellants* v GHOSE MAHOMED AND OTHERS (*Defendants*), *Respondents* *

[26th September and 15th October, 1893]

Limitation—Limitation Act—Act XV of 1877, *Schedule II, Article* 85—*Mutual account*

To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create [294] obligations on the one side, those on the other being merely complete or partial discharges of such obligations Thus an account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same purpose is not a mutual account within the meaning of Article 85 of Schedule II of the Limitation Act

Hirada Basappa v *Gadigi Muddappa* (1) cited and followed

A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality

[R, 22 B 606 (609), 34 M 513 (516)=8 Ind Cas 141=21 M L J 391=8 M L T 412 =(1911) M W N 1, 17 Ind Cas 48=23 M L J 516=(1912) M W N 1204, 13 M L J 210, 22 M L J 14 (22)=10 M L T 409=(1911) 2 M W N 440, 132 P R 1907]

APPEAL against the decree of H H O'Farrell, District Judge of Trichinopoly, in original suit No 33 of 1890

The plaintiffs sued as heirs to their father, a broker, who had had continuous dealings with the defendants, to recover from them the sum of Rs 3,016-1-6 The plaintiffs' account (with which the defendants' accounts agreed) ran from the 23rd September 1885, on which date a balance was struck and a settlement made in favour of the plaintiffs, to the 7th October 1890, on which date they showed a balance of Rs 3,016-1-6 in the plaintiffs' favour, the sum now sued for Payments had been made from time to time and balances struck on both the plaintiffs' and defendants' accounts, but with one small exception in 1885 the account was invariably in favour of the plaintiffs The District Judge held that the plaintiffs' account did not fall under Article 85, Schedule II of the Limitation Act, since to bring a case within that article there must

* Appeal No 89 of 1892

(1) 6 M.H.C.R 142

1893 Oct. 5. APPELLATE CIVIL. 17 M. 293 = 4 M. L. J. 149.

be a fluctuating balance, at times in favour of one party and at times in favour of the other, and in the present case the solitary item referred to above being beyond the period of limitation, and therefore not availing the plaintiffs' case, the amounts prior to the 3rd November 1887 were barred, and passed a decree in favour of the plaintiffs for the amounts due between the 3rd November 1887 and the close of the accounts.

The plaintiffs preferred this appeal.

Rama Rau, for appellants.

T. Rangachariar, for respondents.

JUDGMENT.

The only point argued in this appeal is as to the correctness of the Judge in holding that the account on which plaintiffs rely is not a mutual account within the meaning of Article 85 of Schedule II of the Limitation Act.

The reason assigned by the District Judge is that, with one trifling exception, and that beyond the period of limitation, the [295] account has been invariably in favour of plaintiffs. He says: "although it "may not be necessary in order to bring the case within Article 85 of Act "XV of 1877 that there should be actual demands, it is necessary that "the balance should fluctuate, being at times in favour of one party and "at times in favour of the other," and in support of this proposition he refers to *Harrandas Hemraj* v. *Vissandas Hemraj* (1) and *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa* (2).

In the former case it was said by Sir Charles Sargent, C. J., that the corresponding clause of Act IX of 1871 appeared to have been intended to apply to "cases where the course of business has been of such a nature as "to give rise to reciprocal demands between the parties; in other words, "where the dealings between the parties are such that sometimes the "balance may be in favour of one party and sometimes of the other." The meaning of which is not that there must have been such a shifting balance, but such was a possible and likely incident of the mutual transactions with regard to which the account was kept.

The decision in *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa* (2) is authority for the proposition that the mere fact of the balance having been in favour of the defendant on some occasions is not sufficient to constitute the account a "mutual, open and current account."

A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality.

The reason assigned by the Judge for his finding is therefore not valid; but, nevertheless, his decision is correct. The rule to be applied is to be found in the judgment delivered by the late Mr. Justice Holloway in *Hirada Basappa* v. *Gadigi Muddappa* (3). "To be mutual "there must be transactions on each side creating independent obli- "gations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or "partial discharges of such obligations." The amounts credited to defendant in the account kept by plaintiffs in the present case are merely payments made in reduction of the debt due from defendants to plaintiffs, and the two entries of amounts due to defendants from plaintiffs for oil, &c., pur-[296] chased from defendants are also credited merely as items received

(1) 6 B. 134. (2) 5 C. 759 (3) 6 M.H.C.R. 142.

in partial discharge of defendants' debt to the plaintiffs We cannot accede to the contention that they are evidences of reciprocal demands They are casual merely and not such as would imply a regular course of reciprocal dealings

1893 Oct 5 — APPELLATE CIVIL — 17 M. 293=4 M. L. J. 140.

The Lower Court's decision is, therefore, correct, and this appeal must be dismissed with costs

Objection has been filed by respondent against that part of the Lower Court's decree which awards to plaintiffs costs on the whole amount sued for, instead of limiting the same to the amount decreed The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed *Mudhan Mohan Doss* v *Gopal Doss* (1) The Judge has given no reason for departing from this rule The decree will be modified by awarding costs to plaintiffs only on the amount decreed. The circumstances of the case are such as to justify disallowance of costs to the second defendant (respondent)

In allowance of this objection the Lower Court's decree will be modified as above

There will be no order as to costs of this memorandum of objections

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17 M. 296.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar

KUNHANUJAN (*Defendant No* 8), *Petitioner* v ANJELU (*Plaintiff*), *Respondent* * [22nd and 25th September, 1893]

Transfer of Property Act (Act IV of 1882), Section 108, clause (j)—Lessor's right to sue both lessee and his transferee

The provision in Section 108 of the Transfer of Property Act that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and that the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, does not prevent the transferee being also liable to the lessor, who may at the same time sue the [297] lessee upon his express covenant and the transferee upon the privity of estate, though he can have execution against one only

[F., 3 L B R 90, R., 29 B 391 (397)=7 Bom L R 313, 30 M 410=17 M L J. 258 =2 M L T 363, D, 11 M L T 432=(1912) M W N 541]

PETITION under Section 25 of Act IX of 1887 praying the High Court to revise the decree of E. K Krishnan, Subordinate Judge of South Malabar, in small cause suit No 65 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

The Subordinate Judge gave a decree in favour of the plaintiff, and the eighth defendant preferred this appeal

Sundara Ayyar, for petitioner

Sivasami Ayyar, for respondent

JUDGMENT

This was a suit for house-rent The house was let to the first defendant under a kulichit, which he executed on the 23rd September 1888

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* Civil Revision Petition No 414 of 1892

(1) 10 M I A 563.

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SEP. 25.

APPELLATE CIVIL.

17 M. 296.

The first defendant assigned the lease to one Ali Koya, and defendants 2 to 7 are his heirs. The eighth defendant purchased Ali Koya's interest at a Court sale. The plaintiffs claimed Rs. 210 as the balance of rent due by all the defendants. The eighth defendant did not enter into possession, and stated that he did not desire to take possession under his sale cerificate, though it was his intention to insist on his claim as purchaser so far as the improvements made by Ali Koya are concerned. The Subordinate Judge held, on the small cause side, that, as the principal lessee, the first defendant, was liable for rent, that defendants 2 to 7 were also liable, as Ali Koya's heirs, from date of Ali Koya's purchase, and that the eighth defendant was liable for rent from the date on which he purchased Ali Koya's interest The eighth defendant is the petitioner in revision before me, and it is contended for him that unless he enters into possession as purchaser, he is not liable for rent under Section 108, Clause (j) of Act IV of 1882. It is not denied that under the English law the assignee of a lease may be sued on covenants which run with the land, although he has not taken actual possession of it, and that a covenant to pay rent is a covenant running with the land (Woodfall's Landlord and Tenant, page 239). The reason for the assignee's liability is the privity of estate created by the assignment as between heir and the original lessor, and the privity arises from the vesting of the assignor's interest in the assignee. The question, therefore, is whether, as argued on petitioner's behalf, Section 108, Clause (j) of Act IV of 1882 renders this view inapplicable in this country That clause provides [298] that the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease. But from this it does not follow that the transferee is not also liable. The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate, though he can have execution against one only (Woodfall's Landlord and Tenant, 11th Edition, 238). I do not, therefore, consider that this petition can be supported, and I dismiss it with costs.

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17 M. 298.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATANARASIMHA NAIDU (*Petitioner*) *v.* SURANNA (*Respondent*) *

[12th October, 1893.]

Rent Recovery Act—Madras Act VIII of 1865, *Section* 76*—Civil Procedure Code, Sections* 4, 622

Orders passed by a Collector under the Rent Recovery Act are not open to revision under Section 622 of the Civil Procedure Code *Velli Periya Mira* v. *Moidin Padsha* (1) followed.

PETITIONS under Section 622 of the Civil Procedure Code praying the High Court to revise the order of C. Venkatajugga Row, Assistant Collector of Kistna, dated 9th March 1892, passed in summary suits Nos. 100 and in others.

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* Civil Revision Petitions Nos. 489 of 1882, &c.

(1) 9 M. 332.

1893 Oct. 12. APPELLATE CIVIL. 17 M. 298.

The petitioner, a zemindar, applied under Section 10 of the Rent Recovery Act to eject a tenant on the ground that he had not, in accordance with a decree of the Assistant Collector given in a suit to enforce the acceptance of patta brought by the petitioner against the tenant, accepted patta and presented a muchilika as directed The Assistant Collector rejected the application, and the zemindar presented this petition under Section 622 of the Civil Procedure Code

Pattabhirama Ayyar, for appellant

Seshagiri Ayyar, for respondent

JUDGMENT

[**299**] The preliminary point in this case is whether orders passed under Madras Act VIII of 1865 by a Collector are open to revision under Section 622 of the Code of Civil Procedure

The question was answered in the negative in *Velli Periya Mira* v *Moidin Padsha* (1), which was followed in *Appandai* v *Srihari Joishi* (2)

It has now been contended that the revision mentioned in Section 76 of Act VIII of 1865 (Madras) means revision by the Court which made the order and not revision by a superior Court We are unable thus to limit the scope of the word by introducing words which are not to be found in the section

As to the contention that Act VIII of 1865 is a local Act and cannot override the provisions of Section 622 of the Code of Civil Procedure by the powers conferred on this Court under the Letters Patent,, we need only refer to Section 4 of the Code of Civil Procedure

We do not see sufficient ground for dissenting from the decision in *Velli Periya Mira* v *Moidin Padsha* (1)

This petition is dismissed with costs

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17 M. 299.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt , Chief Justice, and Mr Justice Shephard

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TIRTHA SAMI (*Plaintiff*), *Appellant*, v SESHAGIRI PAI AND OTHERS (*Defendants*), *Respondents* * [30th October, 1893]

Limitation—Limitation Act (Act XV of 1877), Section 14—Deduction of time during prosecution of suit with due diligence—Defect of jurisdiction—Other cause of a like nature

Where a previous suit by the same plaintiff against the same defendant has failed by reason of misjoinder of causes of action and parties, the plaintiff in a second suit is not entitled to the extra period of limitation allowed by Section 14 [**300**] of the Limitation Act, since the cause of failure of the previous suit is not due to 'defect of jurisdiction' in the Court which entertained the suit, nor is it a cause 'of a like nature' thereto *Deo Prasad Singh* v *Pertab Kairee* (3) dissented from

[**R.**, 22 A 248 (256), 19 M 90 (95), 5 M L J 58 (59)]

SECOND appeal against the decree of W C Holmes, Acting District Judge of South Canara, in appeal suit No 440 of 1889, confirming the decree of U Babu Rao, District Munsif of Udipi, in original suit No 320 of 1888

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* Second Appeal No 639 of 1892.

(1) 9 M 332 (2) 16 M 451. (3) 10 C 86

1893 OCT. 30. — APPELLATE CIVIL. — 17 M. 299.

The facts of the case appear sufficiently for the purpose of this report from the following judgment of the District Judge:—

" The plaintiff, the present sami of the Puttige matt, sued to set " aside a number of decrees passed against the Puttige matt property " during the incumbency of Vijayendra Tirtha Sami, who was the *de facto* " sami of the matt between the death of Samuthendra Tirtha Sami, who " had nominated Vijayendra Tirtha Sami as his successor, and his (the " plaintiff's) getting possession of the office of sami and of the lands " attached to the matt under the High Court decree in appeal suit No. 66 " of 1881, dated 26th October 1883. The plaintiff contended that the suits " were fraudulent and collusive, and denied that the money was borrowed " or the goods purchased for the purposes of the matt, and asserted that " Samuthendra Tirtha Sami and Vijayendra Tirtha Sami had no power " to do anything connected with the matt after the samis of the seven " other matts deposed Samuthendra and appointed the plaintiff as his " successor.

" The Lower Court has held that all the suits are barred. The Lower " Court held that Article 95 of Schedule II of the Limitation Act governs " the cases. That article, it is argued in this appeal, does not apply. " The article relates to a suit ' to set aside a decree obtained by fraud,' " and, assuming that the only ground for setting the decrees against the " matt property aside would be fraud and collusion, the Article would " clearly apply, and I do not think that the decrees can be questioned on " any other ground. I think Article 95 governs the cases.

" It is contended in this appeal that the suits would not be barred " even if the article applies; because to the three years allowed by Article " 95 there must be added under Section 14 of the Limitation Act the " period (two years, five months and [301] twenty-six days) during " which the plaintiff was prosecuting a suit against all the defendants " jointly. That suit (original suit No. 11 of 1886) was filed in the Sub- " ordinate Court on the 13th February 1886 and was dismissed, as it " was held the defendants were wrongly joined in the same suit, and in " appeal to the High Court (No. 139 of 1887) the Subordinate Judge's " decree was confirmed on the 9th August 1888

" Section 14 of the Limitation Act directs that the Court should " exclude the time during which the plaintiff has been prosecuting against " the defendant another civil proceeding which the ' Court from defect of " ' jurisdiction or other cause of a like nature ' is unable to entertain. In " the present case the plaintiff sued a number of defendants together. It " was held that there was a separate cause of action against each defend- " ant, and no joint cause of action, and the suit was therefore dismissed. " The question is, should the time he was prosecuting that suit be excluded " in computing the period of limitation for the suits brought against each " defendant separately. In *Ram Subhag Das* v. *Gobind Prasad* (1) it was " held that the plaintiff could not count in his favour the period during " which the plaintiff was prosecuting a suit which could not be entertained " owing to misjoinder of parties (plaintiffs). In *Deo Prosad Singh* v. *Pertab* " *Kairee* (2), where there had been a misjoinder of causes of action in a " suit, it was held that in a subsequent suit the period during which the " former suit was being prosecuted was to be excluded, misjoinder of causes " of action being held to be of ' like nature ' with ' defect of jurisdiction.' " In *Jema* v. *Ahmad Ali Khan* (3) this Calcutta decision was not followed. A

(1) 2 A. 622. (2) 10 C. 86. (3) 12 A. 207.

"plaintiff sued without joining his partner as party in the suit and the "suit was dismissed It was held that in a subsequent suit the period "during which the former suit was prosecuted could not be excluded, because there was no defect of jurisdiction or ' other cause of a like nature,' "which was held to mean something analogous to defect of jurisdiction "The Madras High Court has not as yet given a decision on the point, "and it is, if not incumbent, at least advisable, that this Court should "follow the latest ruling of the other High Courts Besides, to interpret "inability to entertain a suit for defect of jurisdiction or other like "cause, to include inability to decide a suit in [302] consequence of "misjoinder of causes of action or of parties or in consequence of some "other reason that prevents the suit being decided on its merits, would "be, I think, to put a wider meaning on the words used in the statute "than would be in accordance with the principles of interpretation usually "applied to the interpretation of modern statutes I think, though with "considerable hesitation, that the suits should be held to be barred"

The plaintiff preferred this second appeal

Subramanya Ayyar and *Ramachandra Rau Saheb*, for appellant

Pattabhirama Ayyar, for respondents

JUDGMENT

Assuming that the suit is one to which the six years' rule applies, we do not think that the plaintiff can take advantage of Section 14 of the Limitation Act, inasmuch as his previous suit against the same defendant, failed, not by reason of any want of jurisdiction on the part of the Court, but by reason of misjoinder of causes of action and parties In our opinion that is not a cause of a like nature within the meaning of the section We are unable to agree with the decision in *Deo Prosad Singh* v *Pertab Kairee* (1) The Courts of Allahabad and Bombay seem to take the same view as we do

The appeal is dismissed with costs.

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17 M. 302 (F.B.)=4 M L.J. 99

APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J H Colllins, Kt , Chief Justice, Mr Justice Muttusami Ayyar and Mr Justice Shephard

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PALAMALAI PADAYACHI AND ANOTHER (*Defendants* 1 *and* 4), *Appellants* v SHANMUGA AUSARI (*Plaintiff*), *Respondent* *

[10th October, 1892, 23rd November, 1893 and 6th February, 1894]

Hereditary office—(Madras) Regulation VI of 1831, *Section* 3—*Jurisdiction of Revenue Courts*

A suit for 'Maniam' lands attached to the hereditary office of village carpenter is barred by the operation of Section 3 of Regulation VI of 1831

[R., 21 M 134 (135), 30 M 320 (321), 33 M 488 (491)=5 Ind Cas 477=7 M L T 198]

APPEAL against the decree of R S. Benson, District Judge of South Arcot, in appeal suit No. 254 of 1890, reversing the decree [303] of

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* Appeal against Order No 94 of 1891.

(1) 10 C 86

1894 FEB. 6. — FULL BENCH. — 17 M. 302 (F.B.) = 4 M. L. J. 99.

P. Subramaniya Pillay, District Munsif of Vridhachalam, in original suit No 694 of 1889.

The plaintiff brought a summary suit against the defendants in the Court of the Head Assistant Collector under Regulation VI of 1831 for the possession of the plaint lands on the ground that he was the carpenter of the village of Kandiyankuppam, and that the lands were ' Maniam ' lands attached to his office as carpenter. The Head Assistant Collector found that the defendants' occupation was unlawful, and that the plaintiff who was the village carpenter, was the proper person to be in possession of them, *i.e.*, of the ' Maniam ' lands.

An appeal was made to the Collector, and he confirmed the Head Assistant Collector's decree, but remarked that there was no means of carrying out a decree under Regulation VI of 1831.

On the 23rd August 1889 the plaintiff applied to the Head Assistant Collector to be put in possession in accordance with the decree in the above suit, but the Head Assistant Collector referred the plaintiff to the Civil Court

The plaintiff then brought his suit in the Lower Court to recover possession of the lands and Rs. 30 as mesne profits, but the District Munsif dismissed it on the ground that the land was unenfranchised service inam land and that, under Regulation VI of 1831, claims regarding such lands are not cognizable by Civil Courts.

Plaintiff appealed on the ground that the Revenue authorities having decided the right in plaintiff's favour, the defendants were liable to be ejected, and that the suit, being virtually one to enforce the order of the Head Assistant Collector under the Regulation, was maintainable.

The District Judge decreed in favour of the plaintiff, and the defendants preferred this appeal

R. Subramanya Ayyar, for appellants.

Pattabhirama Ayyar, for respondent.

This appeal came on for hearing before MUTTUSAMI AYYAR J., and WILKINSON, J., on the 10th October 1892, when the Court made the following order of reference to Full Bench :—

We are unable to reconcile the decision in *Ravutha Koundan* v. *Muttu Koundan* (1) with the provisions of Section 3 of [**304**] Regulation VI of 1831 and with the decision in the *Collector of Kistna District* v. *Chinnamrazu* (2) The present suit is one for the possession of the emoluments of a certain hereditary office, and such a suit is apparently barred by the operation of Section 3, Regulation VI of 1831. We therefore refer the question whether the suit is so barred to the Full Bench.

This appeal having come on for hearing before the Full Bench on 23rd November 1893, the Court delivered the following

JUDGMENT OF THE FULL BENCH.

This is clearly a suit within Section 3 of the Regulation, and we must, therefore, answer the question in the affirmative. There is no necessary conflict between the two cases cited in the order of reference.

This appeal coming on for hearing before a Division Bench consisting of MUTTUSAMI AYYAR and BEST, JJ. the Court delivered the following

(1) 13 M. 41. (2) 5 M. H. C. R. 360

1894 FEB 6.

FULL BENCH.

17 M. 302. (F.B.) 4 M. L. J. 99.

JUDGMENT OF THE DIVISION BENCH

In accordance with the opinion of the Full Bench we set aside the decree of the District Judge and restore that of the District Munsif

Respondent must pay appellant's costs in this Court and also in the Lower Appellate Court.

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17 M. 304.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

RAMAN (*Petitioner*), *Appellant*, v KUNHAYAN AND ANOTHER (*Counter-Petitioners*), *Respondents* * [17th October, 1893]

Execution—Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition

The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made no mention of the irregularities now relied on does not create an estoppel

Thakoor Mahatab Deo v *Leelanund Singh* (1) followed

[R., 2 C L J 584]

[305] APPEAL against the order of the Subordinate Judge of North Malabar passed on civil miscellaneous petition No 8 of 1892

The petitioner, a judgment-debtor, prayed that the sale in execution of the decree passed against him might be set aside on the ground that the decree-holder, having entered into an agreement with him arranging for a settlement of the debt in lieu of the sale of the property, had nevertheless caused the property to be sold, had purchased it at a low price and had generally acted fraudulently and in contravention of the agreement It appeared that after the execution of the aforesaid agreement, the petitioner had filed a petition for the purpose of obtaining an adjournment of the sale with a view to making arrangements for carrying out his agreement. The Court, however, had refused the petition on the ground that the date of the sale was very near

The Subordinate Judge rejected the petition on the ground that the first petition (No 545 of 1891) estopped the petitioner from alleging any irregularity in the sale, since no mention had been made in the said petition of the alleged arrangement between the creditor and judgment-debtor

Ryru Nambiar, for appellant.

Govinda Menon, for respondents

JUDGMENT

The Subordinate Judge is in error in thinking that the petitioner is estopped by his previous petition No 545 of 1891 There was no occasion for mentioning in that petition the irregularities now relied on as vitiating the sale, as that petition was filed for the purpose of obtaining an adjournment with a view to raising the money by private arrangement In a similar case the Calcutta High Court also held that omissions in such a petition did not create an estoppel (1). We set aside the order and

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* Appeal against Order No 78 of 1892.

(1) 7 C 613.

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direct the Subordinate Judge to allow the parties to adduce evidence with reference to the alleged irregularities and to dispose of the case in accordance with law. The costs of this appeal will abide and follow the result.

17 M. 306.

[306] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUNDARARAJA AYYANGAR (*Plaintiff*), *Appellant v.* PATTANATHUSAMI TEVER AND OTHERS (*Defendants*), *Respondents.** [16th *January*, 1894.]

Legal Practitioner's Act—(Act XVIII of 1879), Sections 28, 29—Remuneration by promissory note for past professional services rendered under oral agreements —Guardian and ward—Services necessary or manifestly beneficial.

A Guardian executed a promissory note in favour of a vakil (the plaintiff) as remuneration for his past professional services rendered under oral agreements with him:

Held, that a suit upon the note was barred by Sections 28 and 29 of Act XVIII of 1879, and that, as there was no such necessity for the proceedings in question as to render the contract binding on the minors, no suit would lie against them

[R., 35 C. 320 (324)=12 C W N 256=3 M.L.T 156; 31 M. (49)=17 M L J. 553=3 M.L.T 95, 15 C.L.J. 660=17 C.W N 45 (46)=13 Ind Cas. 43; 6 L B.R. 166 (167), 7 O C 46 (48)]

SECOND appeal against the decree of J. W. F Dumergue, Acting District Judge of Madura, in appeal suit No. 270 of 1892, reversing the decree of H. Krishna Row, District Munsif of Madura, in original suit No. 272 of 1891.

This was a suit upon a promissory note executed by the fourth defendant as the guardian of his sister's sons, defendants 1 to 3, for Rs. 600 alleged to be due to the plaintiff as remuneration for past professional services rendered by the plaintiff as vakil under oral agreements with the fourth defendant in certain criminal cases and proceedings which arose as follows.—

The present zamindar of Sivagunga and the late zamindar granted the villages of Tiruvelloor, Vembatore and Thavasagudy to the father of the first, second and third defendants on a perpetual cowle in August 1882. After the death of the said defendant's father in September 1887, the present zamindar granted a cowle of the village of Tiruvelloor to his own wife. Disputes arose since then between zemindar's wife backed by the zamindar and first, second and third defendants' mother, who was supported by her brother, the fourth defendant. The zemindar's wife [307] through her husband commenced to issue puttas to the tenants and collect melwaram, which the first, second and third defendants' mother through her brother, the fourth defendant, resisted. The first, second and third defendants' mother leased the village of Tiruvelloor to one Gopalsawmy Naidu, who brought suit against zemindar's wife for possession in original suit No. 7 of 1890 on the file of the East Subordinate Court and obtained decree. While matters were thus progressing, two criminal cases arose out of them. The zemindar's wife's against charged the fourth defendant's agents with carrying off the fruits of Karuvela trees in Tiruvelloor village before the Sub-Magistrate of Sivagunga. The

* Second Appeal No. 700. of 1893.

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fourth defendant engaged the plaintiff's service to defend the accused and the accused were acquitted In the other case, while first, second and third defendants' men were taking the melwaram of Vembatore village to the said defendants' house, the zemindar's men waylaid them near Othapoovarasu and beating them, carried off the said melwaram produce The fourth defendant charged the zamindar's men with dacoity and the preliminary enquiry was conducted by the Head Assistant Magistrate, who committed the men to the Session Court where, however, they were acquitted The plaintiff was engaged to prosecute the men before the Head Assistant Magistrate during the preliminary enquiry It was mainly in connection with the plaintiff's services in these two criminal cases that fourth defendant executed the plaint promissory note The promissory note further stated that plaintiff's services were engaged in a breach of trust case and putta transfer case against the zamindar

The District Munsif passed a decree in favour of the plaintiff, which the District Judge reversed, on the grounds that the suit on the promissory note was barred by Sections 28 and 29 of the Legal Practitioners' Act, which require all agreements for remuneration between a pleader and his client to be in writing and filed in Court, and that there was no such necessity in the case as to render the agreement of the guardian binding on defendants 1 to 3

The plaintiff preferred this appeal

Bhashyam Ayyangar and *Gopalasami Ayyangar*, for appellant

Sundara Ayyar, for respondents

JUDGMENT

This was a suit upon a promissory note executed by fourth defendant as the guardian of his sister's sons, defendants [**308**] 1 to 3, for Rs 600, alleged to be due to plaintiff as remuneration for professional services rendered by plaintiff as vakil in criminal cases and proceedings We agree with the Judge that the claim cannot be supported on the special contract evidenced by the promissory note Sections 28 and 29 of the Legal Practitioners' Act require that such agreements should be in writing and filed in Court It appears from the promissory note that it was executed for past services rendered under oral agreements with the fourth defendant

It has been held that this is no bar to a decree being passed for such reasonable remuneration as may be found due on the principle of *quantum meruit* If, therefore, the fourth defendant should be held to have had authority to bind the minor defendants 1, 2, 3 by this contract, we should have considered it necessary to call for a distinct finding as to the amount that plaintiff would be entitled to as reasonable compensation for services rendered But no contract made by fourth defendant whether as guardian of the minors, or as their next friend can be held to be binding on them unless the services to be rendered were either necessary or manifestly beneficial to the minors The finding of the Judge is that there was no such necessity as to render the contract binding on the minors Having regard to the objects for which the plaintiff was employed, we do not think they were necessary or manifestly beneficial to the minors In this view of the case it is not necessary for us to express an opinion as to the competency of the minors' mother to appoint a guardian for her sons We also observe that a decree has been passed against fourth defendant for the amount claimed by plaintiff and he has preferred no appeal

We dismiss the appeal with costs.

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17 M. 309= M. L. J. 91.

17 M. 309=4 M.L.J. 91.

[309] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SHANMUGA PILLAI (*Defendant No.* 1), *Appellant v.* RAMANATHAN CHETTI (*Plaintiff No.* 2), *Respondent.** [22nd December 1893, and 25th January, 1894.]

Civil Procedure Code—Act XIV of 1882, *Sections* 25, 223—*Madras Civil Courts Act Section* 12—*Jurisdiction of Munsif's Court—Execution of decree of superior Court.*

As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by Section 12 of the Civil Courts Act, but in the five cases mentioned in Section 223 of the Civil Procedure Code special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience The condition as to the jurisdiction of the Subordinate Court to which a suit can be transferred under Section 25 of the Code of Civil Procedure is not laid down in Section 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein. *Narasayya* v *Venkatakrishnayya* (1) followed. *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee* (2) and *Durga Charan Majumdar* v. *Umatara Gupta* (3) dissented from.

[**Diss.,** 9 P.R. 1901=1 P L R 1901; U B R. Civil (1902) III Quarter, Execution of decree, 5; **F.**, 5 Ind. Cas. 155=7 M.L T 132; 22 M L J. 125 (126)=10 M L.T. 525 (526)=(1911) 2 M W N 355; **R**, 1 N L R 39 (41).]

APPEAL against the order of W F. Grahame, District Judge of South Arcot, dated 30th August 1891, passed on civil miscellaneous appeal No. 20 of 1891, confirming the order of the District Munsif of Chidambaram passed on execution petition No. 354 of 1891 and miscellaneous petitions Nos 503 and 598 of 1891 (original suit No 19 of 1888 on the file of the District Court of South Arcot).

The facts of this case were as follows:—

The defendant had mortgaged to the plaintiff certain property, only half of which belonged to him, the other half belonging to his brother, one Theagaraja Pillai, who instituted a suit for partition and had his share delivered to him The plaintiff instituted a suit and attached and sold the defendant's share of the property, the decree in the said suit having been, on the plaintiff's petition, sent by the District Court to the District Munsif's Court for execution. When the plaintiff applied for attachment of the defendant's other property, the defendant presented a petition demanding that the remainder of the property [310] which he had mortgaged should be first sold before his other property was proceeded against On both the Lower Courts rejecting this petition, the defendant preferred this appeal alleging, *inter alia*, that the District Munsif had no jurisdiction to execute the decree of the District Court for more than Rs. 2,500, the limit of his jurisdiction.

Sundara Ayyar, for appellant.

Rangaramanujachariar, for respondent.

JUDGMENT.

Two questions arise for determination in this appeal and the first is whether the District Munsif had jurisdiction to execute the decree in original suit No. 19 of 1888. Though the objection was not taken in either

* Appeal against Appellate Order No. 70 of 1892.

(1) 7 M. 397. (2) 16 C. 457. (3) 16 C. 465.

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of the Courts below, it relates to the inherent jurisdiction of the District Munsif and is patent on the face of the proceedings, and I am of opinion that such objection may be taken at any stage of the case The decree which is being executed by the District Munsif was passed upon a hypothecation bond for more than Rs 5,000 which is considerably in excess of his pecuniary jurisdiction, and it is contended on appellant's behalf that the Judge had no power to transfer such decree for execution to a District Munsif As to the question whether this contention ought to prevail, there is a conflict of opinion among the different High Courts It was decided in the negative in *Narasayya* v *Venkatakrishnayya* (1) and in civil miscellaneous appeal No 47 of 1888, but in the affirmative in *Gokul Kristo Chunder* v *Aukhil Chunder Chatterjee* (2) and *Durga Charan Mojumdar* v *Umatara Gupta* (3) and in *Shri Sidheshwara Pandit* v *Shri Harihar Pandit* (4) The last case was decided in 1887, the case was decided in 1884 and the Calcutta case in 1889 The learned Judges at Calcutta who decided *Gokul Kristo Chunder* v *Aukhil Chunder Chatterjee* (2) considered the Madras case and expressed themselves as being unable to concur in the decision therein

That decision depends on the construction put on Section 223 of the Code of Civil Procedure Section 25 which relates to transfer of suits authorities the transfer to a Subordinate Court " competent to try the same in respect of its nature and the amount or value of its subject-matter " These words of limit-[**311**]ation are not found in Section 223 which relates to transfer of applications for execution of decrees That section not only omits the condition that the Court to which it is sent for execution must be competent to determine the suit in which the decree was passed but also substitutes for it five other conditions The first condition clause (*a*) premises that the judgment-debtor resides or carries on business or works for gain within the local limits of the jurisdiction of the Court to which the decree is sent for execution The second condition clause (*b*) presupposes that the judgment-debtor has not sufficient property within the jurisdiction of the Court which passed the decree, but has property within the jurisdiction of the Court to which the decree is sent for execution The third condition clause (*c*) premises a case in which immoveable property is ordered to be sold, and such property is situated outside the jurisdiction of the Court which passed the decree The fourth condition clause (*d*) postulates the existence of some special reason for the transfer which the Court that orders the transfer is required to state in writing The fifth condition premises that the Court to which the decree is sent for execution is subordinate to the Court which passed the decree Looking at the nature of the several conditions, they suggest the inference that the legislature contemplated a special convenience, or a special facility or some special reason or a special relation as Subordinate and Appellate Courts, as grounds for the transfer There is thus reason to conclude that the condition as to jurisdiction, inserted in Section 25, was omitted from Section 223 for the special reasons mentioned therein It follows that if the condition as to jurisdiction mentioned in Section 25 and intentionally omitted from Section 223 were imported into it, the special facility or convenience which it was the intention of the legislature to secure to judgment-creditors in certain cases might be taken away from them, and the object which the legislature had in view, might be defeated Suppose for instance the case of a decree passed by a District Court or Subordinate

(1) 7 M. 397. (2) 16 C. 457 (3) 16 C. 465. (4) 12 B 155

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Court for Rs. 2,600 and of the judgment-debtor residing within the jurisdiction of a District Munsif or possessing property only within that jurisdiction; why should the special convenience or facility which might exist if the decree were executed by the District Munsif be denied to the Judgment-creditor? Again, the specification of five special cases in Section 223 implies that in [312] other cases the Court executing the decree must be competent to decide the suit in which the decree was passed. Hence it was inferred in *Narasayya* v. *Venkatakrishnayya* (1) that in framing the five conditions, the legislature intended to denote the statutory exceptions founded on special considerations to the rule which regulates the ordinary jurisdiction. Further, the penultimate clause of the section states expressly that when a decree transferred for execution is that of a Provincial Court of Small Causes, the Presidency Small Cause Court to which it is transferred must also have jurisdiction over the suit in which the decree was passed as regards its subject-matter. The express mention of the ordinary rule in this paragraph emphasizes its omission in the five cases mentioned in the first paragraph of the section. There is also reason for holding that the Code of Civil Procedure contemplates certain exceptions to the ordinary rule, that a Court can only exercise jurisdiction, over proceedings of civil nature when the subject-matter therein does not exceed in value the pecuniary limit of its jurisdiction as defined by Section 12 of the Civil Courts Act Take for instance a claim preferred in regard to a house of Rs. 3,000 value in the Court of a District Munsif during the execution of a money decree passed by him for Rs. 2,400. Which is the Court competent to investigate the claim? Is it the District Munsif who passed the decree or the Subordinate or District Court, as the case may be that has jurisdiction to try a suit relating to a house of Rs. 3,000 value. The language of Section 278 shows that it is the District Munsif who was executing the decree that is authorized to investigate the claim.

The reason mentioned for holding that no exceptions were intended to be created is that intricate questions of importance are likely to arise as often in execution of decrees as in the trial of suits; but it must also be remembered that there are cases in which execution of decrees may be a simple matter giving rise to no questions of special difficulty In order that the cases may be differentiated, the legislature has given a discretion to the District Court in whom the power of transfer is vested, and also enacted Section 239 in addition to Section 228. Furthermore, the special relation of the Court to which the decree is sent for execution, under paragraph 6 as a Subordinate Court will enable [313] the District Court to call up the application for execution for disopsal by itself when questions of exceptional difficulty arise therein for consideration.

The grounds on which the decision of the Madras case rests may be thus formulated As in suits so in execution proceedings, the competent *forum* is ordinarily that indicated by Section 12 of the Civil Courts Act, but in the five cases mentioned in Section 223 special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction. In view to show that this view is not tenable, the High Court at Calcutta refers to Sections 3, 6, 9, 228 and 649 in addition to Section 25 of the Civil Procedure Code and Section 12 of the Civil Courts Act. The learned Judges think that this Court overlooked the rule that the word ' suit ' may include as well proceedings after decree as proceedings before decree.

(1) 7 M. 397.

First, as to Section 12 of the Madras Civil Courts Act it is referred to in the Madras decision and its applicability to cases other than those specified in the second and third paragraphs of Section 223 is recognised But what is stated there is that an extraordinary or a special jurisdiction was conferred by the Code of Civil Procedure in cases to which paragraphs 2 and 3 relate The absence of this special jurisdiction would render ineffectual the considerations of special convenience and facility implied by the five conditions in Section 223 to which reference has already been made As regards Section 25, the word 'suit' may no doubt include in its extensive sense proceedings after as well as before decree, but it may also possibly be used in its popular and restricted sense to connote proceedings before decree, as contradistinguished from execution proceedings The presence of additional words in Section 12 of the Civil Courts Act and in Section 3 of the Code of Civil Procedure lends weight to the view that in Section 25 it was used by the legislature in its restricted sense Even assuming that it includes execution proceedings, the limitation as to jurisdiction can only be imported into Section 223 so far as it is consistent with that section. To import it into that section so far as it relates to the special cases founded on special considerations would be incongruous and not only do violence to the plain grammatical interpretation, but also deny to judgment-creditors the special convenience and facilities contemplated in these cases

[314] As to Section 3 it exempts pending proceedings from the operation of the Code, and refers in terms to proceedings prior to decree in any suit instituted or appeal presented before the 1st June 1882, or to proceedings after decree that may have been commenced and were still pending at that date This section furnishes an argument in support of the view that when proceedings after decree are intended to be denoted the legislature said so expressly As to Sections 6 and 9 they are relied on as indicating that the term 'suit' may be taken to include execution proceedings, but I have already stated that on that view the limitation as to jurisdiction in Section 25 can only be imported into Section 223 so far as it can be done without incongruity

With reference to Section 649 it recognises the principle which ordinarily regulates the jurisdiction in execution proceedings, but it does not negative an intention to create a special jurisdiction in the five cases specified in Section 223 After carefully considering the Bombay and Calcutta decisions, I do not see where the fallacy lies in the reasoning adopted in *Narasayya* v *Venkatakrishnayya* (1), and I must, therefore, adhere to the principle of that decision therein until the Full Bench overrules it

The second question for decision is whether appellant's omission to bring to sale Tiyagaraja Pillai's share is a bar to the execution of his decree against other than mortgaged property until he cures the omission In the present case there is no doubt a direction in the decree that respondent shall first execute the decree against the mortgaged property, but the direction presupposes that the property belongs solely to appellant, or that the decree is binding on Tiyagaraja Pillai It must be observed here that Tiyagaraja Pillai was not a party to that decree, and that the partition suit brought by Tiyagaraja Pillai was pending at the date of decree under execution. It is not even alleged that in the decree since passed in the partition suit the mortgage debt was either mentioned as a family debt

(1) 7 M. 397.

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or that Tiyagaraja Pillai had his share decreed to him, subject to payment of a moiety of that debt The respondent was therefore justified in not proceeding against Tiyagaraja Pillai's share, lest by so doing he may run the risk of involving himself in litigation which may entail [316] on him expense. The direction is binding only so far as it does not compel him to invade the rights of third parties who were not parties to the decree. This view is in accordance with that taken by the High Court at Allahabad in *Zalim Gir* v. *Ram Charan Singh* (1). In that case a zemindar executed two mortgages of his zemindary property in favour of one Panna Lal—one on the 10th October 1871 and the other on the 10th October 1872. On the 27th January 1874 he mortgaged about 117 bighas out of his zemindary for Rs. 700 to the defendant in that case. On the 10th September 1877 he made a conditional sale of the zemindary property in favour of the plaintiff for Rs. 4,500 to pay off the two charges created in favour of Panna Lal. On the 10th August 1878 the zemindar made another mortgage to the defendant for Rs. 300 of the same 117 bighas. On the 8th November 1881 the defendant obtained a decree on his two mortgages of the 27th January 1874 and of the 10th August 1878, and on his application for execution of the decree, the mortgaged property was advertised for sale on the 20th November 1883. Meanwhile the plaintiff took the necessary proceedings to foreclose his conditional sale, and upon the 18th March 1883 the sale was foreclosed. On the 19th November 1883 the plaintiff brought a suit to have it declared that defendant was not entitled to bring the property to sale, and it was held that he was not entitled to do so before first recouping the plaintiff the amount due on the prior encumbrances. It is therefore competent to respondent in the case before us to apply for execution against other than the mortgaged property if he can show that the portion of the mortgaged property not brought to sale belongs to appellant's divided brother It is urged on behalf of appellant that the decree under execution was passed against appellant as the managing member of a joint Hindu family during the subsistence of co-parcenary, for a debt contracted for purposes binding on all the co-parceners; but the decree is not produced before me; nor am I referred to any document showing that the decree was passed against appellant as the representative of the joint family whilst the absence of all allusion to the debt and to Tiyagaraja Pillai's liability for his moiety thereof negatives the contention.

The appeal fails, and I dismiss it with costs.

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(1) 10 A. 629.

17 M. 316=4 M L.J. 152.

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[316] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

SUBRAMANYA PANDYA CHOKKA TALAVAR (*Plaintiff*), *Appellate v* SIVA SUBRAMANYA PILLAI AND OTHERS (*Defendants*), *Respondents* *
[9th, 10th, 11th and 15th January, and 13th February, 1894]

Limitation—Suit to recover immoveable family property unlawfully alienated during plaintiff's minority—Limitation Act, Section 7, Illustration (b), and Schedule II, Articles 12, 44, 45, 120 and 144—Hindu Law—Succession, whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible co-parcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian ad litem—Code of Civil Procedure—Act XIV of 1882, Sections 13, 244 and 312—Powers of a Hidu son to question the alienation of an impartible estate by his father

Where a suit is brought to set aside a sale of immoveable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under Schedule II, Article 12 of the Limitation Act Section 7 of that Act must be read together with each article in Schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years But when the period of limitation prescribed is less than three years, as in Article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years

In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law

Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible Where therefore, the family property belongs to a co-parcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years

Representation by a Collector of all minor sons of a deceased Zemindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a [317] defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zemindari as their proper ward Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zemindari property attached in execution of the decree given in the former suit, is barred by Sections 13, 244 and 312 of the Code of Civil Procedure

[R, 19 A 215 (226), 26 B 730 (733), 17 M 422 (444), 24 M 562 (608)=11 M L J 191, 15 Ind Cas 412 (414)=23 M L J 79=12 M L T 245 (250)=(1912) M W N 790 (796)]

APPEAL against the decree of Venkata Rangayyar, Subordinate Judge of Tinnevelly, in original suit No 46 of 1885 The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court

The Subordinate Judge decreed in favour of the defendants

The plaintiff preferred this appeal

Rama Rau and *Ramachandra Rau Saheb*, for appellant

Bhashyam Ayyangar, *for respondents* Nos. 11 to 14 and 146.

* Appeal No. 22 of 1891.

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316 = 4
M. L. J.
152.

Ranga Ramanuja Chariar, for respondent No. 1.
Gopalasami Ayyangar, for respondents Nos. 137 and 152.
Ranga Rau, for respondent No. 7.

JUDGMENT.

This was a suit to recover the mittas or estates called Perunani and Karaikurichi and the pannai or home-farm lands therein, which had formed part of the zemindari of Maniachi, situated in the district of Tinnevelly. The Subordinate Judge of Tinnevelly, who tried the suit, dismissed it with costs. Appellant (plaintiff) is the present zemindar of Maniachi, which is admittedly an impartible estate belonging to a joint Hindu family, but capable of being enjoyed by but one member of the family at a time, and respondents are alienees who are in possession of the property in dispute.

The transactions, which have given rise to this litigation are fully set forth by the Court of first instance in paragraphs 25 to 57 of its judgment. The Subordinate Judge has also sufficiently stated the substance of the pleadings, the contentions of the several respondents, and the questions arising thereupon for determination, and we do not think it is necessary for us to recapitulate in this judgment.

Of the fourteen issues recorded for decision, the thirteenth and fourteenth relate merely to improvements and mesne profits. To the decision on the first three issues, no exception is taken at the hearing before us. The fourth, sixth and seventh issues relate to preliminary grounds of objection urged against the suit, whilst the other issues refer to the merits.

[318] The first question for determination is that raised by the fourth issue, *viz.*, whether the suit is barred by the Act of Limitations. The facts, from which it arises, are shortly these. At the commencement of the year 1866, and for some years before it, one Bhuloka Pandya Chokka Talavar was the zemindar of Maniachi, and the properties now in dispute were then comprised in the zemindari. He died on the 14th January 1866, leaving him surviving seven widows and five minor sons as shown in the sub-joined pedigree:

Bhuloka Pandya Chokka Talavar,
Zemindar of Maniachi, who
died in January 1866
His seven wives.

- No. 1 Kattama Talavachi (died childless).
- No. 2 Rama Talavachi (died childless).
- No. 3 Udayanna Talavachi (died childless).
- No. 4 Rama Talavachi
  - son Chokka Talavar, No. 8.
- No. 5 Shanmukha vadivu Talavachi
  - Three sons
    - Subramania Pandia Chokka Talavar, No. 9.
    - Vellaya Pandyan, No. 10 (died unmarried).
    - Sendura Pandyan No. 11.
- No. 6 Shanmukha vadivu Talavachi
  - son Subramania Pandya Chokka Talavar *Plaintiff (Appellant)* No. 12.
- No. 7 (died childless)

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On the death of Bhuloka Pandya in 1866, the Government at first recognized as his lawful successor, his son by the fourth wife, Chokka Talavar, No 8 in the pedigree He was, however, junior in years to the eldest son by the fifth wife, Subramanya Pandya Chokka Talavar, No 9 in the pedigree But the Government considered that his mother's prior marriage was a legitimate ground of preference As he (No 8) was a minor, the Court of Wards assumed management of the zemindari under Regulation V of 1804. The late zemindar's fifth wife then instituted original suit No 25 of 1866 on the file of the Civil Court of Tinnevelly, disputing the action of the Government and asserting her eldest son's preferable claim by right of primogeniture In May 1868 the Civil Court decreed in his favour Meanwhile, the Government recalled their recognition of the junior son by the fourth wife and recognized in his stead the eldest son by the fifth wife, No 9 in the pedigree, Subramanya Pandya Chokka Talavar, and the Court of Wards since continued in management on his behalf

Of the three sons by the fifth wife, the second son, Vellaya Pandyan, died unmarried during his minority, and the eldest [319] Subramanya Pandya Chokka Talavar, the last recognized zemindar and lawful holder, died during his minority in 1873, leaving him surviving one uterine brother named Sendura Pandyan, No 11 in the pedigree, and two half-brothers, Chokka Talavar, No 8, and the plaintiff (appellant) No 12 in the pedigree It is an undisputed fact that of the three surviving brothers, the plaintiff is the eldest It is also admitted that the Zemindari of Maniachi is an impartible estate belonging to a joint Hindu family constituted by its male co-parceners, and that the last lawful zemindar was appellant's and Chokka Talavar's half-brother, and the uterine brother of Sendura Pandya, No 11 in the pedigree

Appellant rests his title to the zemindari in this Court, as in the Court below, on his position as the eldest of the surviving brothers of the last zemindar, while the respondents' case is that the uterine brother, Sendura Pandyan, excludes him from succession With reference to this contention, it was alleged for the appellant that Sendura relinquished his interest in the zemindari, if any, in favour of the appellant by document C, which bears date the 15th August 1885 The plaint, which is dated the 9th June 1885, prayed for a decree (1) establishing appellant's right to the properties in dispute, cancelling the decree in original suit No 14 of 1866 and the auction sale in its execution, and (2) awarding him possession of the properties mentioned in the plaint It stated that the decree and the execution sale were vitiated by fraud, and that the circumstances constituting fraud came to appellant's knowledge only in March 1885 The decree in original suit No 14 of 1866 was passed on the 4th May 1867, and the sales in execution of it took place on the 11th and 13th August 1870, and were confirmed by the Civil Judge on the 14th September 1870 * The purchasers were placed in possession on 27th and 29th September 1870

These are the facts which have to be borne in mind whilst dealing with the question of limitation with reference to the arguments addressed to us at the hearing Treating this suit as one brought to recover immoveable family property unlawfully alienated during appellant's minority, the Subordinate Judge has found that it is barred by limitation He rests his opinion on the ground that appellant was born on the 5th May 1861

* [by Exhibits M and P, and LIV —Ed]

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and completed his twenty-first year on the 4th May 1882 and not as [320] alleged by him on 11th June 1882. It is urged on appellant's behalf that his finding is contrary to the weight of evidence.

The date of appellant's birth formed the subject of the sixth issue, and the evidence cited with reference to it is partly oral and partly documentary. It must be observed that in the case of the appellant, no horoscope has been kept so as to throw light on the precise date of his birth. Both parties admit that appellant was in existence from the 12th June 1861, the contest being as to whether he was born on that date or, as found by the Subordinate Judge, on the 5th May 1861.

As regards the oral evidence, it is that of plaintiff's witnesses Nos. 4 and 25, and defendants' witnesses Nos. 11 and 12. The two former state that plaintiff was born in the month of Vaiyasi, Andu 1036 corresponding to May—June 1861, and the two latter depose that the plaintiff's birthday star or lunar mansion was 'Satayam' or the 24th lunar day or star in the month of Chittirai Both the witnesses for appellant are related to him, the fourth being a distant relative, and the twenty-fifth witness being his maternal uncle. The evidence of the maternal uncle is open to the observation that he is unable to remember the month and year in which his own eldest and other sons were born, though he professes to recollect the month and year in which appellant was born. The evidence of the fourth witness is also open to the remark that the date of the temple festival at Tiruchendur in the district of Tinnevelly in the year 1861 with which he connects appellant's birth shows (as explained by the Subordinate Judge) when it is computed from the calendar, that appellant was born on the 5th May and not on the 12th June.

On the other hand, respondents' twelfth witness does not name the month in which special worship or Archania is performed in the Tiruchendur temple on appellant's Janma Nakshatram day or the day of his birth fixed with reference to the lunar asterism or mansion. According to respondents' eleventh witness it is clear that the appellant's Janma Nakshatram or the star, under which he was born, was the 'Satayam' or the 24th lunar mansion day in the month of Chittirai which corresponds to the 5th May 1861 according to the calendar. Respondents' witnesses are not connected with them. The Subordinate Judge describes the evidence at length in paragraph 21 of his judgment and comes to the conclusion that appellant was born on the 5th May 1861; and after [321] carefully considering it, we see no reason to disturb his finding. In the first place, respondents' eleventh witness is a disinterested witness The fact deposed to by him is in the nature of circumstantial evidence. It is a fact which he was in a position to remember from the Archanai or special service being performed every year on the same lunar day of the same solar month. It is corroborated by the date of the Tiruchendur festival in the year 1861 with which event the fourth witness connects appellant's birth. Respondent's twelfth witness corroborates the eleventh so far as the performance of a special service in the Tiruchendur temple on the zemindar's birthday and the name of his Janma Nakshatram or the star under which he was born are concerned.

On the other hand, the *onus* of showing that the suit was brought in time is on the appellant. Both his witnesses are related to him, and their evidence is open to the observations mentioned above. The appellant's pleader suggests that his fourth witness may have made a mistake, but it is not likely. The allusion to the Tiruchendur festival as the event

which enabled him to fix the month and star of appellant's birth appears to be natural

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The documentary evidence bearing on the sixth issue consists of two Exhibits H and XV The former is a takid sent on the 31st May 1882 by the Sub-Collector of Tinnevelly to the Tahsildar of Ottapidaram taluk. It states that the Maniachi Zemindar attains his majority on the 12th June and directs the Tahsildar to close the accounts of the estate and be ready to deliver the zemindari on the 13th June Exhibit XV is the letter written by the Sub-Collector to the Collector on the same date and is to the following effect "It appears the eldest "minor of the Maniachi estate has no horoscope and the exact date of his "birth is not known The Tahsildar on examining the previous records "and on due inquiry, approximately fixes the date on which the minor "against his age as the 12th June 1882 I propose to issue orders to "the Tahsildar to make over the estate to the minor on the 13th pro-"ximo" The report of the Tahsildar to which reference is made in Exhibit XV is not before us We cannot say that the exhibits which name the 12th June 1882 approximately as the date on which the appellant attained his majority are inconsistent with the finding that the actual date of birth was the 5th May 1861 It is then said that the zemindari was actually made over to the appellant on the 13th June 1882, but this fact does not carry the case [322] further No correspondence is produced, from which we can infer that the real date of birth was ascertained by the Court of Wards, and it was enough for that Court that on the 13th June 1882, when they transferred the estate, the appellant had ceased to be a minor The Subordinate Judge appears to us to have come to a correct finding as to the date of appellant's birth

With reference to the latter part of the sixth issue, it is argued by respondents' pleader that under the Indian Majority Act IX of 1875, Section 3, the appellant should be treated as having attained his majority on the completion of 21 years, only in case he had lawfully been under the jurisdiction of the Court of Wards, and that he must otherwise be treated as having attained his majority on the completion of 18 years We shall presently consider the question whether Sendura Pandyan excludes the appellant from succession and whether an uterine brother succeeds to an impartible estate in preference to a half-brother, though the latter is senior in years to the former Assuming, for the purpose of dealing with the question of limitation and for that purpose only, that the appellant was not only the *de facto* but also the *de jure* Zemindar, we see no reason to doubt the correctness of the Subordinate Judge's decision that appellant attained his majority on the completion of 21 years on the 4th May 1882

There are three more matters in connection with which the question of limitation has been considered by the Subordinate Judge Adverting to the prayer in the plaint that the decree in original suit No 14 of 1866 and the sales, in execution of it, of the properties in dispute be cancelled, the Subordinate Judge observes that there is no doubt that as a suit to set aside Court sales in execution of a decree to which appellant was a party, it must be governed by the one-year's limitation prescribed by Article 12, Schedule II of the Act of Limitations He adds, however, that, as the plaintiff was a minor, a period of two years must, under illustration (*b*) attached to Section 7 of the Act, be added to the one year. It is argued on appellant's behalf that this is a misapprehension of

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the scope of the illustration, and that the period of limitation prescribed by Article 12 is applicable to minors as well as to adults.

That article premises a suit to set aside a sale in execution of a decree and prescribes as the period of limitation one year from the date on which the sale is confirmed. The case premised by [323] illustration (*b*) of Section 7 is one in which the right to sue for a legacy accrues to A during his minority, and A attains his majority eleven years after such accrual; he would have under the ordinary law one year remaining within which to sue, but under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority within which he may bring his suit The Subordinate Judge considers that by reason of the illustration (*b*) a minor, who is a party to a suit has three years to set aside a sale therein from the date on which he attains his majority He relies in support of his opinion on *Mahommed Hossein* v. *Purundur Mahto* (1), and on *Suryanna* v. *Durgi* (2), but neither of them is in point The question whether illustration (*b*) of Section 7 is an authority for giving a minor the right to sue to set aside a sale falling under Article 12 within three years from the date on which he attains his majority, though Article 12 prescribes only one year in the case of adults, was not raised or considered in those cases.

The illustration, no doubt, recognizes the principle that when the period of limitation prescribed by the ordinary law exceeds three years but expires within three years from the date on which he attains his majority, the minor will have the whole period of three years from the date of his majority. But it does not warrant the inference that it gives three years in cases which are governed by Article 12. If the minor were an adult at the date of the sale which he seeks to set aside he would have to sue within one year from the date of the confirmation of the sale; and on attaining his majority, he stands in the position of an adult, and there is no reason why he should have three years instead of one year from the date of majority. Section 7 ought to be read together with each article in the second schedule, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed by the schedule, as for instance by Article 12, is less than three years, and the minor has that period from the date of his majority, we see no warrant for holding that the intention was to enlarge the period of limitation prescribed by the schedule to three years. [324] We are unable to adopt the view of the Subordinate Judge that the appellant had more than one year to set aside the Court-sales if he were a party to original suit No. 14 of 1866.

In paragraph 147 of his judgment, the Subordinate Judge observes that as a suit to set aside the decree in suit No. 14 of 1886 for fraud, the suit is governed by Article 95 which allows the appellant a period of three years from the date on which the fraud came to his knowledge. As he finds, however, that no fraud has been proved, the question does not arise in this case, and we shall consider in connection with the merits whether this finding is correct.

The Subordinate Judge also refers to Article 44, though he considers it to apply only to voluntary sales; but, for the appellant, it is contended

(1) 11 C. 287. (2) 7 M. 258.

that, by analogy to that article, he is entitled to sue to set aside, within three years from the date of his majority, an improper Court sale which took place during his minority with the privity of his guardian We cannot accede to this contention, as Article 12 must be read together with Article 44, and there can be no true analogy when there is an express provision to the contrary With Articles 12 and 144 before us, we do not think that Article 120, which presupposes the absence of a special provision applicable to the case under consideration, can apply The conclusion we come to on the fourth issue is that the present suit is time-barred as a suit falling under Article 144 or Article 12 and that neither Article 120 or 44 or 45 has any application

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In dealing with the question of limitation it was assumed that appellant was a party to original suit No 14 of 1866 by his guardian, and that as the eldest surviving brother though of the half-blood, he is lawfully entitled to the zemindari We now proceed to consider these questions

The question raised by the fifth issue is whether appellant is entitled to the zemindari of Maniachi in preference to Sendura Pandya Talavar who is still alive The facts upon which it arises for determination are (1) that the zemindari is an impartible estate, (2) that it belongs to the co-parcenary family consisting of the appellant and his brothers, (3) that the *propositus* was Subramanya Chokka Talavar, No 9 in the pedigree, who died without male issue, (4) that Sendura Pandyan is his uterine brother, whereas appellant is only his half-brother, and (5) that the latter is older than the former and is the eldest of the surviving sons of [325] Bhuloka Pandya Chokka Talavar It is admitted that Subramanya Chokka Talavar was the eldest son of the previous Zemindar, and that he succeeded his father by right of primogeniture, no special custom being alleged by either party as controlling the right of primogeniture in case of disputed succession to the zemindari The point for consideration is whether, under the Mitakshara law nearness of blood is a ground of preference as between brothers of the half and full blood in case of disputed succession to impartible co-parcenary property

The Subordinate Judge decides it in the affirmative, but in that opinion we are unable to concur Apart from authority, we are of opinion that on general principles the question should be answered in the negative The first of them is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of the special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law The third principle is that, in the absence of a special custom, the rule of primogeniture furnishes a ground of preference In determining who the single heir is according to these principles, we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible, regard being had to its nature as co-parcenary or separate property, and we have next to select the single heir by applying the special rule indicated above

Applying the principles mentioned above to the case before us, there can be no doubt that if the property in dispute had been the separate property of the last lawful Zemindar, from whom succession has to be

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traced, the uterine brother would be preferred to the half-brother. In enumerating the classes of heirs to separate property with reference to the Smriti of Yadnavalkya cited in Mitakshara, Chapter II, Section I, sloka 2, the Commentator observes in Chapter II, Section IV, sloka 5, that " 'among brothers, such as are of the whole blood take the inheritance " 'in the first instance,' under the text already cited, 'to the nearest " 'sapinda the inheritance next belongs,' since those of the [326] half-blood " 'are remote through the difference of the mothers.' " Vignanesvara Yogi proceeds then to state in Section 6 that "if there be no uterine " brothers, those by different mothers inherit the estate," and adds in Sec- " tion 8 that "in case" of competition between brothers and nephews, " nephews of the whole blood have no title to the succession in preference to brothers of the half-blood," for their right of inheritance is declared to be on failure of brothers If the Zemindari of Maniachi, from which the property now in litigation was severed by Court-sales, had been the separate or self-acquired property of Subramania Talavar, Sendura Pandya, his uterine brother, would certainly have succeeded to it in preference to the appellant who is his brother by a different mother. The principle which determines the class of kindred entitled to succeed is that, in case of disputed succession to such property, remoteness of blood furnishes a rule of exclusion. This being so, the further question arises whether the same principle applies when the property is the co-parcenary property, though impartible, belonging to a joint Hindu family consisting of the deceased Zemindar and his brothers Looking again to the Mitakshara law of succession as applied to partible co-parcenary property, the right of survivorship is mentioned as a dominant right which controls the rule of succession applicable to separate property In Chapter II, Section I, sloka 20, of the Mitakshara, the Commentator premises a case of competition between the co-parceners and widows of a deceased person, and refers to the text of Narada 'left them allow a maintenance to his woman for life, and concludes that the widows are entitled only to maintenance, the co-parceners being entitled to the property It follows that in case of co-parcenary property, the doctrine of survivorship furnishes an additional rule whereby the class of heirs has to be found. It is also a controlling or dominant right for the reason that, according to Hindu theory, co-parcenary property belongs to the co-parcenary family, that though co-parceners are tenants in common, they have no specific property but only an interest which may ripen into specific property on partition, and that, if the existing co-parceners die without male issue, they are to be treated as if they had never been born, and, as if the partible property actually belonged to the body of co-parceners who are alive at the time of partition. When therefore partible property belongs to a co-parcenary family, and when a co-parcener dies without male [327] issue, leaving one uterine brother and one half-brother surviving him, the half-brother is entitled to share the property equally with the uterine brother at the time of partition, the deceased brother being considered as if he never had been born, and the property being treated as always vested in, the family as a unit and as never absolutely vested for purposes of inheritance in any one co-parcener in preference to another, how much soever the family may change as to the number of co-parceners from time to time during co-parcenary. To say, therefore, that nearness of blood is a ground of preference in such cases would be tantamount to ignoring the pre-existing co-parcenary interest of half-brothers. Nearness of blood being thus no ground of preference under the Mitakshara law in

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case of disputed succession to co-parcenary property when it is partible, it is likewise no ground of preference when such property is impartible It is conceded that the zemindari belongs to the co-parcenary family consisting of all the brothers of the *propositus*, and the nearest class of kindred in which the single heir ought to be found is that of brothers, whether of the whole or half-blood, and applying the rule of primogeniture as a subsidiary rule of selection, since there is no specific custom, the brother, that is entitled to the zemindari, is the eldest in years, *viz*, the plaintiff or appellant

This view is in accordance with the course of decisions to which our attention has been called at the hearing

The first is the case of *Katama Natchiar* v *The Rajah of Shivagunga* (1) The point decided in that case was that the zemindari of Sivagunga was the self-acquired property of Gouri Vallabha Tevar, the prior lawful Zemindar, that the competition being between his daughter and brother's son, there was no right of survivorship as in the case of co-parcenary property, and that, according to the ordinary rule of succession, the class of kindred among whom the single heir was to be found was represented by the daughter and not by co-parceners The question, now in dispute, did not arise in that case, but there are observations made by the Privy Council which indicate the principles that should guide our decision in this case Their Lordships say there are two principles on which the rule of succession, according to the Hindu [328] law, appears to depend The first is that which determines the right to offer the funeral oblation and the degree in which the persons making the offering are supposed to minister to the spiritual benefit of the deceased, the second is the right of survivorship It is generally intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should prevail Their Lordships say further that in co-parcenary property according to the principles of Hindu law, there is co-parcenership between the different members of a united family and survivorship following upon it, for there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession But the law of partition shows that as to the separately-acquired property of one member, the other members of that family have neither unity of interest nor unity of possession and the foundation, therefore, of a right to take such property by survivorship fails It is said that these observations are in the nature of *obiter dicta*, but if so, they are the *dicta* of the highest judicial tribunal for India, followed in several later cases Moreover, the two main principles of succession mentioned above are those embodied in the text of Manu, 'that the inheritance belongs to the nearest sapinda,' and in the text of Narada to the effect that in an undivided family, the brother takes the co-parcenary property in preference to the widow

The second case is *Neelkisto Deb Burmono* v *Beerchunder Thakoor* (2) That was a suit in the nature of ejectment brought by a brother of the half-blood against the uterine brother on the ground that, as he was the eldest of the class of heirs from whom a jobraj should be selected according to family custom, the appointment by the deceased Zemindar of his younger brother, the then defendant, as jobraj, was invalid The

(1) 9 M.I A 539

(2) 12 M I A 523

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Privy Council held that the appointment was valid by family custom or kulachar which imposed no restriction on the power of the reigning raja to appoint a jobraj from among his kindred. On this point, the Lords of the Judicial Committee remarked that "where there is evidence of a power "of selection, the actual observance of seniority [329] even in a considerable series of successions cannot of itself defeat a custom which establishes "a right of free choice; and had the instances been uniform and without "exception, that alone would have been sufficient to support the appellant's "case. Such uniformity of practice was however not proved, for, several "instances appear of infants appointed to the office of jobraj, whilst "relatives within the custom and older in years were living." It is this finding of fact that was the *ratio decidendi*, but the decision is an authority for the proposition that in determining the right of succession to an impartible estate, we should first ascertain the class of kindred from whom a single heir is to be selected, next see whether family custom or kulachar discloses a special rule of selection, and that in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law The Judicial Committee say further that by general Hindu law, the uterine brother would be the heir in reference to the half-brother, were it a disputed succession to divided property.

This limitation is also in accordance with the text of the Mitakshara in Chapter II, Section IV, slokas 5 and 6, and is an authority for the proposition that in case of disputed succession to impartible property, which was acquired by, or belonged exclusively to, the deceased zemindar, nearness of blood is a factor to be considered in determining the class of kindred from whom the single heir has to be selected. Respondent's pleader lays considerable stress on the passage in the judgment of the Privy Council which deals with the contention on behalf of the appellant in the Tipperah case, to the effect that the preference of the whole to the half-blood does not extend to a raj, and that, when the estate is ancestral and undivided, brothers of the whole and half-blood are on the same footing. Their Lordships observe as follows: "When a raj is enjoyed and inherited "by one sole member of a family, it would be to introduce into the law, "by judicial construction, a fiction, involving also a contradiction to call "this *separate* ownership, though coming by inheritance, at once sole and "joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne "and to the royal lands is, in this case, one and the same title. Survivorship cannot obtain in such a possession from its very nature, and there "can be no community [330] of interest; for, claims to an estate in lands "and to rights in others over it, such as to maintenance, are distinct and "inconsistent claims. As there can be no survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the "absence of custom, furnish the rule to ascertain the heir to a property "which is solely owned and enjoyed and which passes by inheritance to a "sole heir." It is further argued on behalf of the respondents that the doctrine of survivorship, as a dominant right, has no operation as well in the case of impartible co-parcenary as in the case of impartible separate property, and that we are not at liberty to introduce a distinction so as to vary the ordinary rule of succession which, it is contended, applies alike to both. We are unable to accede to this suggestion for several reasons. In the first place, later decisions of the Privy Council recognized survivorship as a material factor when the impartible estate is co-parcenary property. In

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the next place, the Tipperah estate is situated in a part of India governed by the Dayabhaga School of Hindu Law, which explains away the Smriti of Narada as inapplicable to married women and denies a place to the doctrine of survivorship in its scheme of succession It may be, as suggested by Mr Bashyam Aiyangar on respondents' behalf, that when the Tipperah case was decided by the Privy Council, there was an impression at Calcutta that, even under the Dayabhaga law, there was survivorship as an exception to the general scheme of inheritance in the case contemplated by Jimutavahana in verse 34, Section 5, Chapter XI of the Dayabhaga But such a notion was held to be erroneous by the Full Bench of the High Court at Calcutta in *Rajkishore Lahoory* v *Gobind Chunder Lahoory* (1) and see *Sheo Soonday* v *Pithee Singh* (2) wherein it was decided that by the Hindu law current in Bengal, a brother of the whole blood succeeds in the case of an undivided immoveable estate, in preference to a brother of the half-blood The *ratio decidendi* is that the doctrine of survivorship has no operation under the Dayabhaga law either as part of the general scheme of inheritance or as an exception to it

Again, the recognized foundation of the right of survivorship is the Smriti of Narada cited in Mitakshara, Chapter II, Section 1, verse 7, but Jimutavahana notices this Smriti in Chapter XI, Sec-[331]tion 1, verse 48, of the Dayabhaga, and concludes after a consideration of the other Smritis, especially the Sriti of Vrihaspati, that Narada contemplated the case of wives of an inferior rank, who do not possess the status of a Patni or the lawful wife of approved rank On the construction suggested by him in verse 54, there is no foundation in the Smriti law, on which the doctrine of survivorship can rest As the Mitakshara, however, differs from the Dayabhaga, the decision in the Tipperah case, although it is in perfect accordance with the Dayabhaga law, has no application in the Mitakshara country

It is further urged by the learned pleader for respondents that assuming that the Tipperah hills and estate are governed by the Dayabhaga law, the reason assigned by the Privy Council for their decision suggests that the character of impartible property as one capable of sole enjoyment by the incumbent for the time being is so much in the nature of separate property that it is inconsistent with the theory of co-parcenary of which unity of ownership and unity of possession *quoad* the property in litigation are essential incidents

This contention is sound only in the Dayabhaga country, for as explained by this Court in *Naraganti Achamma Garu* v *Venkatachalapati Nayanivaru* (3) the modifications of co-parcenary which flow from impartibility consist in this "where from the nature of the property, " possession is left with one co-parcener, the others are not divested of " co-ownership Their necessary exclusion from possession imposes on " the co-owner in possession two obligations to his co-parceners, in " virtue of their co-ownership—the obligation to provide them with main- " tenance and the obligation to preserve the corpus of the estate The " rights of possession and maintenance are to this extent distinct and " inconsistent—that they cannot co-exist and be enjoyed by the same " persons, that the one is a right to the immediate perception of " the fruits of the property, the other a right to an direct benefit, " but both rights have a common origin, unity of ownership " Separate possession but not separate ownership is the characteristic

(1) 1 C 27 (2) 4 I A 147 (3) 4 M 250 (266).

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"of property, which, although impartible, is *ex hypothesi* joint. Co-"ownership, which is the cause of survivorship, was held not to exist "in the case of the Tipperah raj. We should have hesitated [332] to "express an opinion at variance with that ruling if we could find no support "for our views in a ruling which is equally imperative upon us, and from "which, in the Tipperah case, their Lordships expressed no intention "to dissent. In *Katama Natchiar* v. *The Rajah of Sivagunga* (1) their "Lordships declared that, in the absence of proof of a special custom "of descent, the succession to a zemindari impartible and capable of "enjoyment by one member only of the family at a time, is governed by "the general Hindu law prevalent in that part of India with such quali-"fications only as flow from the impartible character of the subject. The "impartibility of the subject does not necessitate the denial of the right "of survivorship, and there are not wanting in the admitted rules which "govern the enjoyment of such property and the succession it *indici* of "co-ownership and consequent survivorship" This case is an authority in the Presidency for the proposition that the very custom by which coparcenary property is rendered impartible suggests survivorship as a necessary incident of impartibility, and that it is not correct to say that there is no co-parcenership in regard to such property, the difference being only in the form in which co-parcenary exists in respect of partible and impartible property.

In this connection our attention is drawn to the decision of the Privy Council in *Rani Sartaj Kuari Rani* v. *Deoraj Kuari* (2). This case modifies the opinion expressed in the last preceding case to this extent and no further, "when the estate is governed by the Mitakshara law, and it is "impartible by the usage and custom of family and descends according to "the law of primogeniture on the male heirs of the original grantee, the "estate is not inalienable except on proof of special custom." The case is, therefore, an authority for the proposition that inalienability is not one of the modifications which flow necessarily from the impartibility of the subject. As regards survivorship as a cause of succession, their Lordships expressly save it and say, "by the custom or usage, the eldest son "succeeds to the whole estate on the death of the father as he would, if "the estate were held in severalty. It is difficult to reconcile this mode "of succession with the rights of a joint family and to hold that there is "joint ownership which is a restraint on alienation. It is not so difficult "where the holder of [333] the estate has no son, and it is necessary "to decide who is to succeed." Referring to the Sivagunga case, their Lordships add "the saying in the Sivagunga case that the zemin-"dari, though impartible, was part of the family property, must "be understood with reference to the question which was then before "their Lordships" That question was one of succession and not of alienation, *inter vivos*

Another case referred to is what is called the Totapalli case, *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (3). In that case an impartible estate belonging to a joint Hindu family was usurped by one of the members of the family. The zemindar, by the aid of another member of the family, ousted him and afterwards entered into an agreement with him to pay the revenue. There was no division in the family. It was argued in that case by appellant's counsel that the estate being impartible must, from its very nature, be taken to

(1) 9 M.I.A 539 (593). (2) 15 I.A. 51. (3) 13 M.I.A. 333.

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be separate estate, and consequently that, according to the decision in the Sivagunga case, the succession was determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. With reference to the first contention, their Lordships' answer was: "It is clear that the mere impartibility of the estate is *not* sufficient "to make the succession follow the course of succession to separate "estate. Their Lordships apprehend that if they were to hold that it "did so, they would affect the titles to many estates held and enjoyed "as impartible in different parts of India. Has it then been shown that, "though the family was undivided, the estate was in fact the separate property of the appellant's husband?" After answering the above question in the negative their Lordships answered the second question in these terms: "In the Sivagunga case, the zemindari had escheated to Govern-"ment, which was free to deal with it as it chose. By a new Sannad "the Government granted it to Gouri Vallabha, conferring a legal title "which none could dispute. But what was done in this case?" After referring to the facts of that case their Lordships state: "this account "shows no legal forfeiture, no fresh grant by any person competent to "grant a legal title. It only shows that on a dispute between Mallappa "Dhora and his superior, another member of the family came in, and, "with the [334] strong hand and in concert with the superior, succeeded "in ousting Mallappa Dhora and in assuming the position and right of "the zemindar." This case is an authority for the position that forcible dispossession produces no change in the nature and tenure of the impartible property.

Another case is that of *Maharani Hiranath Koer v. Baboo Ram Narayan Singh* (1), in which the Tippera case was dissented from.

Two other cases were also referred to at the hearing,—*Ranganayakamma v. Ramaya* (2) and the *Padamathur case* (3). They follow the Sivagunga case.

The latest case is that of *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh* (4). In that case the contest was as to the right of succession to an impartible raj and a zemindari, the rival claimants being the last male holder Nandikishore's three widows and daughter on the one side, and his illegitimate brother on the other. The joint family belonged to the Sudra caste. Their Lordships of the Privy Council held that the illegitimate brother was entitled under the Mitakshara law to succeed by survivorship and observed as follows: "according "to the decision in the Sivagunga case which, as their Lordships under-"stand is not now disputed, the fact of the raj being impartible does not "affect the rule of succession. In considering who is to succeed on the "death of the raja, the rules which govern the succession to a partible "estate are to be looked at, and, therefore, the question in this case is "what would be the right of succession, supposing instead of being an "impartible estate, it were a partible one." After discussing the point "and concluding that the right of survivorship existed as between the deceased zemindar and his illegitimate brother, their Lordships held that the latter was entitled to succeed to the raj by virtue of survivorship. This case is the latest authority for the position that when the impartible estate belongs to a co-parcenary family, the right of survivorship determines the heir entitled to succeed.

(1) 9 B L R 274 (324). (2) Mayne, § 499. (3) 1 M 312. (4) 17 I A 128.

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The next question is whether the suit is barred by Sections 13, 244 and 312 of the Code of Civil Procedure. It is conceded that if the eighth issue is determined against the appellant, this question must likewise be decided against him.

[335] The eighth issue is whether the plaintiff and his predecessor in title were properly represented in original suit No. 14 of 1866? The Subordinate Judge states the facts of the case so far as they bear on this question in paragraphs 36 to 57 of his judgment, and comes to the conclusion that the appellant and the zemindar whom he succeeded were represented for the reasons mentioned in paragraphs 58 to 103. To this finding several objections are taken on behalf of the appellant.

The first objection is that though the appellant and his predecessor in title were made defendants in original suit No. 14 of 1866, yet they were then minors, and they were not described either as defendants by their mothers and guardians, nor were their mothers, who were also defendants, described as the guardians of their minor sons. It appears from the decree in that suit* that the first eleven defendants consisted of six widows and the five minor sons of the former zemindar, Buloka Pandya, including the plaintiff and his predecessor in title, the mother's name being entered first as that of a defendant and the minor's name being entered next as that of her minor son. It is not stated in terms that the mother of each minor was appointed or made a party as his guardian, *ad litem;* but it is clear that, in each case, the mother was her minors' sons' natural guardian and that the object in including both as defendants was presumably to make both parties to the suit, the mother as Buloka Pandya's widow and the minor son by his mother and natural guardian. It was Act VIII 1859 that was in force when the suit was brought, and it contained no provisions as to appointment by the Court of guardians, *ad litem*, for minor defendants According to the then practice of the Court, it was sufficient if the mother was made a party as guardian and permitted to act as such on his behalf. It also in evidence† that the mother of Subramania Pandya Chokka Talavar, plaintiff's predecessor in title, applied‡ for a postponement of the sale and preferred an appeal to the High Court from the order of the Civil Judge refusing her application. The conclusion we come to is that in the suit of 1866, as originally framed, appellant and his predecessors' mothers were included to act as their guardians; that the Court allowed them to act as such; that one of them endeavoured in execution proceedings to obtain a postponement of the sale, and that, though the description is [336] defective, the defect is merely one of form and the minors were in no way prejudiced thereby.

Even assuming that the description is insufficient, we must still hold that the minors were adequately represented and their interests carefully protected by the Collector of the District, as the Agent of the Court of Wards, and as their guardian *ad litem*. Original suit No. 14 of 1866 was instituted subsequent to the death of Buloka Pandya Chokka Talavar, but prior to the recognition of his son, Chokka Talavar, by the Government as his successor, and to the assumption of management of the zemindari by the Court of Wards. After the Court entered on the management of the estate, the Civil Judge included the Collector of the District as the twelfth defendant, and § he was made a party as the *ex-officio* guardian of

* [Ex. XXII—ED.]
† [Ex. XXIX—XXXII.—ED.]
‡ [Ex. XXXI.—ED.]
§ [Ex. XXI shows.—ED.]

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the minor *heirs* It is clear, therefore, that the minors were sufficiently represented by the Collector as their guardian *ad litem*, if not also by their mothers previously, but it is urged on behalf of the appellant that the Collector, as Agent of the Court of Wards, was the lawful guardian only of the then recognized zemindar, on whose behalf the Court of Wards held the zemindari, but not of his brothers including the plaintiff and his predecessors in title, the then fifth and ninth defendants We do not, however, attach weight to this contention, as it is open to the Judge to appoint any competent person as guardian, *ad litem*, provided that there is no antagonism between his interest and that of the minors in the subject-matter of the suit The Collector accepted the appointment and acted as guardian of all the minor sons Representation by him of all minor sons as their guardian under the order of the Court is sufficient, even if it were held that the Collector could only treat under Regulation V of 1804 the particular minor on whose behalf the Court of Wards then managed the zemindari as their proper ward

The second objection is that the mothers of the minors allowed the trial to proceed *ex parte*, and that summonses were not served upon them As regards non-service of summonses the allegation was attempted to be supported by oral evidence which the Subordinate Judge has discredited As to the weight due to the oral evidence on this point, we concur in his opinion It is true that* the copy of the judgment in original suit No. 14 of 1866 shows that the Collector alone defended the suit, but the circumstances [337] of the case suggest the inference that the minors' mothers left the defence to be conducted by that officer acting under the direction of the Court of Wards, as he was more competent than themselves adequately to protect the minors' interests We may here observe that the interests of the then *de facto* minor zemindar, who was the ward of the Court of Wards under Regulation V of 1804, were identical with those of his brothers so far as they related to the subject-matter of that suit

The third objection is that the admission by the Collector of the claim was an act not compatible with his position as guardian, *ad litem*, and prejudicial to the minors Exhibit XXI proves that the Collector acknowledged the correctness of the plaint in original suit No 14 of 1866, but requested that the debt sued for and other debts might be permitted to be paid rateably from the income of the estate as it was realised If the claim was true and valid (it will appear later on from this judgment that such was really the case), it is preposterous to say that the guardian should not have acknowledged the claim but put the plaintiff to the proof of it Such conduct on his part would add to the costs of the suit, which would be a needless burden on the estate We are of opinion that the Collector's action was *bona fide* and abundantly warranted by the actual facts of the case

It is here argued that of the six instalments for which a decree was asked for in the plaint, only three were overdue at date of suit, that the fourth, fifth and sixth instalments had not then accrued due, and that the Collector ought to have resisted the claim for a declaratory decree in respect of the last-mentioned instalments. It is true that the plaint prayed for an order of the Court directing defendants to pay into Court the fourth, fifth and sixth instalments as agreed on in the razinamas on which the suit was based It is also true that the Civil Court decided that there

* [Exhibit XXI.—Ed.]

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must be a decree for the then plaintiff for the amount sued for, and for an order that the fourth, fifth and sixth instalments be paid as they fell due. Assuming that no such order should have been made, the then plaintiff might have obtained separate decrees for those instalments with costs prior to the date of the Court-sale. The omission, therefore, of the Collector to take the technical objection now argued saved the minor the costs of other suits which the creditor was at liberty to institute as each instalment fell due Considering that he put in the written statement in communica-[338] tion with the Court of Wards and with its sanction, and seeing also that the Collector then asked the Civil Court for indulgence as to payment of the decree amount from the income of the zemindari, his action was perfectly *bona fide*. It was not then unusual for the Civil Courts in order to avoid multiplicity of suits (though the practice is now considered loose) to include a direction in the decree passed on instalment bonds to pay future instalments due on those bonds as they fell due.

Another objection taken to the finding on the eighth issue is that the decree was merely declaratory in so far as it related to the fourth, fifth and sixth instalments and that the decree was nevertheless executed against the minor's estate.

It must be observed, however, that the decree was not declaratory but contained an order for payment as those instalments fell due, and, in fact, the sale now impugned by the appellant took place long after they had become overdue In our opinion this objection is entitled to no weight.

Another objection is that the Collector ought to have objected to the execution of the decree on the ground mentioned in the last paragraph, when he represented the plaintiff's predecessor in title in execution proceedings In fact the Collector did not then take the objection; but, if it had been taken, it would have been disallowed for the simple reason that on its true construction, the decree was not declaratory after the future instalments became due any more than a decree for payment of future maintenance at a fixed rate would be, and that in execution Courts do not go behind the decree sought to be executed, but take it as they find it, unless it is impugned for fraud or want of jurisdiction patent on the face of the record

It is also an admitted fact that neither the plaintiff's predecessor in title nor any one else on his behalf objected to the execution of the decree at any time before his death, and we do not think that the plaintiff is now at liberty to rip open the decree and to undo proceedings held in its execution, and completed during his predecessor's lifetime, except on the ground of fraud or collusion.

The next objection is that the Collector should have obtained an adjournment of the sale and not allowed the property in dispute to be sold. The Subordinate Judge refers to the several applications made for adjournments of the sale, to the several adjournments actually granted, to the order of the Civil Judge refusing the last [339] application and to the several attempts made to prevent the sale, and to its being at last found unavoidable as shown by the Collector Mr. Longley's letter. We agree in the opinion that the sale was not due to any laches on the Collector's part as guardian of the plaintiff's predecessor in title, but to its being found otherwise impracticable to clear off the heavy debts left by Buloka Pandya Chokka Talavar.

The next objection is that there was no attachment prior to the sale. This is not well-founded in fact, and it is inconsistent with the appellant's

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admission in the plaint There are also several exhibits which prove that an attachment preceded the sale On this point we agree with the Subordinate Judge that the objection has no foundation in fact

Passing on to the ninth issue, we observe that there is not a particle of evidence in support of the alleged fraud The learned pleader for the appellant states that he relies on the objections taken by him to the decision of the Subordinate Judge on the eighth issue as constituting together a case of fraud We are of opinion that they do not amount to fraud

The last question which remains to be considered in this appeal is that raised by the tenth issue The plaintiff's case was that the decree-debt was vicious and immoral, and that, although it had originally been contracted by his father, yet it was not one binding upon him The contention for the defendants was that the debt was incurred for purposes binding on the former zemindar, Buloka Pandya s family, and therefore on the plaintiff The Subordinate Judge has stated the evidence on each side, and, after carefully considering it at length, has come to the finding that the debt was neither vicious nor immoral as alleged by the appellant, but was a debt contracted by a Hindu father for purposes binding on his family In this opinion we entirely concur The evidence for defendants clearly traces the nucleus of the decree-debt to debts contracted by appellant's father in 1845 and 1849 whilst the plaintiff was born only in 1861 Original suit No 1 of 1845 was brought by an illegitimate son of appellant's grandfather, and, to that suit, the grandfather and Buloka Pandya, appellant's father, were made parties The object of that suit was to recover possession of a pannai land or home-farm on the ground that it had been sold to the then plaintiff by appellant's grandfather Appellant's father resisted the claim, but the suit ended in a compromise, whereby [340] it was agreed that appellant's grandfather should pay the then plaintiff Rs 7,000, that the sale in favour of the latter should be cancelled, and that appellant's father should succeed to the pannai land given up by the then plaintiff After the compromise, appellant's grandfather died, and appellant's father succeeded to the zemindari and the pannai land in November 1845

In order to pay the sum of Rs 7,000 due under the razinamah to pay peishcush, and then zamindar's installation expenses and palace expenses, appellant's father borrowed Rs 22,000 from one Vellayan Chetty That this debt was contracted for the abovementioned purposes is, as observed by the Subordinate Judge, proved by defendants' witnesses Nos 1, 3, 4, 7 and 8, by plaintiff's witnesses Nos 4 and 22, and by the compromise V

Vellayan Chetty instituted original suit No 1 of 1849 against appellant's father and another, and the suit terminated also in a compromise, whereby appellant's father undertook to pay the debt in certain instalments *

In order to pay Vellayan Chetty, appellant's father borrowed from one Venkatachellam Chetty, who subsequently brought original suit No. 3 of 1854, which suit terminated in a compromise, which secured the debt on the zemindari and moveable property of appellant's father In execution of the decree several razinamahs were filed, the last of which was for Rs 36,000 Venkatachellam assigned his right under the razinamah to Chidambaram Chetty, the plaintiff in original suit No 14 of

* [Exhibits VI and XVIII ED.]

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1866, in execution of the decree in which the Court-sales now in dispute took place.

Thus the uncleus of the decree-debt is traced by a series of public documents to the money borrowed from Vellayan Chetty prior to original suit No. 1 of 1849, of which Rs. 7,000 was the amount undertaken to be paid to secure to appellant's father the succession to certain pannai land yielding an annual income of Rs. 10,000, and Rs. 15,000 were borrowed for payment of (i) peisheush, (ii) installation expenses, and (iii) palace expenses. It is is argued by the appellant's pleader that the razinamah entered into by appellant's father with Venkatachellam Chetty does not operate to create a charge but only evidences a money-debt. We should be inclined to hold that it did create a charge, for the language of the instrument suggests an intention to secure the debt on specific property. The insertion of general words moveable property in addition to the zemindari cannot defeat that intention which [341] is the key to right construction. However, it is not necessary to determine this question for the purposes of the present appeal, as we concur in the opinion of the Subordinate Judge that, before the property in dispute was sold, it had been attached in execution of the decree. On the other hand, the appellant's contention that the decree-debt was immoral rests on mere oral evidence. The Subordinate Judge sets out the evidence and considers it not trustworthy, and the reasons assigned by him support his conclusion. On reading the evidence, we do not see our way to coming to a different finding Thus on the one side there is unimpeachable documentary evidence, whilst on the other side there is only questionable oral evidence in regard to transactions which took place more than forty years ago, the evidence being produced at a late stage of the final hearing and several of the witnesses being in a position to be influenced by a person in the appellant's position We have, therefore, no hesitation in adopting the finding of the Subordinate Judge on the tenth issue. Apart from the weight due to the evidence, there are also several reasons why the appellant should not now be permitted to question the nature of the debt. (i) It was held by the Privy Council in *Rani Sartaj Kuari* v *Rani Deoraj Kuari* (1), that a Hindu son has no power, unless he has it by special custom, to question the alienation of an impartible estate by his father, and in the present case there is no proof of such custom; (ii) there is also the fact that the debt sued for in original suit No. 14 of 1866 had been contracted more than ten years previous to the birth of the appellant; (iii) again the original debt merged into a decree-debt during the lifetime of appellant's predecessor in title and in a suit to which both appellant and his predecessor in title were substantially parties, and there is no proof of fraud nor any other material fact upon which appellant can repudiate the decree in original suit No. 14 of 1866 or the Court-sales in its execution.

We shall here briefly notice another question which respondents argued at the hearing of this appeal with reference to the relinquishment by the two surviving brothers of the whole blood in favour of the appellant of any interest which they possess in the zemindari. Exhibit C evidences such relinquishment, and it is admitted by both the brothers of the full blood, Sendura [342] Pandaya Talavar and Chokka Talavar. Also in their evidence, as the third witness for the plaintiff and as the Court first witness, they acknowledge the appellant's right to the zemindari.

(1) 15 I.A. 51.

The Subordinate Judge held that on the true construction of the document, their rights of survivorship to the zemindari were not the interest relinquished, but we are unable to support this construction, having regard to the language of paragraph 6 of document C It is in these terms "Further, as we have given up in consideration for this, all our right, "interest and title, &c , in the moveable and immoveable properties, such as "the zemindari, &c., capable of improvement by you, as far as our share of "maintenance is concerned, and as what we have received is sufficient "for our share of maintenance suitable to our dignity as per zemindari "custom and our shares, you and we are not undivided but divided "gnathis (bandhus), and we shall live in separate families " The words 'such as the zemindari ' and ' we are divided ' disclose an intention to regard the zamindari as appellant's exclusive property from the date of the document

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The respondents' contention is that appellant's claim, as based on Exhibit C, would be time-barred and that the relinquishment is not available to appellant as an additional ground in support of his claim It is argued that, though Sendura Pandyan, the next junior brother of the appellant and the eldest of the surviving brothers of the whole blood, might not be time-barred by reason of his having attained his majority within three years before he executed document C, yet the privilege conferred upon minors by Section 7 of the Limitation Act is personal to them, and does not extend to their adult transferees, and that the transfer of their right after a period of twelve years from the date on which the sale was confirmed and before the expiry of three years, a period which is allowed to them as a personal privilege, is not actionable if the transferee had attained his majority more than three years before suit In support of this contention reliance is placed on *Rudra Kant Surma Sircar* v *Nobo Kishore Surma Biswas* (1) and *Mohomed Arsad Chowdhry* v *Yakoob Ally* (2) Those decisions involve, however, the apparent anomaly that a minor cannot transfer his title to property though at the date of transfer it is a subsisting interest so far as he is concerned In the view which we take [343] of the question whether a brother of the whole blood is entitled to succeed to an impartible zemindari in preference to his elder brother of half-blood, it is not necessary for us to determine this question for the purposes of this appeal Thus, the appellant's claim is barred first by limitation, and next by Sections 13, 244 and 312 of the Code of Civil Procedure, and lastly, it also fails on the merits

As this is a case which may be taken to the Privy Council, and as the original suit was instituted in 1885 and the appeal preferred in 1891, we have deemed it fit to consider at length all the questions argued before us on appeal in order that no occasion may rise for further investigation. The result is that the appeal cannot be supported and must be dismissed with costs

(1) 9 C 663 (2) 15 B L.R 357

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PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir Richard Couch and the Honourable George Denman.

[*On appeal from the High Court at Madras.*]

PONNAMBALA TAMBIRAN (*Appellant*) *v.* SIVAGNANA DESIKA GNANA SAMBANDHA PANDARA SANNADHI, VISVALINGA TAMBIRAN AND SAMINADHA TAMBIRAN. [2nd and 3rd March and 28th April, 1894.]

Code of Civil Procedure (Act XIV of 1882), Section 244, sub-Section (c)—Questions arising in execution of decree—Construction of a decree as to appointment of a manager of the property of a religious institution

A decree of the High Court declared its holder entitled as the Pandara Sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the Tambirans who had received initiation at that institution, was appointed to fill the then vacant office of Tambiran, managing certain mutts The decree directed that the Pandara should name a Tambiran of his adhinam for the office, whom, after inquiry as to his fitness, the Subordinate Court should appoint. If that Court found him unfit, it was to appoint a Tambiran of that adhinam upon its own selection.

In execution the Pandara named a Tambiran for the office, but died before the inquiry as to his fitness. His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another Tambiran The Subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first [344] named Tambiran, appointed him to the office The High Court, on the Pandara's appeal, decided that the first nomination had been competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first-named was not fit:

Held on the appeal of the Tambiran first named, that the question as to his right was one that had arisen between the parties to the suit, and related to the execution of the decree, within the meaning of Section 244, sub-Section (*c*) Civil Procedure Code, and that he could appeal from the order made. Also that, on the construction of the decree, the first nomination could not be withdrawn and a second one substituted before the inquiry, and that the person first named was entitled to the Court's decision as to his fitness. On the facts, the finding of the High Court that the first-named Tambiran was unfit, was not affirmed; and the order of the Subordinate Judge was maintained

[F., 31 M 406=4 M L T 92]

APPEAL from an order (24th February 1890) of the High Court, reversing an order (7th October 1889) of the Subordinate Judge of Kumbakonam, made in execution of a decree (23rd October 1888) of the High Court

The orders now in question related to the appellant's appointment to be managing Tambiran of endowments belonging to two mutts—one called the Benares (Kasi) mutt at Tiruppanandal in Kumbakonam, and the other at Benares connected with it Both were in relation to the adhinam at Dharmapuram in the Tanjore district, of which the first respondent was the head or Pandara Sannadhi. The orders were made in execution of a decree of the High Court of the 23rd October 1888, following a judgment in *Gnana Sambandha Pandara Sannadhi* v. *Kundasami Tambiran* (1). In that suit the plaintiff, Gnana, then the head of

(1) 10 M 375 (397).

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the adhinam, obtained a decree against Kundasami Tambiran, declaring his appointment as manager of the property of the mutts to be invalid The latter, though appointed by the will of the last holder of the office, Ramalinga, deceased in 1880, had not been a disciple who received initiation from the adhinam at Dharmapuram The judgment described the connection of the religious establishments affected by the suit, giving their histories and stating their customs The decree is to be found in the report of the appeal in the execution proceedings in *Gnana Sambandha* v *Visvalinga* (1) The judgment of 1888 decided that the managing Tambiran at Tiruppanandal was entitled to select his junior and successor, but his selection was subject to the condition that it should be made of a [345] Tambiran from among the disciples of the adhinam at Dharmapuram Also that, when this had been fulfilled, the Pandara Sannadhi at that adhinam was alone entitled to conduct the ceremony of investiture The relation of the adhinam to the mutt was to be maintained according to ancient usage Reference was made also to a previous decision of this committee relating to these institutions in *Kashi Bashi Ramaling Swamee* v *Chitumber Nath Koomar Swamee* (2) The right of the plaintiff consisted in seeing that a Tambiran of the association at Dharmapuram was appointed to manage the property of the mutts, and the remedy applicable was that the Subordinate Court should, on the nomination by him of a qualified Tambiran belonging to Dharmapuram, appoint the latter to the office The decree ordered that the Subordinate Judge should direct the head of that adhinam to name a Tambiran, from among those of his adhinam, competent to the duties of the managing Tambiran of the mutt at Tiruppanandal, and that, if the Judge saw no objection to the fitness of the person so named for the office he was to appoint him, but that, in case the Judge should object to the person named, he was to select as well as to appoint, and to direct the head of the adhinam to make the investiture, and certify it, whereupon, the Judge should put the person so appointed and invested in possession of the mutts and their endowments

The proceedings in execution are stated in the report abovementioned On the 25th January 1889 the Subordinate Judge ordered the Pandaram to name On the 11th February he named Ponnambala, and the Court issued a notification of the nomination On the 18th February 1889 Gnana Sambandha died, and was succeeded by the first respondent, Sivagnana Desika, whose succession was recognized on the 15th March following On the same day the new Pandaram filed a petition stating the unfitness of Ponnambala for the office, and asking leave to withdraw his name, and to nominate Saminadha instead The latter became the third respondent in this appeal The second respondent was Visvalinga, who represented Kundasami, the original defendant, deceased, pending the proceedings Visvalinga did not appear on this appeal

The principal questions now raised were, firstly, whether, with reference to Section 244, Civil Procedure Code, the present appellant, in order to prefer his claim as the Tambiran first named for the [346] appointment, ought to have brought his separate suit, or could maintain his right in execution proceedings and appeal, as he had done as a petitioner in them, without having been one of the original parties to the suit, secondly, whether, on the true construction of the decree of 1888, the succeeding Pandara of Dharmapuram had power to withdraw his predecessor's

(1) 13 M 338 (2) 20 W R P C 217.

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nomination; thirdly, whether, upon the inquiry as to his ordination in religion, his character and qualifications, the appellant satisfied requirements.

On the 16th March 1889 the Subordinate Judge made his order. He decided that the power of nomination had been exhausted, and did not continue to the representative of the deceased decree-holder. He referred to the absence of any direction from the Subordinate Judge to the succeeding Pandara to nominate. He added: "I am unable to construe "the decree of the High Court as giving to the appellant the power of "nomination more than once. As the person that had made the nomi- "nation, and as one that saw reason subsequently for not quite approving "the nomination, the deceased appellant might, before the Court passed "final orders in respect to his nomination, make representations calcu- "lated to show how he had been mistaken in his nomination, and the "Court might permit him to make a fresh nomination. The same line of "procedure is open to the present Pandara Sannadhi also Beyond this "he cannot go, I think. Of course, it is the duty of the Pandara "Sannadhi to see that a nominee of his adhinam is in every way worthy "of the office he is called upon to fill. Consequently, if the present "nominee is not worthy of the office, the present Pandara Sannadhi, as "I said before, should assist the Court in finding out whether the "nominee is a worthy person or not Therefore I am of opinion that the "power of nomination could be exercised only once."

The Subordinate Judge then vacated his offce His successor made inquiry as to the fitness of Ponnambala, and on the 7th October 1889 gave judgment that there was no objection to his nomination, which he confirmed. The Pandara Sivagnana Desika was directed to invest Ponnambala with the signs of his office, but filed an appeal to the High Court from the order

A Divisional Bench (Collins, C. J , and Muttusami Ayyar, J.) reversed the order of the Subordinate Judge. They held that Ponnambala, who, before them, was respondent with Visvalinga, the Pandara, was a necessary party to the appeal, in order that his [347] interests might not be prejudiced. Their view was that, until the Subordinate Judge had acted upon the nomination, it might be re-called, and that, if there should be any valid cause, it was open to the nominator or his representative to withdraw it and name another person. It might be that there was hardly enough to justify the removal of the first-named Tambiran, if he had been put into possession; but there was enough to show his disqualification upon the inquiry which had yet to be held when his name was withdrawn. They directed an inquiry as to the fitness of the Tambiran secondly nominated, and upon his being found unfit, if that should result, the Subordinate Court was itself to appoint. The judgment is given at length in I. L. R. 13 Mad., 339.

On the 16th January 1891, on Ponnambala's petition under Section 598, Civil Procedure Code, for a certificate to enable him to appeal to Her Majesty in Council, the High Court refused leave, giving the following reasons: "The order of this Court of the 24th February 1890, from "which Ponnambala desires to appeal, was not a final order made against "a person who was already a party in execution proceedings, the peti- "tioner's status being merely that of a candidate for selection as a trustee, "whose nomination by the former Pandara Sannadhi had been withdrawn "by the present Pandara Sannadhi, and whom the latter had declined to "invest with the insignia of the office as provided by the decree of 1888.

"Further, the order proceeded, not only on the ground that under the "terms of the decree the present Pandara Sannadhi was perfectly com- "petent to revoke the nomination made by his predecessor for sufficient "cause, but also on the further ground that there was enough in the "evidence as regarded the petitioner's antecedent conduct for disallowing "his claim as a candidate for the responsible and important position of "trustee of the mutt at Tirupanandal

"We do not consider that the refusal to accept a candidate for the "office of a trustee, when there is no prior vested right in him, is a matter "in respect of which the petitioner is entitled to leave to appeal to the "Privy Council.

"It is contended that the former order treated the petitioner as a "necessary party to it The petitioner was made a party by the Pandara "Sannadhi (who was entitled to appeal) to his appeal from the order of "1889, and it was considered that he was a necessary party in his own "interest, for the limited purpose of deter-[348] mining whether the "objections taken by the Pandara Sannadhi were well founded, and "whether the petitioner was an eligible candidate for the office of trustee "We do not consider that this is a case in which we should grant leave "to appeal to the Privy Council"

On the 9th May 1891 Ponnambala, on the motion of Mr *J D. Mayne*, obtained special leave to appeal, liberty being reserved to the respondents to raise any question as to the competency of the appeal at the hearing

On this appeal, Mr *J D Maynee* appeared for the appellant, Sir *John Rigby*, Q C Solicitor-General, and Mr *Walter Lindley* appeared for the first and third respondents

The second respondent did not appear

Sir *John Rigby*, Q C, raised the objection, as one preliminary to the hearing, that the appellant was not in a position to bring forward his claim to be appointed managing Tambiran by appealing from the order of the 24th February 1890 He had not been a party to the suit The order of the High Court of the 16th January 1891 was referred to As regarded his right to secure, if he could, the result of his nomination, the order of the 24th February 1889 was not a final decree or order in his favour within Section 595, Civil Procedure A right under that decree had vested in the nominator, but none was vested in the person who might be named by the latter, so as to enable him to appeal in the suit which was between rival claimants of the power to appoint His only mode of insisting on his right, if he had one, was by bringing his separate suit Reference was made to *Ragava* v *Rajaratnam* (1)

Their Lordships disallowed the objection, reserving their reasons till they should give judgment on the appeal

Mr *J D Mayne* for the appellant argued that the High Court had been wrong in deciding that the first respondent had power to withdraw, as he had petitioned to withdraw, the nomination made by his predecessor The first question was—had not the power to name been exhausted when the first nomination was made? It was true that the Pandara of the adhinam had not, by exercising the power to name in favour of the appellant, invested him thereby with the office But the nomination was sufficient to [349] vest in him the right to be subsequently appointed to the office, subject to one exception, *viz*, that his right would be defeated if the judicial inquiry provided should terminate in a finding of his unfitness.

(1) 14 M. 57.

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The inquiry had not taken place when the first respondent applied to be allowed to withdraw the nomination made by his predecessor, without alleging that it had been made in error, or without care, or on any undue ground. No such reason was assigned why the nomination should be withdrawn. The first respondent had asked leave to withdraw the name already submitted, and with it to withdraw what the appellant had previously obtained as a right, *viz.*, the opportunity of submitting himself for the Court to inquire wheher he was fit for the office or not. The appellant, when named, had a right defeasible in a special manner, but not in the manner attempted. Reference was made to *Neelkisto Deb Burmono* v *Beerchunder Thakur* (1). The appellant was entitled to rely on a strict adherence to the terms of the decree of 1888, which did not authorize a series of nominations, but required an inquiry to be held by the Judge as soon as a nomination had reached him from the Pandara. If nothing had vested in the Tambiran first named, the Judge's proceedings, after the attempted withdrawal, which would in that supposed case have been effectual, would have been void. There would have been no person in whose favour the Subordinate Judge's approval of the nomination would have operated. But that was not the state of things. The first nomination was valid for all the way that it went; the choice had been exercised; and the rest was in the hands of the Subordinate Judge. Moreover, the High Court was wrong upon the evidence in reference to the character and conduct of the appellant As to this the order was made on an incorrect view of the facts. The sanctioning authority had no right of selection, but must proceed on judicial grounds, and could not withhold the appointment, unless there were valid reasons for holding the first nominated Tambiran to be unfit. There was error in the High Court's finding that such reasons existed.

Sir *John Rigby*, Q. C., and Mr. *W Lindley* for the first and third respondents argued that, upon the true construction of the decree of 1888, the right of nomination had not been exhausted, but the right and duty of seeing that due nomination was made [350] by the causing a suitable person's name to be before the Subordinate Judge, had passed to the successor of the original decree-holder as head of the adhinam. The former having died before the approval of the nomination, without that approval it could have no effect. To this must be added that the High Court found valid reasons to exist why the Subordinate Court should not have sanctioned the nomination. There had been a *locus penitentiæ* as the High Court had decided. If the nominator had changed his opinion as to the fitness of the person whom he had named, and in this respect the successor had the same power, he could have withdrawn that name. It was contended that, upon the evidence, the High Court was right in finding that there were grounds for refusing to confirm the appellant's nomination; and that the order that inquiry should be made as to the qualifications and fitness of the third respondent was a proper one

Mr. *J. D. Mayne* replied.

Afterwards, on the 28th April 1894, their Lordships' judgment was delivered by Sir Richard Couch.

JUDGMENT.

This appeal arises out of proceedings in the execution of a decree of the High Court at Madras, made on the 23rd of October 1888, in an

(1) 12 M.I.A 523=3 B.L.R. 13=12 W.R. (P.C.) 21.

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appeal in which Gnana Sambandha, the plaintiff in the suit, was appellant, and the second respondent Visvalinga Tambiran, the representative of Kumarasawmi Tambiran, the original defendant in the suit, was respondent. The suit related to two mutts (temples)—one situated at Tiruppanandal and the other at Benares—and was brought by the plaintiff as the representative for the time being of a religious institution called the adhinam at Dharmapuram in the district of Tanjore. The plaintiff's case was that the properties in suit were the endowments founded in support of the mutts and various charities at Benares and other places, in the charge and under the management of the Tambirans or representatives of the mutt called the Benares mutt at Tiruppanandal in the same district, that the last lawful manager of this mutt was one Ramalingam Tambiran, and upon his death a dispute arose in regard to the right of succession to the management The plaint prayed for a declaration that the mutts at Tiruppanandal and Benares were subject to the control of the plaintiff and his successors at Dharmapuram, that they were entitled to appoint and send Tambirans to manage them, that the defendant's succession was unlawful, as he was not a Tambiran [351] attached to the adhinam at Dharmapuram, and was not appointed by the plaintiff, and that the will executed by Ramalingam Tambiran in his favour had no legal force The High Court decreed that the appellant's claim that the properties at Tiruppanandal and Benares belonged to the adhinam at Dharmapuram and to the possession of those properties should be dismissed, and that his claim to a declaration of his right to appoint Tambirans to management at Tiruppanandal and Benares, and to a direction that possession of the said properties should be transferred to a Tambiran whom he might appoint, should also be dismissed In other respects the decree of the Lower Court was reversed, and it was declared that the appointment of Kumarasami, the original defendant, by Ramalingam as his junior and successor, and the will in favour of Kumarasami, were illegal, and they were set aside so far as they related to the mutts at Tiruppanandal and Benares and other subordinate mutts and their endowments It was also declared that the appellant was entitled, as the head of the Dharmapuram mutt, to see that a competent Dharmapuram Tambiran was appointed as the head of the mutt at Tiruppanandal, that the Subordinate Judge of Kumbackonam, in order to fill up the then vacant office of Tambiran of the Tiruppanandal mutt, should direct the appellant, who was the plaintiff in the suit, to name a Tambiran from among the Tambirans of his adhinam competent to discharge the duties of the managing Tambiran of the Benares (Kasi) mutt at Tiruppanandal, that if the Subordinate Judge saw no objection to the fitness of the person so named for the office aforesaid, he should appoint him as such managing Tambiran, but in case the Subordinate Judge should object to the person so named, he should appoint a competent person of the Dharmapuram adhinam as such managing Tambiran, and should thereupon direct the appellant to invest him as usual and certify it, and that upon the investiture being certified, the Subordinate Judge was to place the person so appointed and invested in possession of the mutt, &c

On the 21st of January 1889 the plaintiff in the suit and appellant in the High Court applied to the Subordinate Judge for execution of the decree by a warrant for realization of the costs awarded by it, and that further proceedings might be taken regarding the appointment of a Tambiran to the then vacant place in the Kasi (Benares) mutt at Tiruppanandal in accordance with the decree Thereupon, on the 25th of January, the

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Subordinate [352] Judge made an order directing the petitioner to name a Tambiran from among the Tambirans of his adhinam competent to discharge the duties, ten days being given for that purpose.

On the 11th of February 1889 the plaintiff presented a petition to the Subordinate Judge praying that, inasmuch as Ponnambala Tambiran, one of the Tambirans of his adhinam, was a fit man for the vacant place, was competent to discharge the affairs thereof with efficiency, and was one of good character from among the Tambirans of his adhinam, the Court would be pleased to appoint him to the vacant office. Upon this an order was made in these terms:—" The Court has no means of testing " the fitness of the Tambiran named except by inviting the opinion of the " public about it. Therefore a notice will be put up at the court-house " calling upon the public interested in the well-being of the mutt at " Tiruppanandal to give its opinion about the Tambiran named on Saturday " the 2nd of March 1889." Accordingly a notice to that effect was, on the 15th of February, affixed in a conspicuous part of the court-house. It may be doubted whether this was either a necessary or a wise proceeding on the part of the Subordinate Judge leading, as it was sure to do, to agitation among the suporters of a rival candidate, and subjecting the appointment to something resembling popular election, which does not appear to be intended by the decree

In the case for the appellant it is stated that in reply to this notice a great number of petitions were forwarded to the Court, many of them expressing approval of the nomination of Ponnambala, others suggesting the names of other Tambirans as being, in the opinion of the writers, more suitable for the post. Of the latter class the majority were in favour of Karbar Saminadha Tambiran, at that time manager of the Dharmapuram adhinam. Of the petitions opposed to the nomination 74 stated the preference of the petitioners for some other nominee, but contained no allegation to the prejudice of Ponnambala; 61 contained a general statement of unfitness, but with no reason for it, and 11 charged him with misconduct. The accuracy of this statement in the appellant's case was not disputed by the respondents' counsel.

On the 18th of February 1889 the plaintiff in the suit and appellant in the High Court died, and was succeeded as the head of the Dharmapuram adhinam by the first respondent in the present appeal who, on the 28th of February, petitioned the Court [353] to admit him in the place of the deceased and to take further proceedings. On the 15th of March he was ordered to be made the representative of the deceased plaintiff. On the same day he presented a petition to the Court stating that Ponnambala was unfit to manage the properties of the Benares mutt at Tiruppanandal, and that contrary to the decision he was a Tambiran who received kashayam (a ceremony of initiation) from the Madura adhinam, and praying that the Court would permit him to withdraw the petition submitted to the Court by the former Pandara Sannadhi nominating Ponnambala Tambiran, and to appoint Karbar Saminadha Tambiran to the office. On the 16th of March the petition, and also one for the realization of the costs, came on for hearing, the representative of the defendant in the suit and Ponnambala being described as counter-petitioners in the title of the judgment. The former did not appear. Ponnambala appeared by two vakils, and in the judgment it is said that on his behalf it was contended, *inter alia*, that the power of nomination could be exercised only once, that it was exercised by the late Pandara Sannadhi, and that under the decree of the High Court the representative of the appellant

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had no power to make a fresh nomination unless directed by the Court The petitioner's pleader contended that there was power to withdraw the nomination and to make a fresh nomination The Subordinate Judge in his judgment, after saying it was suggested that matters would be greatly facilitated by his deciding first of all the question about the power of nomination, gave his reasons for holding that the power of nomination could be exercised only once

Evidence was then gone into, the new head of the Dharmapuram adhinam examining witnesses, including himself, to prove the charges against Ponnambala, and Ponnambala examining witnesses in answer, also including himself The opponents of Ponnambala objected to his appointment on the grounds (i) that he was not ordained by the Dharmapuram adhinam, and was not a Tambiran of the Dharmapuram mutt, but that he came from and belonged to the adhinam at Madura (ii) That he proved himself unequal to discharge the less onerous and comparatively trifling duties of the Dharmapuram mutt to which he had been appointed within the last seven or eight years Upon the latter charge evidence was allowed to be given that he misconducted himself while so employed, and committed acts of [354] malversation and breach of trust, and misappropriated money and things belonging to the mutt and its charities The Subordinate Judge (the successor of the one who held that the nomination could not be withdrawn, and who had taken the depositions of all the plaintiff's witnesses upon the second question, except one who was examined before a commissioner) having taken the evidence of Ponnambala and his witnesses, held that there was no objection to his nomination, and confirmed it, and directed him to be invested and the investiture to be certified within two months from the date of his decree, and ordered that, upon such investiture being certified, Ponnambala Tambiran should be put in possession of the Benares mutt at Tiruppanandal and the properties forming its endowments, and the endowments of the charities attached to it

The new head of the Dharmapuram adhinam, who was allowed to be the plaintiff, appealed to the High Court, which ordered that the order of the Lower Court appointing Ponnambala Tambiran as the head of the mutt should be set aside and the petitions be remanded, and that the Judge should proceed to inquire if there was any objection to the appointment of the person nominated by the then plaintiff, and appoint him if there was no objection, and if his appointment was found on inquiry to be open to objection, to proceed to appoint a competent Tambiran to Tiruppanandal The present appeal is brought by Ponnambala from that order

The Solicitor-General, who appeared for the first and third respondents, objected to the appeal being heard, on the ground that Section 244 of the Civil Procedure Code (Act XIV of 1882) was applicable, and that Ponnambala ought to have brought a separate suit By an order of her Majesty in Council, dated the 9th of May 1891, special leave to appeal against the order of the High Court was given, but the respondents were to be at liberty to raise any questions regarding the competency of the appeal at the hearing thereof Section 244 enacts that questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution discharge or satisfaction of the decree, shall be determined by order of the Court executing the decree and not by separate suit It would be a sufficient answer to this objection that it was not taken before the Subordinate Judge when he allowed Ponnambala [355] to become a party to the proceedings and appear by a vakil at the hearing, at which it was decided that the nomination could

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not be withdrawn. Nor was the objection taken in the grounds of appeal to the High Court. It is too late now to take it. But their Lordships cannot see what suit could be brought by Ponnambala. The nomination could not give a right to bring a suit, and whilst the decree of the High Court stood he had no title upon which to bring one to set aside that decree if such a kind of suit were maintainable. If he is not allowed to appeal against the order of the High Court, he will be without any mode of relief. And the High Court say in their judgment that they considered he was a necessary party to the proceeding as the person to whose appointment the appellant before them objected. Section 244 appears to be intended to prohibit a separate suit in cases where one might be brought, and to enable the question to be determined in the execution proceeding. It is not applicable to such a case as this.

The first question for consideration is—Could the new head of the Dharmapuram adhinam withdraw the nomination of his predecessor and make a new nomination? The answer to that depends upon the meaning of the decree. The declaration in it that the head of the Dharmapuram adhinam was entitled to see that a competent Dharmapuram Tambiran was appointed as the head of the mutt at Tiruppanandal was relied on. What follows this declaration shows that it does not give him power to appoint. He is to nominate, and it is his duty to nominate, a competent person. If he afterwards discovers any ground of unfitness in the person nominated, he should inform the Subordinate Judge, who is to decide whether there is any objection to the fitness of the person. The appointment is to be made only by the Subordinate Judge. He is to direct the head of the adhinam to name a Tambiran, and when that is done, is to decide upon his fitness. The person nominated has a right to have the decision of the Subordinate Judge, and would be deprived of it by the nomination being withdrawn and a new nomination being made. The petition before referred to asked that the petitioner might be permitted to withdraw the nomination of Ponnambala and to nominate Saminadha Tambiran. This was not granted by the Subordinate Judge, but the High Court, if their Lordships rightly understand its judgment, appears to have held that until the Subordinate Judge acted upon the nomination there was a *locus* [**356**] *penitentiæ*, and he was entitled to withdraw it if in his opinion there was any valid objection to it, and therefore the petitioner might withdraw it if there was any valid objection to it. Their Lordships do not concur in this construction of the decree.

There remain then two questions for determination: (i) Was Ponnambala a Tambiran of the Dharmapuram mutt? (ii) Was he unfit to be appoint Tambiran of the mutt at Tirupannandal? The first witness was the then head of the Dharmapuram, adhinam, who petitioned to be allowed to withdraw the nomination of Ponnambala. He said that Ponnambala was removed from the Odakkam (an office) in the Dharmapuram mutt for some wrongful acts committed by him in respect to cash and paddy. He used to visit Dharmapuram occasionally from Trichinopoly, where he held an office, and finding Ponnambala unemployed, he asked him the reason. Ponnambala said he had committed some faults in respect of cash and paddy, and that the Pandara Sannadhi had removed him. The witness spoke to the Pandara Sannadhi himself, who said he had removed Ponnambala for wrongful acts committed by him in respect to cash and paddy. In answer to the Court the witness said that the late Pandara Sannadhi did not think Ponnambala fit for the office of Tambiran of Tiruppanandal, and that he nominated him in consequence of the persuasion

of persons whose names he gave, because it is was thought he would act up to their wishes In cross-examination he said that he had been to the Madura adhinam and saw Ponnambala there, and therefore he stated in his petition that Ponnambala had received his kashayam (the visible symbol of initiation) in the Madura adhinam He said there was some difference in the mode of dress adopted by the Tambirans of the Madura adhinam and the Tambirans of the Dharmapuram adhinam, and that Ponnambala had adopted the Dharmapuram style for 10 or 11 years, ever since he came to the Dharmapuram adhinam, and that the Dharmapuram adhinam had a mutt at Madura As to the faults committed in the Odakkam he said there was a general talk that he had not up to that time inquired about particulars, and did not know what faults Ponnambala had committed in respect to cash and paddy, and there was no record to show that Ponnambala had committed faults in the Odakkam, and that he had been removed. The witness said he and three other Tambrans protested against the nomination, they told the Pandara Sannadhi that Ponnambala belonged to the Madura adhinam, that it was not proper to [357] appoint him to a big mutt like Tiruppanandal, and that the Karbar Tambiran should be appointed This is the Tambiran who was nominated by the witness in his petition for withdrawal of the nomination of Ponnambala Further on he said there were complaints about the management of Rajan Katlai some months before the Pandara Sannadhi's death; that Ponnambala had made large remissions of rent, and that he did not take any notice of the accounts showing less cultivation, there were no records about them Why, it may be asked, did not the witness bring these complaints before the deceased Pandara Sannadhi when he made the protest? He appears to have made in his petition to the Court a grave charge of unfitness against Ponnambala upon vague and general statements, of which he had not at that time any evidence, and to have been influenced by a desire to have the other candidate appointed. The next witness, Venkatarama Aiyer, had been an agent in the Dharmapuram mutt for 47 or 48 years, and had known Ponnambala for 10 or 11 years He said he was a Tambiran of the Madura adhinam He said, " I asked him, and he said he had come from the Madura adhinam. I have moved " with him closely these 10 or 11 years He is not fit to manage the " estate of the Tiruppanandal mutt as the Tambiran thereof." He went on to say that Ponnambala was dismissed from the Odakkam for acts of malversation as regards paddy, rice and cloths, and was unemployed for two or two and a half years, that he was afterwards sent for five or six months by the Pandara Sannadhi to assist the Katlai Tambiran at Tirubhuvanam who was ill, and was afterwards sent to Tiruvarur where he had been for the last two years and there had been frequent complaints that he did not manage the lands properly. He said, " The complaints " existed from the time of the late Pandara Sannadhi " Their Lordships think that if there had been any malversation in the Odakkam which rendered Ponnambala unfit for employment, he would not have been appointed to Tiruvarur or allowed to remain there for two years In cross-examination the witness said, " From what Ponnambala Tambiran " and other Tambirans told me, I said he belonged to the Madura adhi- " nam " As to the faults, as the witness called them, in the Odakkam, he said the Pandara Sannadhi held an inquiry, and callled on Ponnambala for an explanation, and asked the witness and other agents to look into the accounts. They did so, and reported the matter to the Pandara Sannadhi, who did not press it The next witness is Dharmalinga Pillai,

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who [358] said he had been in the service of the mutt for 22 years. In considering the value of the evidence of agents or servants of the mutt it is to be observed that they were deposing in support of the case of the present head of it. This witness said Ponnambala was a Tambiran of the Madura adhinam; it did not appear that he received mantra kashayam in the Dharmapuram mutt. In cross-examination he said that when Ponnambala first arrived at Dharmapuram he was not dressed in the Dharmapuram style, and he asked him to what adhinam he belonged, and he said to the Madura Adhinam. But the witness said, " When he " changed his style of dress I did not ask him about it. . . . I do " not know the reason for his changing his style of dress. It is not usual " for one to remain at the giving of mantra kashayam or upadesam. " Tambirans who received mantra kashayam used to tell me about it. As " Ponnambala did not tell me about it, I thought he did not receive it at Dharamapuram." He said he was present when the Pandara Sannadhi inquired about the cash, cloths and paddy missing, and from faults discovered against him in the Odakkam, and from complaints against him from Tiruvarur, he stated he was not fit to be appointed to Tiruppanandal.

The next witness was Tirumalai Pillai, also an agent in the Dharmapuram mutt. He said Ponnambala committed some faults in the Odakkam, and the Pandara Sannadhi dismissed him; that he knew both the facts personally. This is all he said as to that charge. As to the Rajan Katlai he said two Brahmin agents attached to it represented to the Pandara Sannadhi " that Ponnambala had sold paddy without orders, and that he " had made remissions in lease. They said that paddy was sold, and " the proceeds were not brought to account, and that the yield was good, " and there was no ground for remission at all. Pandara Sannadhi sent " for Ponnambala. The agents said that the sale proceeds were carried " towards the payment of debts due to one Somasundara. This was " what the accounts stated. They said Ponnambala said he had not " committed any faults and that the accounts would support him." The accounts were not produced as they should have been. Without them this evidence is of no value. The next witness is Ramasamy Aiyan, who was emlpoyed in the Rajan Katlai at Tiruvarur as the Attavanai accountant. His charges against Ponnambala were that he expended money without uthara chits (which are orders on the shroff for disbursements of monies, prepared by the witness and signed by the [359] Tambiran); that when there were not uthara chits, Tambiran himself spent the money and the shroff had no knowledge of it. He said Ponnambala wrote in the accounts some fictitious debts and appropriated the sums to his own use; that the debts were written in the names of Somasundara Chetti and Tyagu Chetti. The witness also said that a sum of Rs. 100 and odd, the produce of a sale, was not brought into account, and there was a remission to a lessee; that the Pandara Sannadhi directed the amount remitted to be collected, and as regards the matters not brought into account he said he would send final orders, but no such orders were received. Without the accounts the truthfulness of this witness could not be tested. He said he got Rs. 6 a month in the Rajan Katlai and " did not mention " to any one else the said matters up to now," which is improbable if they were of any importance. The next witness is Ramasawmy Aiyar, one of the Brahmins who were said by a former witness to have made a complaint. He does not give any material evidence, and appears to have had a dispute with Ponnambala about his pay.

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The evidence of the remaining witnesses for the plaintiff, with one exception, Vidilinga Tambiran, whose evidence need not be noticed, relates to the question whether Ponnambala was a Tambiran of Dharmapuram, and it will be better now to notice his witnesses in answer to the charges against him He was first examined He said that he was a native of Kallianpuram and received mantra kashayam in Sivasilam He denied that while he was doing duty as Odakkam Tambiran he was removed for any fault, or that the Pandara Sannadhi held an inquiry as to his having appropriated to his own use paddy, cloth and cash, or that he was tried at Dharmapuram for any fault committed at Tiruvarur He said in cross-examination that " orders were received that it was wrong to have " granted a lease to the maniagar of the village of Sakkramangalam "' that it was wrong not to have collected 150 kalams of paddy out of the " lease amount The order to the effect that it was wrong to have granted " remission of 50 kalams of paddy was received subsequent to the explana- " tion sent by me to the Pandara Sannadhi " He also admitted that uthara chits were not properly kept by him, and that they should be properly kept up In the course of a long cross-examination he repeated that he was not dismissed from the Odakkam, and was not found fault with for stealing money and [360] paddy, or punished for it This examination was taken on the 11th of April 1888, and it appears from the Judge's diary that, owing to his illness, and the Court being closed for recess, the further hearing was postponed till the 13th of September On the 18th of September the witness was re-called and examined by the plaintiff's pleader, when he said that he never made expense without issuing uthara chits He was then examined as to sums amounting to Rs 200 credited in the accounts of Rajan Katlai under the name of Somasundari Chetti He admitted that there was a man of that name at Dharamapuram, a cook in the mutt there, who was serving under him for a month or two, but he said he did not know who the Somasundari Chetti in the accounts was and did not inquire " until now " He said he knew the man, he was living at Tiruvarur, he kept no profession of any kind as far as he knew, he said he had a house, he must look to the accounts to see if there were any dealings with that man before he went to Rajan Katlai He then spoke about credit in the name of Tiyagu Chetti which he had been charged with He said that one Tyagaraja Pillai and a Mudaliar kept a common shop at Tiruvarur, that the kanuk-kupillai used to borrow from him for their Katlai purposes and wanted to give credit in the name of Tiyagu Chetti, and he gave him leave to do so, that he knew Tyagaraja Pillai who came to him to demand money due to him, that there was no man of the name of Tyagaraja Mudali at Tiruvarur, and he had made a mistake when he said before that the creditor was Tyagaraja Mudali; that the Judge was not well at the time, and he was told to answer readily and to the point, and so the mistake happened The Judge's diary in the record shows that he was ill at this time This part of Ponnambala's evidence appears to be what is referred to in the judgment of the High Court as " matters against him in evidence which " he ought to have explained, but has not explained satisfactorily " It is to be observed that the plaintiff's witnesses had been examined before the predecessor of the Subordinate Judge, who gave the judgment, but Ponnambala was examined before that Judge, who did not express any dissatisfaction with his evidence The other witnesses spoke about his being a Tambiran of Dharmapuram, except the last, V Krishna Aiyar, a vakil of the High Court. His evidence was that the nomination was made

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by the late Pandara Sannadhi after consideration of the merits and demerits [361] of the Tambirans from whom the selection might be made, and with a desire to select one who might not be disapproved by the Court. From his evidence the nomination appears to have been honestly made, and not from any undue influence or pressure.

Some of the evidence for the plaintiff on the latter question has been already noticed. Two remain to be mentioned. Subramania Mudaliar, who lived in the Tinnevelly district, and was one of the chief disciples of the Dharmapuram adhinam, said that when Ponnambala was in the Odakkam, he told him he belonged to the Madura matam (apparently meant for adhinam) in reply to his questions where he came from, where he received his kashayam, and what he was doing. He was then dressed in the Dharmapuram style. "From what Ponnambala told me I say he "belongs to the Madura adhinam. I have no other reason for saying that "he is a Tambiran of the Madura adhinam." He also said he told him he belonged to Panangudi. Theetharappa, Mudali, who also lived at Tinnevelly and is one of the disciples of the Dharmapuram mutt and one of the petitioners for the appointment of Saminada Tambiran, said that the Dharmapuram adhinam had a mutt at Sivasilam in the Tinnevelly district; that Ponnambala was a Tambiran of the Madura adhinam and belonged to Panangudi in the Nanguneri taluk; that Kallianpuram is near Sivasilam; there was a Kallianpuram Ponnambala, a Tambiran of Dharmpuram, who was dead. In cross-examination the witness said the nominee, Ponnambala, told him about his native place; that he had belonged to Panangudi and had received his kashayam in the Madura mutt. He is the only witness who speaks about another Ponnambala.

The case of the nominee, Ponnambala, was that he received his kashayam at the mutt in Sivasilam and did not belong to Panangudi, but to Kallianpuram. Three witnesses, members of his family residing in Kallianpuram, deposed that he got his kashayam at the Dharamapuram mutt at Sivasilam; he was then 20 or 22 years of age. Another witness, Chitambaranadha, a Tambiran of Dharmapuram, said that Ponnambala got his mantra kashayam at Sivasilam; the witness was then present at Sivasilam outside the pujamatam; that Ponnambala came to Dharmapuram and was employed at the Odakkam. Ponnambala was not asked in cross-examination or by his own pleader about the statements it had been said he had made he came from the Madura adhinam. This is a frequent omission in trials in India, and [362] no inference can fairly be drawn from it. Their Lordships cannot attach much weight to the evidence that Ponnambala said he came from the Madura adhinam. Assuming that the witnesses intended to speak that truth, it is possible they may not have exactly recollected what was said. He may have said he came from Madura, which appears to be true, and it may have been supposed by the witnesses that he meant he came from the Madura adhinam. Their Lordships do not give credit to the evidence that he belonged to Panangudi, and that there was a Kallianpuram Ponnambala who is dead. Upon the question whether the nominee, Ponnambala, was a Tambiran of Dharmapuram the High Court was silent, but as they may have thought it was unnecessary to decide it, no inference can be drawn from their silence. Upon the questions of fact in the case their Lordships have come to the same conclusion as the Subordinate Judge, and they will humbly advise Her Majesty to reverse the order of the High Court, and to order

that the appeal to it be dismissed with costs, and to affirm the order of the Subordinate Judge The respondent, Sivagnana Desika Gnana, will pay the costs of this appeal

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Appeal allowed

Solicitor for the appellant Mr *R. T Tasker*

Solicitors for the first and third respondents Messrs *Keen, Rogers and Co.*

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17 M. 362

APPELLATE CIVIL.

Before Sir Arthur J. H Collins, Kt, Chief Justice, and Mr. Justice Shephard

17 M. 343 (P.C.)= 21 I.A. 71 =6 Sar. P.C.J. 434.

MALLIKARAJUNA PRASADA NAIDU (*Defendant*), *Appellant v* DURGA PRASADA NAIDU AND ANOTHER (*Plaintiffs*), *Respondents* *

[30th November and 1st, 6th and 7th December, 1893, and 9th March, 1894]

Hindu law—Partition—Maintenance—Arrears of maintenance—Wrongful withholding

Where, in consequence of suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion

[363] In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled

Jivi v *Ramji* (1), *Mahalakshmamma* v *Venkataratnamma* (2), and *Sri Raja Satruchala Jagannadha Razu* v *Sri Raja Satruchala Ramabhadra Razu* (3), followed

[**Affirmed**, 24 M 147, **F.** 6 M L J 147 (148), **R.** 16 C P L R 30 (32)]

APPEALS against the decrees of G T Mackenzie, District Judge of Kistna, in original suits Nos 10 and 13 of 1891

These two suits were filed by the younger brothers of the Zemindar of Challapali or Devarakota, who was the defendant in both suits The plaints were similar, and set forth that plaintiffs and defendant were members of an undivided Hindu family, that their father died on 6th April 1875, leaving these three sons, that disputes arose and plaintiffs lived apart from defendant from 1st May 1875, that their father left a valuable zemindari estate, regarding the partition of which the parties engaged in litigation, which terminated with the decision of the Privy Council, dated 1st May 1890, that the zemindari was impartible, that the plaintiffs, while engaged in the partition litigation, did not ask for or receive maintenance from defendant, that defendant in a written statement and in an affidavit admitted his liability to give plaintiffs maintenance; that each plaintiff received Rs 19,500 as maintenance during the pendency of the partition suit by order of Court, that each plaintiff claimed Rs 2,000 per mensem as maintenance from defendant, with arrears bearing interest, and sums for the marriages of their children, furniture and residence; that this was demanded by a letter, dated 30th March 1891, and had not been given; and the plaintiffs prayed for a decree for these sums as a charge upon the zemindari with costs and subsequent interest

The defendant filed similar written statements in the two suits He pleaded that plaintiffs had been divided from defendant since 30th

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* Appeals Nos 47 and 48 of 1892.

(1) 3 B 207 (2) 6 M 83. (3) 14 M. 237 (240).

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September 1882, the date of the decree of the District Court in the partition suit, and that they had no claim upon defendant for maintenance. Defendant denied that he had ever made any admission that he was liable to maintain plaintiffs after a decree for partition. Defendant pleaded that the amount of maintenance claimed was excessive, and that the other sums claimed were contrary to law and custom Defendant also submitted that the [364] Court must take into account the amount of property which has come into the hands of plaintiffs from other sources, and suggested that Rs. 3,000 per annum to each plaintiff would be a sufficient grant. Defendant also stated that the plaintiffs were maintained until February 1879 out of the estate funds, and that defendant was ready and willing to maintain the plaintiffs in the family house in the accustomed manner. The defendant contended that plaintiffs by their acts and omissions had deprived themselves of the right to claim arrears of maintenance, and that the claim for arrears was for the most part barred. If arrears were granted, they ought not to be at the rate of Rs 2,000 per mensem, and they ought not to bear interest, and that the maintenance ought not to be a charge upon the zemindari.

The District Judge decreed in favour of the plaintiffs and the defendant preferred this appeal.

Pattabhirama Ayyar, for appellant.

The Advocate-General (Hon. Mr *Spring Branson*) and *Venkatarama Sarma*, for respondent.

JUDGMENT.

The plaintiffs and defendant are, sons of the late Raja Ankinidu, Zemindar of Challapalli, who died in the month of April 1875. The zemindari, as it has now been finally decided by the Privy Council, is an impartible one, and consequently the eldest son of the late zemindar, that is the defendant, is in enjoyment The present suits are brought against him for maintenance.

The main question raised by the defendant is whether the family has, in consequence of proceedings in the suit ultimately determined by the Privy Council, become a divided one.

A larger question was raised by the defendant's vakil with regard to the right of a younger brother of the holder of an impartible zemindari to any maintenance at the hands of the zemindar for the time being. Having regard to the pleadings and issues, this general contention, we think, cannot properly be allowed on this appeal. If it could have been successfully maintained, it ought to have been raised in the Court of First Instance. The plaintiff would then have had an opportunity of meeting it by showing that at any rate in this family it has been usual for the reigning zemindar to make provision for the other members of his family, and there are some indications that such was in fact the case Moreover, in his written statement in the partition suit, the zemindar admitted his liability in this respect.

[365] The real defence is based on the admitted fact that in 1880 the plaintiffs brought a suit against the defendant for partition of the entire family property, and so far as the partible property was concerned, obtained a decree. It is said that the effect of a partition of any part of the property of a Hindu family is to sever the joint ownership in respect of the whole property, and that it is not legally possible for a family to divide a portion of their family estate and yet to remain undivided in respect of the remainder. It is true that, when a partition is effected in a family

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either by agreement or by decree, the result generally is to bring about a complete severance of the coparcenary, and that this consequence may follow, although in fact a portion of the property remains undivided. In the case however of division by consent of parties, it is clear that they may, if they choose, reserve and keep undivided part of the property With regard to such part they must necessarily retain the status of undivided family (See *Sri Raja Satrucharla Jagganadha Razu* v *Sri Raja Satrucharla Ramabhadra Razu* (1)) No authority for the contrary proposition was cited by the zemindar's vakil In the present case, with regard to the property which remains undivided, there was on the plaintiff's side a demand that it should be divided, but that demand was ineffectual because in point of law the property was not partible No partition has taken place either by decree or by consent, and therefore, in our judgment, the rights of the junior members of the family remain as they were before any demand was made That is to say, they retain "such right and "interest in respect of maintenance and possible rights of succession as "belong to the junior members of a raj or other impartible estate descendi-"ble to a single heir" (See *Sartaj Kuari* v *Deoraj Kuari* (2)) If the plaintiff is entitled to maintenance he is, we think, entitled to have it charged on the zemindari property or part of it (See *Coomara Yettapa Naikar* v *Venkateswara Yettia* (3)) In view of the liberty of disposition enjoyed by the zemindar there is no other way in which the rights of junior members can be secured No reason was suggested why in this respect any distinction should be made between the male and female members of a family, and in the case of women there is no [366] doubt that a decree for maintenance in their favour is generally accompanied with a direction making it chargeable on certain specified property We think, however, that the zemindar is justified in objecting to the decree as framed by the District Judge, inasmuch as it fetters him unnecessarily in the disposition of his property It is sufficient that the decree should make the maintenance chargeable on certain villages, and if the parties cannot agree, we must ask the Judge to find what particular property will form sufficient security

The next question is as to the rate at which maintenance should properly be allowed It was contended on behalf of the zemindar that in estimating the rate the Court should take into account the property alleged to be in the hands of the plaintiff, and the finding of the Judge with regard to that property was impugned

The zemindar's vakil relied particularly on certain letters put in by the plaintiff himself and admitted in some unaccountable way, although the writer of them was not called and was admittedly alive The case made for the zemindar was that lanka lands of considerable value had been acquired by the plaintiff in his own name, and in June 1890, when the unfavourable judgment of the Privy Council had been heard of, transferred *benami* to Janakiramayya, the District Munsif We do not think this is proved, and agree with the conclusion stated by the Judge in the 41st paragraph of his judgment Janakiramayya's letters some written to the zemindar's brother Ramalinga and some to the plaintiff's servant Suryaprakasa (11th witness), cannot fairly be construed as implying that the lands belonged to the plaintiff or his brother The District Judge has found that a monthly allowance of Rs 500, with an additional Rs 250 in lieu of any provision for a house, furniture, cattle or

(1) 14 M 237 (240) (2) 10 A 272 (285) (3) 5 M H.C R 405.

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occasional expenses, *e.g.*, on account of marriages, is an adequate and fair allowance. The plaintiff had asked for a much larger sum, *viz.*, Rs. 2,000, and the defendant had named a smaller one, *viz.*, Rs. 250. It appears from the notes that the quantum of the allowance was in a great measure left to the Judge, and considering his experience in the district, we should be slow to disturb his judgment in the matter. On the part of the plaintiff it is urged that the allowance ought to be raised at least to Rs. 1,000 per mensem, and that some provision ought to be made from the allotment to the plaintiff of a house and garden. On the other hand, it is contended for the [367] zemindar that the allowance of Rs. 750 is excessive. We think that the District Judge has given good reasons for refusing to grant the use of a house to the plaintiff, and we are not satisfied that the money allowance he has made is either excessive or inadequate.

The District Judge has granted arrears at the rate of Rs 500 per mensem for twelve years prior to the institution of the suit In this we think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of action for arrears. On proof of failure to maintain without more, he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji* (1) and *Mahalakshamamma* v. *Venkataratnamma* (2). If it were not so, it would mean that the manager of the family could, at the choice of any member preferring to reserve his claim for maintenance out of current income, be compelled to pay him from time to time sums of accumulated arrears which could only be paid out of capital In this case it is admitted that the plaintiff has, since the 1st May 1873, been living apart from the defendant, and has neither asked for nor received maintenance except what he received under the order of the High Court pending the appeal to the Privy Council, that is, between December 1887 and July 1890.

In our opinion it is clearly the plaintiff's own fault that he has not received maintenance for the whole period of twelve years for which he claims it. In his suit brought in 1880 he made another and inconsistent claim, and therefore he has no right now, that he has failed in that litigation, to complain that a claim not made by him, though conceded by the defendant, was not satisfied. There has been no wrongful withholding on the part of the defendant. We must, therefore, reverse the decision of the District Judge with regard to the arrears, except as regards the period above mentioned, during which payment was actually made. The allowance for that period was demanded and given on the footing of maintenance, and as the sum will have to be refunded by the [368] plaintiff in execution of the decree of the Privy Council, we think that plaintiff is entitled to a decree for the same sum, *viz.*, Rs. 19,500 in the present case, to which must be added Rs. 3,500 for the seven months between the date of the institution of the suit and the making of the decree, for the Judge has decreed payment of the higher rate of Rs. 750 per mensem only from the latter date, and in that respect we do not alter the decree.

Subject to the alterations required by this judgment, the decrees are confirmed, and plaintiffs must pay proportionate costs of these appeals.

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(1) 3 B. 207. (2) 6 M 83.

Their memoranda of objections are dismissed with costs We see no reason to interfere with the decrees of the Judge on the point raised 1894 March 9

If the parties do not agree within one week from date of receipt of this order, the Judge must proceed to inquire as to the property which should be charged with the maintenance

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17 M. 362.

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17 M. 368.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr Justice Best

MADHAVA RAU (*Plaintiff*), *Appellant* v P M FERNANDES (*Defendant*), *Respondent* * [20th December, 1893, and 29th March, 1894]

Tort—Injury to property—Contributory act—Test thereof

As in the case of contributory negligence, so an act of one party can only be contributory to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury

SECOND appeal against the decree of S Subbarayar, Subordinate Judge of South Canara, in appeal suit No 321 of 1891, confirming the decree of A Babu Rau, District Munsif of Udipi, in original suit No 25 of 1890

The plaintiff was the owner of a garden The defendant was his neighbouring proprietor on the north and east The plaintiff's case was that his garden was surrounded on three sides—north, [369] east and west—by three channels; that, at a certain point, the defendant blocked up the communication of the third channel with the first by recently putting up a wall, that, by pushing forward a bank to the south of his fields and adding to them, and by additions to the west of his gardens, defendant had encroached upon the beds of the first and second channels and narrowed their water-way considerably, that, by deepening the channel below the foundation of a stone embankment of the plaintiff's he had endangered it, and that these wrongful acts of the defendant had caused the water on three sides of his garden to increase so in depth and force as to overflow his garden, wash off the surface soil and otherwise damage his trees Plaintiff accordingly prayed that the channels might be restored to their former condition, or Rs 50 paid to him in the alternative, and that Rs 21 for damages already sustained might be awarded

The defendant denied the alleged encroachment and acts complained of, and charged plaintiff with having trespassed upon and included the village road and channel to the area of his garden and otherwise encroached from his side of the garden

The District Munsif found that the narrowing of the first and second channels and their water-way was caused by the wrongful encroachments into and usurpation of unassessed Government waste land set apart for ' Karugulanadedari ' (cattle path) by plaintiff and defendant

That defendant had blocked up the channel and cut off the communication of the first channel with the third, that defendant had deepened the first channel, that these wrongful acts though they caused damage to plaintiff's property, were not the sole causes of the damage complained

* Second Appeal No 651 of 1893

1894 MARCH 29. — APPELLATE CIVIL. — 17 M. 368

of, the plaintiff having also contributed to bring about the result. In this view he dismissed the plaintiff's suit.

The plaintiff appealed on the ground, *inter alia*, that the encroachment on his part on Government land had taken place more than twelve years before and did not contribute to the injury complained of. The Subordinate Judge confirmed the decree of the District Munsif.

The plaintiff preferred this appeal.

Ramachandra Rau Saheb, for appellant.

Sundara Ayyar, for respondent.

ORDER.

[370] On the facts found the decrees of the Courts below cannot be supported. It is conceded that the encroachment in the channel by plaintiff was long before the defendant's encroachments. The Courts below are in error in supposing that plaintiff's suit must fail on the ground that he also contributed to the injury. As in the case of contributory negligence, so also in the present case, plaintiff's encroachment could only be held to be contributory if by the exercise of the ordinary care defendant could not have avoided causing the injury. Government, on whose property both parties are found to have encroached, may be entitled to require both parties to restore the channel to its original width; but as between plaintiff and defendant it was the latter's recent encroachment that was the cause of plaintiff's land being submerged. This is a wrong against which plaintiff is entitled to relief against the defendant.

We, therefore, set aside the decrees of the Courts below and call upon the Subordinate Judge to submit findings on the eighth issue, *viz.*, to what relief (if any) is the plaintiff entitled under the circumstance of the case, within one month from date of receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court

(In compliance with the above order, the Subordinate Judge submitted a finding which was accepted by the High Court in the following judgment :—)

JUDGMENT.

Accepting the finding, we reverse the decrees of the Courts below and direct that the channel and cattle lane be repaired by the defendant, or else that he do pay plaintiff a sum of Rs. 30 (thirty) as costs of doing the work, and that defendant do pay plaintiff a further sum of Rs. 15 as damages, and that he do also pay plaintiff proportionate costs on the above in all three Courts.

17 M. 371.

1892
Aug. 11.

APPELLATE CIVIL.

17 M. 371.

[371] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr Justice Parker.

JOSEPH (ON BEHALF OF THE SECRETARY OF STATE FOR INDIA IN COUNCIL) *Petitioner* v. THE SALT COMPANY (SUBBIAH PANDARAM AND COMPANY), *Respondents.**
[5th and 11th August, 1892.]

Code of Civil Procedure—Act XIV of 1882, Section 622—Land Acquisition Act—Act X of 1870, Sections 3, 24, 25, 29 and 34—'Material irregularity'—Mistake in regard to the principle of calculation of the value of the land acquired.

If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by Section 24 of that Act, or have improperly taken into consideration any of the matters prohibited by Section 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under Section 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in Section 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of works on the land which make it suitable for a salt factory, and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction.

[R., 1 Bom. L.R. 451 (457).]

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. A. Davies, District Judge of Tanjore, in compensation case No. 4 of 1890. The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court.

The Acting Government Pleader (*Subramania Ayyar*), for petitioner.

Mr. *Wedderburn, Sankaran Nayar* and *Madhava Row*, for respondents.

JUDGMENT

This is a civil revision petition put in on behalf of the Secretary of State in Council under Section 622 of the Civil Procedure Code against the decision of the District Judge of Tanjore and the assessors in compensation case No. 4 of 1890.

[372] The first question which arises is whether the High Court has power to entertain the petition under Section 622, Civil Procedure Code. The Judge and assessors agreed as to the amount of compensation to be awarded, and under Section 29, Act X of 1870, their decision is final. But under Section 34, the Judge and assessors are bound to state the grounds of their award under Clauses 1—4 of Section 24, and if it can be shown that they have refused to take into consideration any of the matters prescribed by that section or have improperly taken into consideration any of the matters prohibited under Section 25, we think such procedure would amount to material irregularity in the exercise of jurisdiction which would justify interference under Section 622, Civil Procedure Code. We find, moreover, that, in a case in which a question rose under Section 55 of the Land Acquisition Act, the High Court of Calcutta

* Civil Revision Petition No. 312 of 1891.

1892 AUG. 11.

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17 M. 371.

held that though there was no appeal from what the Judge had decided, it could be set aside as being in excess of his jurisdiction. (*Taylor* v. *The Collector of Purnea*) (1).

Passing to the grounds for the award stated under Section 34, we find that the Judge and assessors state that they award under Section 24, Clause 1, the sum of Rs. 42,500 " on the ground of that being its market-" value judging (i) by the amount actually expended upon the property, " (ii) by the amount fetched at sales in neighbouring pans, and (iii) at the " average value per pan arrived at with reference to the estimate of the " several witnesses."

Prima facie there is no illegality or irregularity in the exercise of jurisdiction in this award, the ' market-value of the land ' being the first matter which the Judge and assessors were bound to consider under Section 24, Clause 1.

It is contended, however, for the Government that the Judge and assessors were wrong in estimating the market value of the land as a salt factory, because the Salt Commissioner could, at any time withdraw the license to make salt under Madras Act IV of 1889, that the land could not, therefore, have any market-value as a salt factory, and that the selling price of the land itself was the proper criterion for value.

It is true that Section 16, Madras Act IV of 1889, directs that, when on cancelment of a license the Commissioner resolves to retain the salt works, and to acquire the proprietary rights of the [373] late licensee, the value of the land as a site for salt manufacture shall not be taken into account in acquiring the proprietary right, but that compensation shall be paid to the late licensee at the rate fixed in Section 18. But this Act did not receive the assent of the Governor-General till 30th December 1889, subsequent to this land being taken up under Act X of 1870, and, in the former Salt Act I of 1882, we find no corresponding provision. We observe that the lands were purchased by the company in 1885 and 1886 for about Rs. 3,000, and that in making his offer of Rs. 18,002-11-6 for acquiring them under the Act the Collector has taken into consideration the cost of converting them into salt pans. At the time, therefore, the land was acquired, there was no direction that the Government should only be called upon to pay the value of the land alone and that compensation for its special value should only be paid for at fixed rates Looking to the definition of ' land ' in Section 3, Act X of 1870, we are not able to say there was any illegality in the Judge taking into account the value of the works which made the place suitable for a salt factory, and even if, in making his estimate of market-value, the Judge was in error in taking into consideration the price paid for neighbouring pans, the mistake would at most be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction. We must dismiss the petition with costs.

(1) 14 C. 423 (429).

17 M. 373.

1894 MAY 4.

APPELLATE CIVIL.

17 M. 373.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

RAHAMTULLAH SAHIB (*Defendant*), *Appellant* v RAMA RAU AND ANOTHER (*Plaintiffs*), *Respondents* * [15th and 16th February,] and 4th May, 1894]

Will—Probate—Interest of defendant in testator's estate

In a suit brought to obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate. The fact of being a legatee under the will, or a creditor of the testator, does not amount to such an interest But proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up

[F, 4 C W N 602 (604), R, 34 B 459 (462)=12 Bom L R 366=6 Ind Cas 523, 2 P L R 1902]

[374] APPEAL from the decree of Shephard, J , sitting on the original side of the High Court in testamentary original suit No 10 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Mr. *Michell*, *Subramania Ayyar* and Mr *Laing*, for appellant

The Advocate-General (Hon. Mr. *Spring Branson*), Mr. *Wedderburn*, Mr *W Grant* and Mr *D Grant*, for respondents

JUDGMENT

This was a testamentary suit brought to obtain probate of the last will and testament of the late Raja of Venkatagiri in the district of Nellore. Plaintiffs alleged that the late raja made his last will on the 3rd June 1892 and died on the 6th idem, and as executors appointed by testator, they claimed probate Exhibit A is the will propounded by them, and among the legacies mentioned therein, a sum of Rs 1,000 is given to defendant Haji Muhammad Rahamtullah Sahib. He, however, filed a caveat objecting to the grant of probate on the ground that the will is not genuine, that its execution was procured by fraud, coercion or undue influence; that the testator did not know what he was doing, nor understand the nature and effect of its provisions, if in fact he signed or affixed his mark to the alleged will Defendant set up another will, dated the 31st May 1892, whereby it is alleged the late raja appointed Dewan Bahadur Raghunadha Row, the Honourable Mir Humayun Jah Bahadur, C.I.E., Kummati Krishnamachari and Dewan Bahadur T Venkasami Rao as executors. Defendant stated that that will purports to remit, *inter alia*, a debt of Rs 55,000 due from him to the testator, and further, to give defendant a legacy of Rs. 5,500 He further alleged that the will relied on by him was in the possession or power of the testator's sons and others, including the plaintiffs, Raja T Rama Row and Ramakrishniah.

Plaintiff's application for probate of the will propounded by him was made on the 12th August 1892 and the defendant's caveat was filed on the 19th idem On the 24th January 1893 the following four issues were fixed for decision:—

(i) Whether the will dated 3rd June 1892 was genuine?

(ii) Was the deceased raja at the time of executing the same of sound and disposing mind?

* Appeal No. 29 of 1893

1894 MAY 4.

APPELLATE CIVIL.

17 M. 373.

(iii) Is the will invalid as having been procured by fraud, coercion, undue influence or such importunity as took away his free agency in the matter?

(iv) Was it duly attested?

[375] On the 7th February 1893 two more issues were framed with reference to plaintiff's averment that defendant had no interest in the estate of the late raja entitling him to intervene in the matter of their application for probate, and to call upon them to prove the will in solemn form. The additional issues are—"whether defendant has any interest in the estate of the deceased raja," and "whether it is competent to the defendant to prove such interest, if any, in this suit." The final hearing was fixed on the 3rd March for the 12th April, and it was also directed that the additional, or the fifth and sixth issues be tried first. The suit came on for trial before Mr. Justice Shephard on the 19th April 1893, and on that day defendant applied for an adjournment in order that he might bring in the prior will set up by him, and was not ready with his evidence. The learned Judge declined to grant the application on the ground that it was made at the very last stage of the argument. Thereupon, he recorded a judgment, finding the first of the additional and preliminary issues in plaintiff's favour, and decreed that the will dated 3rd June 1892 was the last will and testament of the deceased raja, and that the probate thereof be granted to plaintiffs. Hence this appeal.

Two questions arise for determination in this appeal *viz.*, whether, apart from the prior will set up by the defendant, there is proof of defendant's interest in the testator's estate, and whether the learned Judge ought to have granted an adjournment to enable defendant to bring in the alleged prior will. As regards the first question, we agree with the learned Judge that, apart from that will, defendant has no interest. It is true that under the will propounded by plaintiffs, defendant is entitled to a legacy of Rs. 1,000, but this circumstance can give him no right to denounce that will and to call for proof of it in solemn form. Another contention on appellant's behalf is that he claims to be also a creditor of the late raja. Adverting to this contention, the learned Judge has observed that in reality there is no evidence that appellant is a creditor of the testator, and even if he is, this will not help him.

The law is clear on this point. In *Hingeston* v. *Tucker* (1) it was held by Sir C. Cresswell that before a person can be permitted [376] to contest a will, the party propounding it has a right to call upon him to show that he has some interest. Section 250 of the Indian Succession Act is framed on the same principles. As for the nature of the interest which ought to be proved, it was held in *Kipping* v. *Ash* (2) that the bare possibility of an interest is sufficient. But this possibility should rest on existing facts and not on mere conjecture. In *Crispin* v. *Doglione* (3) it was held by Sir C. Cresswell that the possibility of filling a character which would give the party concerned an interest was not sufficient, but that there must be a possibility of having an interest in the result of setting aside the will. There are also several Indian cases in which an interest was considered necessary and made the subject of inquiry, and we may refer to *In the matter of the petition of Desputty Singh* (4), *Komallochun Dutt* v. *Nilruttun Mundle* (5), *In the matter of the petition of Hurro Lall Shaha* (6), *Nilmoni*

(1) 2 Swaby & Tristrain's Rep. 596.
(2) 1 Robertson's Rep. 270.
(3) 2 Swaby & Tristrain's Rep. 17.
(4) 2 C. 208.
(5) 4 C 360.
(6) 8 C. 570.

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Singh Deo v *Umanath Mookerjee* (1) In *the matter of the petition of Desputty Singh* (2), and in *Menzies* v *Pulbrook and Ker* (3) it was decided, that a creditor of the testator has no right to contest the will, for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator

There is, however, no doubt that if the defendant proved the prior will, he would have a sufficient interest to contest the will set up by the plaintiffs. The material question, therefore, is whether the defendant was justified in not producing, at the date of the final hearing, evidence to prove the prior will on which he relies He ought to have been prepared to proceed at once with the case if the sixth issue had been decided in his favour It is quite possible, however, that he expected that the second preliminary issue would be determined first and hoped to frame his procedure with reference to such determination Moreover, defendant will be hereafter precluded from proving the will set up by him, as it has been held that when once probate of a will has been granted in solemn form, no one who has been cited or taken part in the proceedings or who was cognizant of those proceedings and stood by, can afterwards seek to have it cancelled *In re Pitambar Ghudai* (4) we are of opinion therefore that if defendant pays [377] into Court within one week from the date of re-opening of this Court after the recess all the costs incurred hitherto by plaintiffs both in the Court below and on appeal, the decree of the learned Judge should be set aside and the case remanded for disposal afresh, after giving appellant an opportunity to prove the will set up by him, and that if the appellant fails to make such payment within the time thus allowed, the appeal shall stand dismissed with costs throughout

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17 M. 377=3 M L.J. 97

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Parker

VENKATRAYER (*Petitioner*) *v.* JAMBOO AYYAN (*Respondent*)*

[25th November, 1892.]

Appeal from insolvency order—Code of Civil Procedure—Act XIV of 1882, *Sections* 588 (17), 589—*Act VII of* 1888, *Section* 56—*Act X of* 1888, *Section* 3, *Clause* (*a*)

Bearing in mind that Section 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, the words, 'Court subordinate to that Court' in Section 3 of Act X of 1888 must be construed with reference to its appellate jurisdiction. Consequently a District Court has no jurisdiction to hear an appeal from an order in insolvency matters, in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject-matter of the suit is more than Rs 5,000 in value

[**Diss.**, 23 A 56 (58)=20 A W N 194, 2 N L R 54 (55), **N.F.**, 27 B. 604 (606), **F.** 14 C P.L.R 62 (63), 4 Ind. Cas 617 (618)=19 M L.J. 68=4 M L T 455, **D.**, 169 P L R 1901=58 P R. 1901]

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order of J A Davies, District Judge of Tanjore, passed on appeal against order No 94 of 1891, presented against the order of P. Doraisami Iyer, Acting Subordinate Judge of Tanjore, in

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* Civil Revision Petition No 17 of 1892

(1) 10 C. 28.
(2) 2 C 208
(3) 2 Curties Rep 845
(4) 5 B 638

1892 Nov. 25. — APPELLATE CIVIL. — 17 M. 377=3 M.L.J. 97.

insolvency petition No. 2 of 1890 (in connection with original suit No. 36 of 1886).

The defendant in original suit No. 36 of 1886 applied under Section 344 of the Code of Civil Procedure to the Subordinate Judge of Tanjore, praying that he might be declared an insolvent, being unable to satisfy his debts, which amounted to over Rs. 9,000. The Subordinate Judge granted the petition. The [378] plaintiff in the above suit, a scheduled-creditor of the petitioner, appealed to the District Judge against the order of the Subordinate Judge, who allowed the appeal on the ground that the Subordinate Judge had no jurisdiction in the matter, and that the application for insolvency should have been made to the District Court. The original petitioner preferred this appeal to the High Court against the order of the District Judge on the ground that the appeal should have been made to the High Court.

Srirangachariar and *Parthasaradhi Ayyangar*, for petitioner.

Ramachandra Ayyar and *Sivaswami Ayyar*, for respondent.

JUDGMENT.

The question before us is whether the appeal lies to the District Court or to the High Court. The suit in which the order was passed was one in which the subject-matter was over Rs. 5,000 in value and the appeal in the suit therefore lay to the High Court.

As Section 589 of the Code of Civil Procedure was first enacted, appeals from orders specified under Section 588, Clause 17, lay in all cases to the High Court. This was modified by Act VII of 1888, in which the Court to hear the appeal in the suit was made the Court to hear the appeal against the orders in insolvency matters. The section thus modified failed, however, to provide for cases in which orders in insolvency matters, were passed by Courts of Small Causes, and by Section 3, Act X of 1888, it was provided that an appeal from an order specified in Section 588, Clause 17, should lie (*a*) to the District Court, when the order was passed by a Court subordinate to that Court; and (*b*) to the High Court in any other case.

The question, therefore, is whether Clause (*a*) operates to transfer the jurisdiction from the High Court to the District Court, in cases in which the subject-matter of the suit is over Rs. 5,000 in value. Section 2 of the Code of Civil Procedure makes a Subordinate Court subordinate both to the High Court and the District Court, but the Civil Courts Act gives the appellate jurisdiction exclusively to the High Court in suits in which the subject-matter is over Rs. 5,000 in value. Bearing in mind that Section 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, we are of opinion that the words 'Court subordinate to that Court' must be construed with reference to its appellate jurisdiction. It would be anomalous that a District Court should have jurisdiction to hear appeals from such [379] orders when it had no jurisdiction to hear an appeal in the suit itself and the first clause in the section points to an intention to give jurisdiction in insolvency matters to the ordinary appellate *forum*.

We must set aside the order of the District Court and direct that the appeal be returned to the party for presentation in the High Court. Appellant is entitled to his costs in this appeal, but we make no order as to costs in the Court below, since the point was not taken there.

17 M. 379.

1894 JAN. 23.

APPELLATE CIVIL.

17 M. 379.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar

GNANAMUTHU UPADESI (*Petitioner*), *Appellant in Civil Miscellaneous Appeal No* 130 *v* VANA KOILPILLAI NADAN (*Counter-Petitioner*), *Respondent in the above.** [22nd December, 1893]

ASEERVADHAM (*Petitioner*), *Appellant in Civil Miscellaneous Appeal No* 139 *v.* VANA KOILPILLAL NADAN (*Counter-Petitioner*), *Respondent in the above.** [23rd January, 1894]

Limitation—Limitation Act, Schedule II, Article 178—Applications for probate.

The Limitation Act does not apply to applications for probate, and the applications referred to in Article 178 of Schedule II of that Act are applications under the Code of Civil Procedure *Janaki* v *Kesavalu* (1), *Bai Manekbai* v *Manekji Kavasji* (2), and *Ishan Chunder Ray in re* (3) followed

[**F**, 11 C P L R 141 (142), **R**, 31 M 24=17 M L J 441=3 M L.T 19]

APPEALS against the orders of T M Horsfall, District Judge of Tinnevelly, passed on civil miscellaneous petition No 165 of 1892 and succession certificate petition No 40 of 1892, respectively

The facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court

The petitioner preferred these appeals.

Ranga Chariar, for petitioner.

JUDGMENT

[380] These appeals have been preferred from two orders passed in connection with a previous order made on an application for probate, which was registered as certificate case No 9 of 1892 on the file of the District Court of Tinnevelly The facts of the case, in so far as they relate to that application, are shortly these. A lady at Tuticorin called Ponniya Muthu Nadathi died on the 12th June 1891 Appellant is her father and respondent is her husband The former applied for probate alleging that she had left a will and appointed him executor, but the latter contended that the alleged will was a forgery and repudiated appellant's claim to probate. He urged further that she died intestate leaving a son surviving her, though he survived her but for three months, and that respondent was entitled to letters of administration in regard to her estate But when the application for probate came on for disposal on the 16th February 1892, as the appellant's vakil stated that he had no instructions, the application was dismissed with costs No appeal was preferred from the order of dismissal

But on the 10th March 1892 appellant made another application for probate to the District Court. The Judge held that there must first be a petition asking, for reasons stated, that the order on petition No 9 of 1892 should be set aside or reviewed, and on the ground that no such petition had been presented, he dismissed the second application for probate with costs on the 7th April 1892 From this order appellant has preferred civil miscellaneous appeal No. 139 of 1892

On the 29th April 1892 appellant made an application to the District Court praying that the order of the 16th February 1892 be set aside and

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* Appeal against Orders Nos. 130 and 139 of 1892

(1) 8 M. 207. (2) 7 B. 213. (3) 6 C 707.

1894 JAN. 23. — APPEL-LATE CIVIL. — 17 M. 379.

the original application for probate be restored to the file. On the 29th July 1892 the Judge dismissed this application as barred. He observed that the rulings in *Janaki* v. *Kesavalu* (1), *Ishan Chunder Roy in re* (2), and *Bai Manekbai* v. *Manekji Kavasji* (3) did not apply, as in all these cases the limitation was merely held not to apply to the institution of proceedings, and that in the case before him the proceedings had begun and must, therefore, be governed by the Code of Civil Procedure and the Limitation Act. From this order civil miscellaneous appeal No. 130 of 1892 has been preferred.

[381] *Civil Miscellaneous Appeal No.* 139 *of* 1892.—The Judge's order in dismissing the second application for probate on the application of 10th March 1892 is clearly bad in law. It was a fresh application for probate, and the Judge was in error in not treating it as such. It was pointed out in *Janaki* v. *Kesavalu* (1), so early as November 1884, that the Limitation Act was not intended to apply to an application for probate, an application under the Religious Endowments Act, an application for a certificate to collect the debts, an application for the appointment of new trustees, and similar applications. It was also explained in the case of *Bai Manek Bai* v. *Manekji Kavasji* (3) and *in re Ishan Chunder Roy* (2) that Article 178 of Schedule II of Act XV of 1877 is limited to applications made under the Code of Civil Procedure, that an examination of all the other articles in the second schedule relating to applications, that is to say of the third division of that schedule, shows that the applications therein contemplated are such as are made under the Code of Civil Procedure, and that though Article 178, when read alone, seems capable of the widest extension to every application that can possibly be made to a Court, the applications referred to in that article are applications *ejusdem generis*, *i.e.*, applications under the Code of Civil Procedure, and that any other construction would lead to the most inconvenient results. It is no doubt usual to demand an explanation when there is unreasonable delay in applying for probate, because the time when after the testator's death the will is to be proved is not fixed, and the explanation is necessary to assist the Judge in coming to a finding as to the genuineness of the will propounded. The reason for the exemption of applications for probate from the operation of the Limitation Act probably is that the application for probate is in the nature of an application for permission to perform a duty created by a will or for recognition as a testamentary trustee, and the right to apply continues so long as the object of the trust exists or any part of the trust if really created remains to be executed. The order of the Judge on the application of the 10th March 1892 is set aside, and he is directed to restore the application for probate to his file and to dispose of it on the merits in accordance with law. Respondents will pay appellant's costs in this Court.

[382] *Civil Miscellaneous Appeal No.* 130 *of* 1892.—The order of the Judge cannot be supported. It is wrong, because when the appellant was legally entitled to make a second application on the 10th March 1892, it was not competent to the Judge to impose a restriction upon appellant's right and to direct that he should make an application under the Code of Civil Procedure, so as to let in the law of limitation and indirectly to defeat the object of the legislature in exempting applications for probate from the Act of Limitations. The Judge is also in error in construing

(1) 8 M. 207. (2) 6 C. 707. (3) 7 B. 213.

Section 261, which only renders the provisions of the Code of Civil Procedure as nearly as may be so as to let in the limitation bar, from which applications for probate are saved.

1894 JAN. 23.

This order must be, and is hereby, set aside, as both appeals were heard at the same time, and as the same vakils appeared in both, there would be no order for costs in this appeal

APPELLATE CIVIL.

17 M. 379.

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17 M. 382.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

JUJI KAMTI AND OTHERS (*Defendants*), *Petitioners* v ANNAI BHATTA (*Plaintiff*), *Respondent* * [27th and 29th November, 1893]

Civil Procedure Code—Act XIV of 1882, Section 257-A—Adjustment of decree out of Court—Instalment bond—Consideration

An instalment bond, executed by a judgment-debtor in favour of the decree-holder and in consideration of the benefit of the decree being given up, is not void as an agreement falling under Section 257-A of the Civil Procedure Code. Such an agreement is void only as far as it affects the right to execute the decree, and may be the foundation of a fresh suit. *Sellamayyan* v *Muthan* (1), *Jhabar Mahomend* v *Mohan Sonahar* (2), and *Hukum Chand Oswal* v *Taharunnessa Bibi* (3) followed

[**Diss.**, 88 P R 1904, **F.**, 4 O C 284 (288), 16 P R 1900, **Appr.**, 29 P R 1908=61 P L R 1907=71 P W R 1907, **R.**, 25 A 317 (322); 21 B 808 (820), 22 B 693 (697), 35 C. 870 (874)=15 C W N. 674=7 C L J 543; 26 M 19 (26)=15 M L J. 113, 7 N L.R 136 (137), 3 O C 165 (166); U B.R (Civil) (1897—1901) 252]

PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the revised decree of S Subbaiyar, Subordinate Judge of South Canara, in small cause suit No 22 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court

[**383**] *Sankaran Nayar* and *Sankara Menon*, for petitioner

Narayana Rau, for respondent

JUDGMENT

Two questions are argued in support of this petition for revision. The first is that the bond sued on is void as an agreement falling under Section 257-A of the Code of Civil Procedure That section is inserted in the code in the chapter relating to the execution of decrees and in the section headed 'mode of executing decrees.' This suggests that the intention was to render such agreement void only so far as it affects the right to execute the decree As observed in *Sellamayyan* v *Muthan* (1) where the benefit of a decree is given up, and in consideration of it a bond is executed, it cannot be intended that the bond should not be the foundation of a fresh suit. This is also the view taken by the High Court of Calcutta *Hukum Chand Oswal* v *Taharunnessa Bibi* (3), *Jhabar Mahomed* v. *Modan Sonahar* (2). We are aware that the High Court at Bombay has held otherwise, but the scheme of the code does not appear to have been allowed due effect in arriving at those decisions

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* Civil Revision Petition No 547 of 1892

(1) 12 M 61. (2) 11 C. 671 (3) 16 C. 504

1893 Nov. 29. — APPELLATE CIVIL. — 17 M. 382.

The second question is whether the suit is time-barred. If, as alleged in the plaint, the first instalment of Rs. 50 was paid in February 1886, as the next instalment was not payable till February 1887, the suit brought in January 1890 was in time. In the revision petition defendants claim credit for the sum of Rs. 50. We cannot, therefore, say the suit is time barred.

A further question raised is as to the liability of the third defendant for the debt. Third defendant was not a party to the bond on which the suit is brought, and the karar referred to in the bond to which third defendant is alleged to have been a party appears to have been superseded by the plaint bond. We therefore exonerate third defendant from all liability for the debt and direct plaintiff to pay her costs; and we modify the decree as against defendants 1 and 2 by reducing the amount decreed from Rs. 420 to Rs. 370.

Plaintiff and defendants 1 and 2 will pay each other's costs throughout proportionate to the amounts now allowed and disallowed.

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17 M. 384 (P.C.)=21 I.A. 93=4 M.L.J. 139=6 Sar. P.C.J. 466.

[384] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Ashbourne and Macnaghten, and Sir Richard Couch.
[*On appeal from the High Court at Madras.*]

BALA GAURI VALLABA TEVAR (*Plaintiff*) *v.* PERIASAMI UDAYAR TEVAR AND OTHERS (*Defendants*), [20th April, 1894.]

Sivaganga sanad of 1803—Failure of suit alleging fraud—Possession known and acquiesced in prior to adjudication—Civil Procedure Code, Section 13.

The High Court of Madras dismissed on the facts a suit brought in 1886, grounded on fraud attributed to the lineal ancestor of the principal defendant, in obtaining, in 1803, the grant of the sanad of the Sivaganga Zemindari, to which the plaintiff claimed title. The plaintiff's case was that the defendant's ancestor, the younger of two brothers, had fraudulently caused the sanad to be made out in his own name, whereas it was intended to be, and ought to have been, a grant to the elder brother, who was the plaintiff's lineal ancestor. Those through whom the plaintiff claimed had not made any such charge, although they had knowledge of all the facts connected with the grant of the sanad of 1803 to the younger brother, and with the long possession by him and his descendants, among whom there had been litigation, resulting in a decision as to the ownership:

Held, that this suit could not be maintained to re-open the question.

APPEAL from a decree (20th March 1889) of the High Court, affirming, after a remand, a decree (20th November 1886) of the District Court of Madura, dismissing the appellant's suit.

In this suit for the proprietary right and possession of the Sivaganga Zemindari, the question which the plaintiff sought to raise related to the selection by the Government of Madras of a successor to the former zemindar of Sivaganga, named Sasivarna, whose lineal heirs became extinct in the last century. In 1801 his surviving collateral relations were the Tevar family, then consisting of two brothers, and of these the younger was appointed by proclamation to be zemindar, and in 1803 received a sanad from the Government. It was claimed that the elder brother, Padamattur Woyar Tevar, from whom the plaintiff was fifth in descent, was intended to be appointed zemindar, but the name of the younger

brother, Gauri Vallaba Woyar Tevar, was by fraud inserted in the sanad, and that his line of descendants had thus come into possession.

1894 APRIL 20.

PRIVY COUNCIL

17 M. 384 (P.C.) 21 I.A 93= 4 M.L.J 139= 6 Sar. P.C.J. 466.

[385] The principal point on this appeal was whether, after judicial decision and the open and known succession of the younger brother and his branch of the family, considered along with the grant made to him, the right of the elder brother could now be held to be an open question Two Courts had found no proof of fraud

The appointment of the zemindar in 1801 was made by Proclamation on the 6th July The sanad was dated the 22nd April 1803, and was forwarded to the Collector for delivery to the zemindar, whom it styled Muttu Ragunadha Gauri Vallaba Wulla Worria Tevar. This the younger brother received and continued in possession till he died in 1829 The elder brother lived till 1814 and left sons, but neither he nor they set up any claim to the zemindari

Gauri Vallaba left no son, but a posthumous daughter, Katama Natchiar, was born to him Between her and others of his immediate family on the one hand, and his collateral relations on the other, the succession was disputed Suits followed in which the elder branch, claiming through Padamattur Goyar Tevar, was represented The report of Srimut Mootoo Vijaya (*Ragunadha Gauri Vallaba Peria Woodia Tevar* v *Rani Angamuthu Natchiar* (1)) shows the earlier litigation, but the principal cases bearing on the present one were *Katama Natchiar* v *The Raja of Sivaganga* (2), decided in 1863 (which decided that the zemindari was to be taken as 'self-acquired' property in the hands of the 'Istemrar zemindar,' in other words in the possession of Gauri Vallaba Tevar), and *Muttu Vaduganadha Tevar* v *Dora Singha Tevar* (3) In this last case, Dora Singha Tevar, the eldest surviving grandson of the 'Istemrar zemindar,' was held solely entitled to the impartible estate of Sivaganga, and in the judgment all the anterior facts material to a report of the present one are to be found at p 298 of I L R., 3 Mad From 1866, when the judgment in 11 Moore I A , 50, was given, the younger branch of the Tevar family remained in possession

This suit was brought on the 4th January 1866 against Periasami, the son of Dora Singha Tevar As defendants with him [386] were joined his brothers, and also purchasers who had become, from time to time, interested in the estate, bringing the number up to 124 The plaintiff claimed a declaration that the judgment of 30th November 1863 in *Katama Natchiar* (the daughter of Gauri Vallaba Tevar) v *Bodha Gurasami Peria Odaya* (the plaintiff's father) (2) was not binding upon him, having been obtained by fraud He complained that in consequence of that decision, Katama ousted his father in 1864 and continued in possession till her death in 1877, after which Dora Singha Tevar, the father of the defendant Periasami, obtained possession from Katama's son by the decree of the Madras Courts dated the 14th May 1881, affirmed in appeal in *Muttuvaduganada Tevar* v *Dora Singha Tevar* (3) and held possession till his death on the 19th July 1883, when Periasami, his eldest son, succeeded to the impartible zemindari He alleged that when his father, Bodha Gurusami, died in 1872, he was left an infant of eight years of age; that he came of age in 1882, 27th December, and acquired the knowledge of the fraudulent acts in 1885 The details of these acts he did not specify

(1) 3 M.I.A. 278. (2) 9 M I A 539=11 M.I.A 50.
(3) 3 M 290

1894 APRIL 20.

PRIVY COUNCIL.

17 M. 384 (P.C.)= 21 I.A. 93= 4 M.L.J. 139 =6 Sar. P.C. J. 466.

The defendant by his written statement, in which his younger brothers joined, contended that the fact of the zemindari having been acquired by his maternal great grandfather Gauri Vallaba Tevar had been conclusively settled as a matter adjudicated within Section 13, Civil Procedure, by the judgment above mentioned (1), which could not be set aside. He denied that there had been fraud in the obtaining the sanad of 1803, and urged the insufficiency of the allegations on account of their vagueness. He also set up limitation.

Issues raising the above points having been fixed, the plaintiff filed a more definite statement, that, in 1802, when the permanent settlement was submitted to the Collector of Madura, Gouri Vallaba fraudulently inserted his name and title between those of his brother Padamattur Woyar Tevar, so as to enable him to assert that he was the grantee of the zemindari; and that "in 1803 the Government forwarded to the elder Woya "Tevar, through the Collector, an istemrar sanad for the zemindari, but "Gauri Vallaba kept possession of it, and pretended that he was the person "named therein as grantee."

[387] The plaintiff also alleged that "Gauri Vallaba caused the "permanent settlement accounts and other documents which were in the "Collector's office, and which stood in the name of Woya Tevar, to be "concealed or destroyed."

Other charges were made, but the main fraud alleged was that Gauri Vallaba had caused his own name to be inserted in the sanad. The suit was dismissed on the 20th November 1886 by the District Judge, who held it barred by the decision in 1863, and also by limitation. He recorded no express finding as to whether fraud had taken place or not. On appeal the High Court (KERNAN and WILKINSON, JJ.) remanded the record for a finding on this latter question, which had been raised by an issue, pointing out that, at the time of the decision of 1863, the question of fraud had not arisen, and was now alleged not to have been known. They added that it was now alleged that Gauri Vallaba Tevar had fraudulently caused the preparation of the sanad, having arranged that accounts should be given by the Collector's office, containing the insertion of his own name as zemindar, and making it appear that his was the name of the person to whom the sanad should issue.

On this remand, the District Judge finally found, on all the evidence, that the allegations of fraud were not proved. He concluded that there was no evidence of the fraud alleged as to Gauri Vallaba Tevar having got his own name inserted in the sanad in the place of that of his elder brother, or that the Government had intended to make the grant to the latter.

Objections were filed by the plaintiff. The same Division Bench of the High Court then dismissed the appeal, giving the following judgment:—

"The plaintiff's case is based on allegation of fraud having been "committed by Gauri Vallaba Tevar on his elder brother in 1802 and "1803 by preparing false accounts showing that he, Gauri Vallaba Tevar, "was the person who was proclaimed zemindar in 1801, and by inducing "thereby the Government to grant the zemindari in his name. All those "acts of alleged fraud have been fully investigated by the District Judge, "and he has, after careful examination, negatived them. It is not necessary to repeat his observations in which, however, we agree. The

(1) 9 M. I. A. 539 (543).

" conduct of the elder brother of Gauri Vallaba Tevar and of his grand- " son after his death contained the clearest evidence that the [388] " sanad granted in the name of Gauri Vallaba Tevar was known to them " and, although there were various suits between the parties, this fraud " was not set up until this suit was filed.

1894 APRIL 20.

PRIVY COUNCIL.

17 M. 384 (P.C.) = 21 I.A. 93 = 4 M.L.J. 139 = 6 Sar. P.C.J. 466.

" In the suit in 1836 the grandson of the elder brother admitted that " the younger brother was installed as zemindar, but he says it was with " the elder brother's consent The installation of the younger brother took " place in 1801 in Colonel Agnew's camp, and the evidence of Mr Hughes, " referred to by the District Judge, shows that, amongst the people who " then held up their hands in homage to the newly-installed zemindar, " the younger brother, was his elder brother.

" The parties have had the sanad in the name of Gauri Vallaba Tevar " before them for eighty years and had ample opportunity of inquiry, and " the plaintiff had entirely failed to prove his allegation, and we dismiss " the appeal with separate costs to the zemindar and to the lessees "

On this appeal Mr *T H Cowie*, Q C , and Mr *J D Mayne*, appeared for the appellant

Mr *R V Doyne*, for the respondent

For the appellant, the argument was, in outline, as follows —The decision of 1863 in favour of Katama Natchiar was based on the assumption that Gauri Vallaba was the person in whom the Government intended that the zemindar should vest in 1801 and 1803 This was no bar to the present suit, which was brought upon the contention that the elder broher was intended to be the zamindar, and that the insertion of Gauri Vallaba's name in the sanad of 1803 was effected by his fraud There were errors in dealing with the evidence in the Courts below, which should be held to affect the findings upon this question, and to leave it open to reconsideration Counsel for the respondents was not called upon

Their Lordships' judgment was delivered by LORD HOBHOUSE

JUDGMENT

This case appears to their Lordships to be a very simple one The appellant contends that by a fraud alleged to have been committed in the years 1802 and 1803 by Gauri Vallaba Tevar, a sanad appointing him zamindar of Sivaganga was granted to him by the Government in 1803, whereas it should have been granted to his elder brother Woya Tevar But Gauri Vallaba Tevar entered upon the zamindari at that time, and he and his descendants have enjoyed it ever since

[389] It is quite clear that there could have been no secrecy about his appointment to be zamindar The matter was the subject of public proclamation, and Woya Tevar must have known, and all his descendants must have known, that the sanad granting the zamindari was in the name of Gauri Vallaba Tevar, and that the zemindari was actually occupied and enjoyed by Gauri Vallaba Tevar and his descendants

No suit can be brought forward at the present time to re-open the question, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal with costs

Appeal dismissed

Solicitors for the appellant Messrs *Rowcliffes, Rawle, Johnstone and Gregory.*

Solicitors for the respondent Messrs. *Lawford, Waterhouse and Lawford.*

1893
Oct. 3.

APPELLATE CIVIL.

17 M. 389

17 M 389.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best

NARANAYYAN (*Defendant*), *Appellant* v. NAGESWARAYYAN (*Plaintiff*), *Respondent*.* [3rd October, 1893.]

Code of Civil Procedure—Act XIV of 1882, Section 283—Whether defendant may plead that the decree in question was collusively obtained.

A defendant in a suit brought under Section 283 of the Civil Procedure Code, who is connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband, or as being his coparcener, may show that the decree, in execution of which the property in dispute was attached, was collusively obtained. *Gulibai* v. *Jagannath Galvankar* (1) dissented from.

APPEAL against the order of J. A. Davies, District Judge of Tanjore, in appeal suit No. 577 of 1891, reversing the decree of T. Venkatramaiyar, District Munsif of Valangiman, in original suit No. 247 of 1890.

This was a suit under Section 283 of the Code of Civil Procedure to establish the plaintiff's right to proceed against certain [390] property of Sitaramayyan, against whose widow the plaintiff held a decree. The District Munsif, having determined that decree to be fraudulent, dismissed this suit.

On appeal by the plaintiff, the District Judge, relying on *Gulibai* v. *Jagannath Galvankar* (1), reversed the decree of the District Munsif and passed a decree in favour of the plaintiff. The defendant preferred this appeal.

Subramanya Ayyar, for appellant.

Mr. *Norton* and *Sankaran Nayar*, for respondent.

JUDGMENT.

We are of opinion that the decision of the Judge cannot be supported.

It is not necessary, for the purposes of this suit, to determine whether it is open to the plaintiff in a suit brought under Section 283 of the Code of Civil Procedure to ask for consequential relief in addition to a declaration establishing his right to the property. If it were necessary to decide the question, we should certainly hold that even a plaintiff could do so, and thus avoid a multiplicity of suits. Such is also the opinion of Jardine and Telang, JJ., in *Sadu Bin Raghu* v. *Ram Bin Govind* (2).

The question before us is whether a defendant in such a suit is precluded from showing that the decree, in execution of which the property in dispute was attached, was collusively obtained. Such a defence would not be ordinarily available or necessary when the defendant is an utter stranger, in no way connected with the judgment-debtor, unless, it may be, the decree makes the debt a charge on the property claimed. In the present case, however, the Munsif considered the defendant interested in setting up the defence either as reversionary heir of the judgment-debtor's husband Seetharamiah or as a coparcener of his. We are unable to hold that such a defence is not open to a party interested in making it in a suit brought under Section 283. We do not see our way to following the decision in *Gulibai* v. *Jaganath Galvankar* (1), as in our opinion Section 283 does not introduce an exception to the rule that the defendant is

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* Appeal against Order No. 64 of 1892.

(1) 10 B. 659.

(2) 16 B. 608.

bound to set up every defence available to him Moreover, we think it unreasonable that he should be compelled to submit to a decree that may result in his eviction and thus have to bring a fresh suit for restoration. 1893 Oct. 3.

[391] We must observe, however, that the defence is only available to the defendant if he is interesed as mentioned above APPELLATE CIVIL.

We set aside the order of remand and send back the appeal to the District Judge for disposal with reference to the foregoing observations.

The costs of this appeal will abide and follow the result. 17 M. 389

17 M. 391=1 Weir 813.

APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt., Chief Justice and Mr. Justice Parker

QUEEN-EMPRESS v YOHAN AND OTHERS * [17th January, 1892]

Christian Marriage Act—Act XV of 1872, Section 68—Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under Section 5 of the Act

A person who performs a ceremony of marriage according to Hindu form between a Native Christian and a Hindu commits an offence under Section 68 of Act XV of 1872, unless he is authorized to solemnize marriages under Section 5 of the Act.

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of H T Ross, Sessions Judge of Godavari, acquitting the prisoners in calendar case No. 39 of 1891

The third accused, a Hindu, performed the ceremony of marriage according to Hindu form between the first accused, who was a Native Christian at the time, and a Hindu girl, who was given in marriage by the second accused, her uncle The Sessions Judge acquitted the accused persons on the ground that Section 68 of the Christian Marriage Act (XV of 1872) does not apply to marriages in Hindu form solemnized by a Hindu, though one of the parties is found in fact to be a Christian, and that the whole Act appears to contemplate marriages in the Christian form alone, differing in that particular form Act V of 1865

[392] The Acting Government Pleader and Public Prosecutor (*Subramanya Ayyar*), for the Crown.

Mr. *Michell*, for the accused

JUDGMENT

We cannot agree with the view taken by the Sessions Judge The preamble and Sections 4, 5 and 68 of the present Act XV of 1872 are almost identical with the preamble and Sections 4, 5 and 56 of Act V of 1865.

Section 68, as amended by Section 6, Act II of 1891, makes punishable the solemnization of a marriage between persons of whom one is a Christian, unless the person solemnizing such marriage has been authorized for that purpose under Section 5 It is conceded that the third accused was not authorized under Section 5, and hence the case is exactly similar

* Criminal Revision Case No 488 of 1892.

1892 JAN. 17. APPELLATE CRIMINAL 17 M. 391 = 1 Weir 813.

to that in Proceedings of the Madras High Court dated 21st March 1871 (1) and the accused are, *prima facie*, liable to punishment.

We are told that this application has been made by Government merely to obtain an authoritative declaration of the law and a re-trial is not pressed for, having regard to the length of time which has elapsed.

We, therefore, do not think it necessary to pass any further order.

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17 M. 392.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

NAGAMMA (*Plaintiff*), *Appellant v.* VIRABHADRA (*Defendant*), *Respondent.** [9th January, 1894.]

Hindu law—Maintenance—Forfeiture of widow's right to maintenance by reason of unchastity.

The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference. *Valu* v. *Ganga* (2) and *Vishnu Shambhog* v. *Manjamma* (3) followed.

[F., 19 M. 6 (7); 9 Ind. Cas. 926=19 P.W.R. 1911; R., 14 M.L.J. 339.]

SECOND appeal against the decree of P. Subbayar, Subordinate Judge of South Canara, in appeal suit No. 246 of 1892, reversing [393] the decree of I. P. Fernandez, District Munsif of Kundapur, in original suit No. 108 of 1891.

Plaintiff in this case the widow of defendant's deceased son, Subraya Hebbara, sued for recovery of Rs. 20-2-6 being the value of rice and money with interest, due for her maintenance from October 1890 to April 1891, under a deed of agreement executed by the defendant on 6th March 1887.

The defendant admitted the agreement, but averred that the plaintiff had been living in adultery for a year and a half, that she had been degraded from caste for her pregnancy, and that thereby she forfeited her right to maintenance.

The plaintiff in her statement in answer to defendant's statement admitted having been put out of caste in consequence of pregnancy, but denied having lived in adultery, her pregnancy being the result of a forcible connection, and contended that the agreement was not invalidated by such pregnancy.

The Subordinate Judge reversed the decree of the District Munsif in favour of the plaintiff, who preferred this appeal.

Pattabhirama Ayyar, for appellant.

Ramachandra Rau Saheb, for respondent,

JUDGMENT.

We must follow the decision in *Valu* v. *Ganga* (2) and *Vishnu Shambhog* v. *Manjamma* (3), and hold that unchastity of a widow deprives her wholly of her right to maintenance. No text has been cited in favour of the theory that a bare maintenance can be allowed. The fact that there has been an agreement in our opinion makes no difference. It merely fixes the amount and the security. We must dismiss the appeal with costs.

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* Second Appeal No. 634 of 1893.

(1) 6 M.H.C.R. App. 20. (2) 7 B. 84. (3) 9 B. 108.

17 M. 394.

1893 April 19

Appellate Civil

17 M 394.

[394] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best

LAKSHMI AMMAH (*Plaintiff No* 3), *Appellant* v PONNASSA MENON AND OTHERS (*Defendants Nos* 1 *to* 15), *Respondents* *
[19th April, 1893]

Code of Civil Procedure—Act XIV of 1882, *Sections* 231, 244—*Order of a Court on application for execution by one or more joint decree-holders—Appeal therefrom*

An appeal lies from an order under Section 231 of the Code of Civil Procedure, such an order being one relating to the execution of a decree within the meaning of Section 244 *Gooroo Doss Roy* v *Ram Ruginee Dossia* (1) and *Odhoya Pershad* v. *Mahadeo Dutt Bhandaree* (2) distinguished

[F, 28 P R 1898, R., 7 Ind Cas 474=61 I R 1910=110 P L R 1910=90 P W R 1910, D, 23 B 623 (625)]

APPEAL under Section 15 of the Letters Patent from the order of Subramania Ayyar, J , dated 4th January 1892, passed on appeal against appellate order No 10 of 1891, confirming the order of A Thompson, District Judge of South Malabar, dated 2nd August 1890, passed in civil miscellaneous appeal No 214 of 1890

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Sankaran Nayar, for appellant

Respondents were not represented

JUDGMENT

We are of opinion that from an order under Section 231 of the Code of Civil Procedure, being an order relating to the execution of a decree between the parties to the decree within the meaning of Section 244 of the same Code, an appeal lies If all the joint decree-holders apply for execution, there can be no doubt that the order passed on such application, whether refusing or granting it, will be appealable Section 231 provides for the case in which all the decree-holders are unable or are unwilling to join in the application, and in such case enables one or more of such decree-holders to apply for execution of the whole decree, and then the Court is authorized to impose such terms as are necessary for the protection of the interests of the other decree-holders This appears to us to disclose an intention to provide [395] facility for executing decrees even when all the decree-holders are unable or unwilling to join in applying for execution It is no doubt true that the Court has discretion to refuse execution for sufficient cause, but that is no reason for holding such order to be other than an order relating to the execution of the decree within the meaning of Section 244 In *Gooroo Doss Roy* v *Ram Ruginee Dossia* (1), which was followed in *Odhoya Pershad* v *Mahadeo Dutt Bhandaree* (2), the question was not between the decree-holder on one side and the judgment-debtor on the other, but merely between two of the joint decree-holders With reference to the learned Judge's observation, we find that there has been no contest as between the decree-holders, but only an allegation that some of them had come to terms with the judgment-debtor.

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* Letters Patent Appeal No 32 of 1892

(1) 17 W R 136.

(2) 17 W R 415

1893 APRIL 19. — APPELLATE CIVIL — 17 M. 394.

We set aside the order of the learned Judge and of the Lower Appellate Court, and remand the case to the District Judge for replacement on the file and disposal on the merits, so far as the order of the District Munsif cancels the previous order in favour of third plaintiff.

The costs in this Court and the District Court will abide and follow the result.

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17 M. 395=3 M L.J. 237.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

LAKSHMINARANAPPA (*Defendant No.* 3), *Appellant v.* VENKATARATNAM AND OTHERS (*Plaintiffs and Defendants Nos.* 1, 4 *and* 5), *Respondents.** [2nd March and 18th April, 1893.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 124—*Suit for having the appointment of a kurnam declared void.*

A suit by existing kurnams for having the appointment of another person as a kurnam jointly with themselves declared void does not fall within the provision of Article 124 of the Limitation Act.

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 545 of 1891, confirming the [**396**] decree of O. V. Nunjundeh Ayyar, District Munsif of Masulipatam, in original suit No. 130 of 1890.

The third defendant was appointed a village kurnam by the first and second defendants, who were the receiver and manager, respectively, of the estate in which the village was situated. The plaintiffs, who were already kurnams of that village, filed this suit to set aside the appointment. It appeared that the third defendant was appointed a kurnam on the ground that the existing kurnams did not discharge the duties of their office efficiently, and that his father, who had died ten years before the suit, had been a kurnam, but had for ten years previously performed no duties as such. The District Judge, in affirming the decree of the District Munsif, held that the third defendant having been out of possession of this hereditary office for twenty years, had lost all right to it, and was barred by Article 124 of the Limitation Act

The third defendant preferred this appeal.

Pattabhirama Ayyar, for appellant.

Srirangachariar, for respondents Nos. 1 and 2.

JUDGMENT.

Article 124 of the Limitation Act is not applicable, as this is not a suit for possession of the hereditary office, but a suit by the existing kurnams for having declared void the appointment of third defendant as kurnam jointly with themselves. We observe that the appointment was made under the orders of the Collector administering the estate on behalf of the zemindar, on the ground that the existing kurnams did not discharge the duties of their office with efficiency.

As regards respondents' contention that the third defendant was appointed as an additional kurnam, we find that the third defendant's

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* Second Appeal No 757 of 1892.

father had been kurnam of the village, and it was quite open to the land-holder, in fact it was his duty, to fill up the vacancy caused by the third defendant's father's death under Section 7 of the Regulation XXIX of 1802. The fasal number of kurnams cannot be reduced without the sanction of the Board of Revenue, and the omission to appoint a successor to the third defendant's father was contrary to the policy of that section. The appointment of the third defendant, instead of being open to objection, was therefore merely in accordance with the requirements of the regulation.

1893 APRIL 18. — APPELLATE CIVIL. — 17 M. 395= 3 M. L. J. 237.

It is contended that the third defendant's right to the office was barred, as his father had died ten years previously, and he has [397] also during the last ten years of his life ceased to do the duties of kurnam, though his name was retained in the list of kurnams. The question is not whether the third defendant's right to claim the office is barred, but whether the Collector had no power to make the appointment.

The appointment of a stranger even by a zemindar when a vacancy exists would be open to no objection on the ground of its not being made within twelve years of the vacancy occurring, and we fail to understand why the appointment of an heir should be open to objection on this ground.

We set aside the decrees of both the Lower Courts and direct that the suit be dismissed with costs throughout to be paid by plaintiffs (first and second respondents).

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17 M. 397= 1 Weir 859.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

QUEEN-EMPRESS v. THOMMAYYA CHETTI.*

[30th August and 1st November, 1893.]

Indian Ports Act—Act X of 1889, Section 6, Clause (k)—Local Government's rules thereunder—Boats plying and not plying for hire—'Ultra vires.'

It is only with regard to boats plying for hire that Section 6 of Act X of 1889 gives the Local Government authority to make rules. Rules purporting to make it obligatory on boat owners to ply for hire are *ultra vires*.

PETITIONS under Sections 435 and 436 of the Criminal Procedure Code, praying the High Court to revise the finding and sentence of the First-class Sub-divisional Magistrate of Negapatam, passed in summary trials Nos. 1, 5 to 7 and 9 to 11 of 1893.

In these cases the owners of boats in the Port of Negapatam were fined various sums for refusing to take out their boats to a certain steamer, when called upon by the Port Officer to do so. The convictions were under rules 1 and 23 of the boat rules sanctioned [398] in Madras G. O., No. 503, dated 16th November 1891, passed under Section 6, Clause (k) of Act X of 1889. The rules in question were as follows:—

"Owners of boats shall be subject to the control of the registering "officer appointed by Government, and shall carry out at all times all "orders issued by him in connection with the plying of their boats and "which are not inconsistent with any of these rules, and shall supply the

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* Criminal Revision Cases Nos. 290 to 297 of 1893.

1893 Nov. 1. — APPELLATE CRIMINAL. — 17 M. 397=1 Weir 859.

"tindal of each registered boat with a printed copy of these rules and of "any orders issued by the registering officer, which copy shall be shown "by such tindal to any passenger by such boat demanding to see the same.

"No owner of a registered boat licensed to ply for hire, not being a "steam launch, and no person in charge of such boat, shall refuse to let "on hire such boat without having and assigning reasonable cause for "such refusal to the satisfaction of the registering officer."

Mr. *Grant*, for petitioners.

The Acting Government Pleader and Public Prosecutor (*Subramanya Ayyar*), in support of the conviction.

JUDGMENT.

COLLINS, C. J.—The accused were convicted for refusing to take out their licensed boats to certain steamers when called on by the Port Officer to do so. The Acting Sessions Judge, who refers this case, admits that the accused were rightly convicted under certain boat rules made by the Local Government under the powers given by Section 6 of Act X of 1889, but suggests that those rules are *ultra vires*. Clause (*k*) is the clause in the Act under which the Local Government acted, and boat rules 20 to 23 are the rules under which the convictions took place. It is contended on the part of the accused that at the time the Port Officer issued his orders they were not plying, and that therefore the order of the Port Officer was not a lawful one. I do not think that there is any power in the Local Government to make rules compelling owners of licensed boats to ply their boats at all times, and if they have a discretion to ply or not, the Port Officer's orders to ply are not lawful orders. These boat rules 20 to 23 appear to be *ultra vires*, and the convictions must be set aside and the fines, if paid, refunded. In summary trial No. 4 of 1893 if the boat was unseaworthy as it is stated, I agree with the Acting Sessions Judge that the complaint was vexatious and frivolous and ought not to have been made.

[399] SHEPHARD, J.—I am of the same opinion. I think that the rules 1 and 23, so far as they purport to make it obligatory on boat owners to ply for hire, are *ultra vires*, and therefore void and of no effect. It is only with regard to boats plying for hire that Section 6 of the Act gives the Government authority to make rules.

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17 M. 399=3 M.L.J. 229.

APPELLATE CIVIL.

Bebore Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

UPENDRA BHATTA (*Counter-Petitioner*), *Petitioner v.* RANGANATHA BHATTA (*Petitioner*), *Respondent.**

[8th February and 8th March, 1893.]

Code of Civil Procedure—Act XIV of 1882, Sections 244, 278 to 283—Questions to be determined by the Court executing a decree—Grounds of objection.

Where the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and the question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and Section 244

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* Civil Revision Petition No. 33 of 1892.

of the Code of Civil Procedure bars a separate suit *Abeedoonissa Khatoon* v *Ameeroonissa Khatoon* (1) followed

[Cons., 23 M 195 (199)]

1893 MARCH 8

APPELLATE CIVIL.

17 M. 399 = 3 M. L. J. 229.

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the District Judge of South Canara in civil miscellaneous appeal No 38 of 1890

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Pattabhirama Ayyar, for petitioner

Narayana Rau, for respondent

JUDGMENT

The petitioner, Upendra Bhatta, obtained a money decree in original suit No 206 of 1883 on the file of the District Munsif of Karakal against one Shridhara Bhatta Shridhara Bhatta having died, execution was applied for against his sons, widow and undivided brothers as his heirs In course of execution a certain piece of land called Mudanga bettu was attached and advertised for sale Counter-petitioner, Ranganatha Bhatta, [400] one of the brothers of the deceased Shridhara Bhatta, objected to the sale on the ground that this land under the will of Shridhara Bhatta's father belonged to a certain temple The District Munsif found that the land in question did not form portion of the land devised to the temple by the will, and ordered execution to proceed Present counter-petitioner appealed to the District Court, which, after calling for a further finding from the District Munsif, reversed his order and dismissed the execution petition so far as it related to the Mudanga bettu land The judgment-creditor, Upendra Bhatta, objects by this revision petition to the proceedings of the District Court on the ground that that Court had no jurisdiction to entertain the appeal against the District Munsif's order inasmuch as that order was passed under the claim sections of the Civil Procedure Code, Sections 278 to 283, and therefore by Section 283 no appeal lies against such order, but counter-petitioner's remedy was by regular suit The objection was not raised in the District Court, but being one relating to jurisdiction, we cannot but entertain it

The argument on the other side is that the question which the District Munsif had to decide was one between the parties to the suit or their representatives, and relating to the execution of the decree, within the meaning of Section 244 of the Civil Procedure Code, and therefore was one to be decided by the Court executing the decree, and not by separate suit This view is in accordance with the later decisions of all the High Courts In some earlier decisions of the Allahabad High Court distinctions were drawn between cases where the judgment-debtor or his representatives set up a title in themselves, and those when they set up a title as trustees on behalf of third parties or of charities But the later decisions adopting the principle laid down by the Privy Council in *Abeedoonissa Khatoon* v *Ameeroonissa Khatoon* (1) have established that when the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and that question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and

(1) 4 I.A. 66.

1893 MARCH 8.

APPELLATE CIVIL.

17 M. 399=3 M. L. J. 229.

Section 244 bars a separate suit. *Kuriyali* v. [**401**] *Mayan* (1), *Ravunni Menon* v. *Kunju Nayar* (2), *Punchanun Bundopadhya* v. *Rabia Bibi* (3), *Nimba Harishet* v. *Sitaram Paraji* (4), *Mulmantri* v. *Ashfak Ahmad* (5), and *Seth Chand Mal* v. *Durga Dei* (6).

We must hold that the District Judge had jurisdiction to entertain the appeal and dismiss this revision petition with costs.

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17 M. 401=1 Weir 409.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMPRESS *v.* BUTCHI.* [5th May, 1893.]

Penal Code—Act XLV of 1860, Section 378, Illustration (o)—Theft—Whether a dishonest removal by a wife of her husband's property left in her custody amounts to theft.

There is no presumption of law that a wife and husband constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.

CASE referred for the orders of the High Court under Section 438 of the Criminal Procedure Code by A. W. B. Higgens, District Magistrate of Godavari, in letter, dated 23rd February, 1893, No. 89.

In this case a married woman, during the absence of her husband in Burmah, removed his moveable property left in her charge from his house to the house of her paramour with whom she was residing. The husband on his return charged the wife and her paramour with theft. The Second-class Magistrate convicted both of theft, but the Deputy Magistrate, on appeal, acquitted the wife on the strength of illustration (*o*) to Section 378 of the Indian Penal Code, which he interpreted as meaning that the paramour, and not the wife, should be treated as the thief in such cases.

On this the District Magistrate referred the case for the orders of the High Court.

[**402**] The Acting Government Pleader and Public Prosecutor (*Subramanya Ayyar,*) for the Crown.

JUDGMENT.

There is no presumption of law that the wife and husband constitute one person in India for the purposes of criminal law. Theft is an offence against property, and where there is no community of property, each may commit theft in regard to the property of the other. The question is one of intention. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft. Her joint possession may, in many cases, give rise to a presumption that she had authority from her husband to give the property, but this is a presumption of fact, and it may be rebutted. The intent with which the husband's property is removed is a question of fact, and where a dishonest conversion is intended, it clearly amounts to theft.

We set aside the Deputy Magistrate's order acquitting the first accused and direct that the appeal so far as she is concerned be restored to the file and disposed of with reference to the above observations.

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* Criminal Revision Case No. 88 of 1893.

(1) 7 M. 255. (2) 10 M. 117. (3) 17 C. 711.
(4) 9 B. 458. (5) 9 A. 605. (6) 12 A. 313.

17 M. 402=4 M.L.J. 196=2 Weir 704.

APPELLATE CRIMINAL

Before Mr. Justice Parker and Mr Justice Best

1894 JULY 10.

APPELLATE CRIMINAL.

17 M. 402=4 M. L. J. 196=2 Weir 704.

QUEEN-EMPRESS *v.* ABBI REDDI AND ANOTHER *
[6th June and 10th July, 1894]

Criminal Procedure Code—Act X of 1882, Sections 531, 532 and 537—Commitment to Sessions Court by Magistrate having no jurisdiction over place where alleged offence was committed—Exercise of powers duly conferred

A Magistrate who commits a case for trial by a Sessions Court does so in the exercise of powers duly conferred upon him, and the fact that he had no territorial jurisdiction over the place where the alleged offence was committed, and that an objection to the committal on this ground was taken before the commitment, is no ground for the Court to which the commitment is made quashing it under Section 532 of the Criminal Procedure Code

The Queen-Empress v *James Ingle* (1), followed

[Appr, 18 A 350 (353)=16 A W N 96, R., 26 M. 640 (643)=1 Weir 100, 30 M 94 95=4 Cr L J 500=1 M L T 345, 13 Cr. L.J 35 (37)=13 Ind Cas 275=22 M L J 141 (145)=10 M L T 563= (1912) M W N 3]

[403] THE facts of the case appear sufficiently for the purpose of this report from the following judgments of the High Court

Pattabhirama Ayyar, for appellants

The Government Pleader and Public Prosecutor (Mr *Powell*) in support of the conviction

JUDGMENTS

PARKER, J —I do not think we are bound to set aside the conviction and sentence of the Sessions Court merely on the ground that the committing Magistrate had no territorial jurisdiction over the place in which the offence is alleged to have been committed The order of commitment was an order under Section 531, Criminal Procedure Code, and is not liable to be set aside because the proceedings were taken in a wrong place, unless the error occasioned a failure of justice The Magistrate was himself empowered to commit to the Sessions, and did not in so doing usurp an authority to which he was not entitled I do not think Section 532, Code of Criminal Procedure, applies See *The Queen-Empress* v *James Ingle* (1) Nor am I of opinion that the institution of proceedings in the wrong sub-division has occasioned a failure of justice The Sessions Court which tried the case had territorial jurisdiction, even though the committing Magistrate had not Under Section 537, Code of Criminal Procedure, we should not be justified in reversing the sentence on account of the irregularity previous to the trial

† [Nor do I think accused is entitled to a new trial on account of witnesses whose attendance could not be procured Every effort was made to secure their attendance.

* * * * *

Under such circumstances I cannot but hold that the false statement was wilful and not due to any mistake in identification I would therefore confirm the conviction]

* Criminal Appeals Nos. 36 and 37 of 1894

† [The portion in rectangular brackets forms a part of the judgment of Parker, J, though omitted in the I L.R. series.—ED]

(1) 16 B. 200.

1894 JULY 10. — APPELLATE CRIMINAL. — 17 M. 402=4 M. L. J. 196=2 Weir 704.

BEST, J.—Before proceeding to the merits of this appeal, a legal objection to the validity of the trial has to be considered.

It is urged on behalf of appellants that the Joint Magistrate, by whom the case was referred to the Second-class Magistrate for inquiry with a view to the committal of the case for trial by the Sessions Court was without jurisdiction in the case, and that, as the objection was taken before the commitment, the commitment ought to have been quashed under Section 532 of the Code of Criminal Procedure.

The section is as follows:—"If any Magistrate or other authority "purporting to exercise powers duly conferred, which were *not so* con- "ferred, commits an accused person for trial before a Court of Session or "High Court, the Court to which the commitment is made may, "after persual of the proceedings, accept the commitment if it considers "that the accused has not been injured thereby, *unless* [**404**] "*during the* "*inquiry and before the order of commitment objection was made* on "behalf either of the accused or of the prosecution to the jurisdiction of "such Magistrate or other authority.

"If such Court considers that the accused was injured, *or if* such "objection was so made, it shall quash the commitment and direct a fresh "inquiry by a competent Magistrate."

The words 'purporting to exercise powers duly conferred' at the begnning of this section appears to me to have reference to Section 206 of the Code, and to signity 'power to commit for trial,' and, as all Magistrates in this presidency are empowered to commit to the Court of Session, I am of opinion that this objection must be disallowed. There can be no doubt that the Sessions Court of the North Arcot District is the proper Court to which the case should have been committed and as the commitment, even if irregular, cannot have prejudiced the accused, the objection must be further disallowed with reference to the provisions of Section 537 of the Code.

Seeing no reason to differ from the finding arrived at by the Judge and assessors we dismiss these appeals.

Order accordingly.

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17 M. 404.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best

KRISHNA CHADAGA (*Plaintiff*), *Appellant v.*
GOVINDA ADIGA (*Defendant*), *Respondent.**
[2nd April, 1894]

Revenue Recovery Act—Madras Act II of 1864, Section 11—Whether gathered products belonging to a tenant can be distrained by Government on account of the landlord's arrears of revenue.

Government can attach for arrears of revenue under Section 11 of Madras Act II of 1864 the gathered products belonging to a tenant, provided that the products are of the land on account of which the arrears of revenue have accrued

CASE stated under Section 617 of the Civil Procedure Code by W. C Holmes, District Judge of South Canara, in appeal suit No. 339 of 1892.

* Referred Case No. 138 of 1893.

[405] This reference arose from a suit in which a landlord sued his tenant, *inter alia*, for 10 mudies of rice-rent, in respect of which the tenant denied his liability on the ground that the said rice was distrained by the Revenue authorities in satisfaction of arrears of revenue due by the landlord. The District Judge decided that Section 11 of Madras Act II of 1864 does not empower the Revenue authorities to distrain *gathered* products in possession of a tenant for arrears of revenue accruing on the land, but referred the point to the High Court as being one not free from doubt.

1894 APRIL 2.

APPELLATE CIVIL.

17 M. 404.

Narayana Rau, for appellant.

Respondent was not represented.

JUDGMENT

Our answer to the question is that the Government can attach, under Section 11 of Madras Act II of 1864, for arrears of revenue, gathered products belonging to a tenant, provided that they are the products of the land on account of which the arrears of revenue have accrued.

The products belonging to a tenant are made liable by the section, and Clause 3 gives a right to the tenant to deduct the value of the same from rent then due or thereafter to become due to the landlord on account of the land on which the products were grown.

It follows that the products liable to distraint are the products of the defaulter's land, though such products may belong to the tenant.

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17 M. 406.

[406] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

CHINNASAMI MUDALI AND OTHERS (*Plaintiff No. 2 and his Representatives*), *Appellants* v. ADVOCATE-GENERAL OF MADRAS AND OTHERS (*Defendants*), *Respondents*.*

[9th, 10th and 18th July, 1894.]

Religious endowment—Powers of a Christian congregation to elect under which Bishoprick the endowment should be placed in spiritual matters—Effect of a concordat placing the endowments within the territorial jurisdiction of a certain Bishop—Suit for partition of the endowment.

In the year 1806, a fund was started by a caste of Roman Catholic boatmen in Royapuram for the purpose of supplying the religious wants of the caste, and in 1829 the Church of St. Peter at Royapuram was erected. The fund was under the control of the Government Marine Board which, in 1830, in consequence of disputes between the headmen of the caste, suspended all payments. In 1863, a member of the caste, claiming to be sole surviving headman, brought a suit against Goverment for a declaration that he was sole surviving headman and as such entitled to the sole management of the funds then in the hands of Government, which funds the Government paid into Court to the credit of the said suit. By the decree in this suit it was declared that the fund, in question, belonged to the whole body of Roman Catholic boatmen in Royapuram, that it must be devoted to the religious observances of the body, and that it rested with that body to determine whether in spiritual matters the Church should continue under the Vicar Apostolic or the Goanese Bishop of Mylapore.

In 1886 a concordat was executed between the Pope of Rome and the King of Portugal, the effect of which was to place St. Peter's Church within the territorial jurisdiction of the Vicar Apostolic. Plaintiffs, who were members of the

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* Appeal No. 11 of 1892.

1894 JULY 18. — APPELLATE CIVIL — 17 M. 406.

Goanese party, complained that, having regard to the effect of the concordat of 1886, it would be impossible for their party—even if in a majority—to elect a priest of their own party, and prayed for a division of the fund:

Held, that even if this were so, this fact would not justify the Court in taking away from St. Peter's Church part of its endowment.

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in suit No. 124 of 1889.

The facts of the case appear sufficiently for the purpose of this report from the foregoing, and from the judgment of the High Court.

[**407**] Mr. *Kernan* and Mr. *Grant*, for appellants.

The Advocate-General (Hon Mr *Spring-Branson*), for respondents Nos. 1 and 3.

JUDGMENT.

We agree with the learned Judge that the plaintiffs have not been able to show that the position of themselves or their party has, in a canonical point of view, been materially affected by the concordat of 1886. The plaintiffs, no doubt, belong to the caste of Christian boatmen, for whose religious benefit the fund was originally intended. But by the decree in original suit No. 105 of 1863, it was decided that it was for the majority of the caste to determine whether in spiritual matters, the Church of St. Peter at Royapuram should be placed under the Vicar Apostolic or under the Goanese Bishop of Mylapore. Although the result of the first caste meeting held in pursuance of that decree was to place the Church under the Bishop of Mylapore, the order of 30th January 1867 recognized the election of the Rev. T. Gnanaprakasa Nadar as the successor of the Rev. Vincent de Silva. The Rev. T. Gnanaprakasa Nadar was subordinate to the Vicar Apostolic, and ever since 1867 the Church of St. Peter has remained under the spiritual jurisdiction of the Bishop of Madras.

The concordat of 1886 and the decree of 1887 have not, therefore, affected the position of the plaintiffs with regard to the sacraments called 'paracholia.' If plainitffs are unable now to obtain these sacraments in St. Peter's Church, they have been under the same disability since 1867, and the concordat between the Pope and the King of Portugal has not altered their position in respect to these sacraments.

All that can be alleged by plaintiffs as a grievance against the concordat is that at any future election of a priest by the members of the boatmen caste, it may be practically impossible for the adherents of the Goanese party—even if in a majority—to elect a priest of their own party, since by the concordat, St. Peter's Church has been definitely placed within the territorial jurisdiction of the Vicar Apostolic. We are by no means clear that this result would necessarily follow. Seeing that the differences settled by the concordat related only to questions of patronage and jurisdiction, and did not touch the validity of the orders of either party or the faith of the Church, it may be that a Goanese priest, if elected, would be granted the necessary faculties by the Supreme Pontiff or the Vicar Apostolic It appears from the evidence of Father [**408**] Mayer, the Vicar-General under the Archbishop of Madras, that such canonical faculties can be given, though no doubt they very rarely are given. But even if supreme ecclesiastical authority has imposed upon the priests of the Goanese party a prohibition to accept this particular office, it appears to us that such prohibition is a matter of ecclesiastical jurisdiction with which the Courts have nothing to do. It could hardly be contended that

1894 July 18 — Appellate Civil. — 17 M. 406.

it would not be open to the Supreme Pontiff to impose such a prohibition upon any individual priest in obedience to the See of Rome And the possibility that the right of the caste to have one of the Goanese clergy as their officiating priest might be terminated by the permanent surrender of the church to the jurisdiction of the Vicar Apostolic was clearly contemplated by Scotland, C J, and Bittleston, J, in civil suit No 136 of 1866, and by Turner, C J, in his judgment in civil suit No 102 of 1880

It is not, however, necessary for us to speculate upon a contingency which may never arise, for even if the practical effect of the concordat is to prevent the election of a Goanese priest, it is clear that that fact will not justify the Court in taking away from St Peter's Church part of its endowment and bestowing that part upon the Church of St Anthony It was held in civil suit No 105 of 1863, and re-affirmed in civil suit No 102 of 1880, that the purpose of the fund was the erection of a church for the use of the caste of Christian boatmen at Royapuram, the performance of divine worship therein and other religious observances connected with the church, and to that purpose the whole property must be devoted The question of the division of the fund so as to endow two churches for the use of the two parties has been previously considered, and it has been twice held that on principle and authority no such division can be made, and that the fund and the church cannot be separated

Finally, it was urged for the appellants that they were entitled to their costs out of the fund, since they had a *bona fide* grievance, and that the Advocate-General had accorded his sanction for the bringing of the suit We have already shown that the concordat has not altered the existing position of the plaintiffs with regard to the rites of the church which remain the same as it has been since 1867, while the possible future grievance, if it exist at all, is one with which the ecclesiastical authorities alone can deal As regards the sanction of the Advocate-General, it is rightly pointed [409] out that it is no part of the duty of that officer to decide the case as a Judge, and that if an apparently good and *bona fide* grievance is shown, he may properly leave the applicants to bring the suit at their own risk When, however, we find that an opportunity has been taken of a *friendly* settlement of differences between the highest authorities in Church and State to re-agitate in a *hostile* spirit questions long ago decided against the party of the appellants, we can see no reason why they should not be left to bear their own expenses It would be an evil precedent if litigants were advised or encouraged to think that they could renew litigation with impunity, drawing the expenses of so doing from trust funds and not from their own pockets We cannot but see how the very existence of such a fund as this may offer temptation to fomenters of litigation and encouragement for speculative actions The last suit, which was decided by Sir Charles Turner on December 5th, 1883, cost the fund no less than Rs 20,366 The present suit, which is framed to re-open the same questions, was filed within 5½ years of that decision, and here too we find that separate costs for third defendant, as well as those of the Advocate-General (first defendant), amounting in all to Rs 4,775, have been allowed out of the fund Apparently none of this has yet been recovered from the plaintiffs It is lamentable to find that monies which have been devoted to the performance of divine worship and the religious instruction of the poor should be dissipated in fruitless litigation, and we cannot but express our regret that the Court was not moved to call for security for costs before the hearing of this appeal.

1894 JULY 18. — APPELLATE CIVIL. — 17 M. 406.

We dismiss the appeal with costs, but we do not feel ourselves justified in ordering that any further sum be paid out of the fund.

Branson & Branson—Attorneys for appellants.

Barclay, Morgan & Orr—Attorneys for respondents Nos. 1 and 3.

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17 M. 410 (F.B.)

[410] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Shephard, Mr. Justice Best and Mr. Justice Davies.

KRISTAMMA NAIDU AND OTHERS (*Plaintiffs Nos.* 2 *to* 6), *Petitioners v.* CHAPA NAIDU AND OTHERS (*Defendants*), *Respondents.** [17th July, 1893, 28th February, 1st, 2nd March and 6th August, 1894.]

Code of Civil Procedure—Act XIV of 1882, *Section* 622—*Power to call for record of cases not appealable to High Court—When a Court can be said "to have acted in the exercise of its jurisdiction illegally or with material irregularity."*

A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, and admitted other appeals after they had become time-barred:

Held, that where a Subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by Section 622 of the Code of Civil Procedure. *Amir Hassan Khan* v *Sheo Baksh Singh* (1) followed

Held, further (Best and Davies, JJ, *dissentiente*), that the case contemplated by the words "act illegally or with material irregularity" in Section 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or procedure

Per Best, J.—The words in question of Section 622 of the Code are applicable to illegalities or irregularities which are the result merely of ignorance of law or carelessness, and the disposal of a suit on a point taken by the Court itself on appeal, without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure within the meaning of Section 622, and that the inadvertent admission of an appeal that is time-barred is an illegality in procedure within the meaning of that section

Per Davies, J.—The clause of Section 622 in question is applicable only to errors of procedure, and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section, interfere in revision The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case.

[R., 1 C W.N 617 (626); 1 C W N 626 (632); 15 Ind. Cas. 212=15 O.C. 78; 16 Ind. Cas 963 (965)=16 C.L J. 375; 2 L B.R. 333 (337); 24 M.L.J. 112 (120)=13 M.L.T. 60]

PETITIONS under Section 622 of Act XIV of 1882, praying the High Court to revise the decrees of the District Court of Ganjam in appeal suits Nos. 80, 82, 83, 84, 85, 86, 117, 119, 121 and 122 [411] of 1891, presented against the decrees of the Court of the District Munsif of Chicacole in original suits Nos. 84, 102, 108, 91, 99, 104, 110, 89, 98 and 107 of 1890 respectively.

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* Civil Revision Petitions Nos. 378 to 387 of 1892.

(1) 11 C. 6.

1894 Aug. 6.

FULL BENCH.

17 M. 410 (F. B.)

These petitions came on for hearing on the 17th day of July 1893 The Court (Muttusami Ayyar and Best, JJ) made the following order of reference to the Full Bench

ORDER

BEST, J —" These cases being not appealable by reason of the amount " of the suit in each of them not exceeding five hundred rupees (see Sec- " tion 586 of the Code of Civil Procedure), these applications are made for " revision under Section 622 of the same Code

" The first question for decision is, whether the cases are open to " revision under the section last mentioned

" Such revision is allowable if the Court by which the case was " decided (i) exercised a jurisdiction not vested in it by law, or (ii) failed " to exercise a jurisdiction so vested, (iii) ' acted in the exercise of its " jurisdiction illegally or with material irregularity '

" The contention on behalf of petitioners in all the cases is that, in " the exercise of its jurisdiction, the Court acted ' with material irregular- " ity," in that its decision proceeds on a point taken by the Court itself in " appeal as to which no issue was recorded and consequently the peti- " tioners (plaintiffs) were afforded no opportunity of proving their case " While in petitions Nos 384 to 387 there is a further contention that " the Judge ' acted illegally ' in admitting the appeals after they had " become barred under the law of limitations

" It has been found in second appeals Nos 604 and 605 of 1892, in " which the amount of the suit being more than Rs 500 appeals lay, " that the first of the above two objections is well founded We have " therefore ordered the District Judge to try the necessary issues and sub- " mit findings thereon; and in second appeals Nos 606 to 608 we have " found the second of the above objections to be also well-founded and " have consequently set aside the Lower Appellate Court's decrees and re- " stored those of the District Munsif There can be no doubt, therefore, " that, if these applications for revision can be entertained under Section " 622 of the Code of Civil Procedure, we should, in the case of petitions " Nos 378 to 383, adopt the course taken by us in second appeals " Nos 604 and 605, and in the case of petitions Nos 384 to 387, set aside " the Lower Appellate Court's decrees and restore [412] those of the " District Munsif as was done in second appeals Nos 606 to 608

" The question is, have we power to entertain these petitions?

" I should have had no hesitation in answering this question in the " affirmative had it not been for the *dictum* of my learned colleague in the " Full Bench case *Manisha Eradi* v *Siyali Koya* (1) that the words ' act " illegally or with material irregularity ' apply to those cases only in which " there is an error of law or material irregularity *on the procedure, by reason " of which the Subordinate Court conclude that it has or has not jurisdic- " tion.*'

" With all deference, I am unable to see either in the wording of " Section 622 of the Code of Civil Procedure or in the decision of the Privy " Council in *Amir Hassan Khan* v *Sheo Baksh Singh* (2) anything to war- " rant the placing of any such limited construction on the words Nor can " I see that the decision of a Divisional Bench of this Court in *Erajabi* v " *Mayan* (3) is in conflict with the decision of the Privy Council in *Amir " Hassan Khan* v *Sheo Baksh Singh* (2) In the latter case not only had " the Lower Courts jurisdiction to decide the question which was

(1) 11 M 220 (2) 11 C 6 (3) 9 M 118.

1894 AUG. 6. — FULL BENCH. — 17 M. 410 (F. B.).

"before them, but they also decided it—whereas the irregularity of the "Lower Court in Erajabi's case was *failure to consider the question* "whether the suit was barred. Nor am I able to think that the cases in "*Seshadri* v. *Krishnan* (1), *Sanjivi* v. *Ramasami* (2) and *Rama* v. *Kunji* (3) "were not rightly entertained under Section 622.

"All that was decided in *Amir Hassan Khan* v. *Sheo Baksh Singh* (4) "was that the mere fact of a Court having come to a wrong decision even "on a point of law is not sufficient to constitute an illegality or material "irregularity in procedure so as to bring the case within the scope of "Section 622.

"I cannot help thinking that the disposal of a suit on a point taken "by the Court itself on appeal, without affording the parties an opportu-"nity of proving what is necessary to meet that point, is an irregularity "in procedure within the meaning of Section 622, and that the inadvertent "admission of an appeal that is time-barred is an illegality in procedure "within the meaning of the same section. Of couse, if the Court had "considered this latter question and decided that the appeals were not "time barred, [413] the case would have been different, for that would "have been a case of erroneous decision within the ruling in *Amir Hassan* "*Khan* v. *Sheo Baksh Singh* (4). But where (as in these cases) there is "no such finding, but without any inquiry, the appeals are treated as "within time, there is, I think, illegality in procedure within the meaning "of Section 622.

"I would therefore hold that this Court has power to entertain all "these petitions under Section 622, and I would set aside the Lower "Appellate Court's decrees in the cases to which civil revision petitions "Nos. 384 to 387 relate with costs in this and the Lower Appellate Court; "and in the cases, the subject of petitions Nos. 378 to 383, I would direct "the trial of issues similar to those sent for trial in second appeals "Nos. 604 and 605 of 1892."

Muttusami Ayyar, J—"I am unable to concur in the opinion of my "learned colleague. I still adhere to the opinion expressed in the Full "Bench case that the illegality or irregularity mentioned in Section 622 "ought to be taken to refer to such error of law or irregularity as has led "the Court below either to exercise a jurisdiction which it did not possess "or to decline to exercise a jurisdiction which it possessed.

"The question must be referred to the Full Bench."

Pattabhirama Ayyar, for petitioners.

Ramachandra Rau Saheb, for respondents.

OPINION.

COLLINS, C J.—"The questions referred to the Full Bench are "whether the cases mentioned are open to revision under Section 622, "Civil Procedure Code.

"The High Court may exercise its powers of revision if the Court "by which the case was decided appears to have exercised a jurisdiction "not vested in it by law, or to have failed to exercise a jurisdiction "so vested, or to have acted in the exercise of its jurisdiction "illegally or with material irregularity. The reference states that the "District Judge decided the case on a point taken by the Court itself as "to which no issue was recorded, and it is further contended that the "Judge acted illegally in admitting the appeals after they had become

(1) 8 M 192. (2) 8 M. 494 (3) 9 M. 375. (4) 11 C. 6.

1894 Aug 6. — Full Bench — 17 M. 410 (F. B.)

"barred under the Law of Limitations It is not stated that the atten-"tion of the Judge was called to these points, or that any review petition "was presented. That the Judge had jurisdiction to try the cases ap-"pears to be [414] certain, and I am of opinion that, although the Judge "undoubtedly was wrong in law, that is no ground for revision under Sec-"tion 622 See *Amir Hassan Khan* v *Sheo Baksh Singh* (1) I am "inclined to adopt the words in the judgment of West, J, in *Shiva Nathaji* "v *Joma Kashinath* (2), and hold that the section applies to an obviously "perverse use of jurisdiction or authority which could not be justified even "on the premises assumed or found by the Judge

"The degree of ignorance or bad law which would amount to "perverseness must be determined by the facts of each particular case I "would hold that Section 622 does not apply to the cases in the reference"

MUTTUSAMI AYYAR, J —"This is a reference made as to the in-"terpretation to be placed on the words in Section 622 of the Code of "Civil Procedure, 'If the Court appears to have acted in the exercise of "its jurisdiction illegally or acted with material irregularity'. The ques-"tion submitted for the decision of the Full Bench is what effect is to "be given to those words

"They were introduced into the Code by the amending Act of 1879, "and they are not to be found in Act X of 1877 According to the last-"mentioned Act, as originally framed, the High Court was authorized to "interfere only in two classes of cases, *viz*, (i) when the Subordinate "Court by which a case was decided exercised a jurisdiction not vested "in it by law, or (ii) when it failed to exercise a jurisdiction vested in it "by law The class of cases in which the Subordinate Court had admit-"tedly jurisdiction, but acted in the exercise of such jurisdiction in con-"travention of a rule of law or of procedure, was not then contemplated "and provided for The inference is clear that it was to supply this "omission that the words 'act illegally or with material irregularity in "the exercise of its jurisdiction' were introduced in 1879

"The intention to extend the section to a third class of cases being "thus clear, some effect must be given, according to recognized rules of in-"terpretation, to the words 'act illegally or with material irregularity' in "order to carry out that intention On this ground I am not prepared, on "further consideration, to adhere to the opinion which I expressed in my "judgment in *Manisha Eradi* v *Siyali Koya* (3), *viz*, that the words 'act "illegally or [415] with material irregularity' are referable to those cases "only in which by reason of some error of law or of procedure the Subordi-"nate Court either exercised a jurisdiction not vested in it by law or failed "to exercise a jurisdiction vested in it by law That opinion is not tenable, "since it practically treats the additional words as superfluous or unneces-"sarily introduced

"Comparing Section 622 as altered by Act XII of 1879, with Section "584 of the Code which states the grounds upon which a second appeal is "to be admitted, it is apparent in what cases a decision is considered by the "legislature either to be illegal or to be vitiated by material irregularity. "The real question is what is the distinction, if any, indicated by the words "'act illegally or with material irregularity' as contradistinguished from "the words in Section 584 'decide contrary to law or to a rule of "procedure'

(1) 11 C. 6 (2) 7 B 341 (359). (3) 11 M 220.

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" In Amir Hassan Khan's case, the question raised for decision was " whether an erroneous conclusion as to whether a suit is barred either by " Section 13 or Section 43 of the Code of Civil Procedure was included in " the words ' act illegally or with material irregularity.' The Privy " Council decided the question in the negative and observed that though " the Subordinate Courts might have decided it wrongly, yet they had " jurisdiction.

" Thus, it is clear that where the Subordinate Court applies its mind " to a question of law or procedure and arrives at an erroneous conclusion " in the exercise of its jurisdiction it is not a ground for interference " under Section 622.

" This being so, the further question arises, what is the nature of the " error contemplated by the words ' act illegally or wtih material irregu- " larity,' if not an error of judgment in applying a rule of law or of " procedure to the facts of a particular case. Looking to the several " causes of erroneous decision in applying a rule of law or of procedure, " they may consist either in misapprehension of a rule of law or of " procedure present to the mind of the Judge or in omission to bear in " mind some principle which qualifies or limits the operation of such " rule.

" I am therefore of opinion that the case contemplated by the words " 'act illegally or with material irregularity ' is that of perverse decision on " a question of law or procedure. A decision can be said to be perverse " only when the matter is pleaded and wilfully disregarded, or when there " is some conscious violation of a rule of law or of procedure on the part of " a Subordinate Court.

[416] " In this view, neither the inadvertent omission in the cases " referred to to consider whether the appeal presented was barred by the " Act of Limitations, nor the refusal to hear evidence, on the ground that " the stipulation the patta contains as to the rate of interest is such as " clearly vitiates it, appears to me to disclose any ground for interference " under Section 622 of the Code of Civil Procedure. I would answer the " question accordingly."

SHEPHARD, J.—" The questions referred relate to two sets of petitions. " In the one set the complaint is that the District Judge omitted to " observe that the appeals were time-barred. In the other set it is said " that he decided the appeals on points not taken by the parties and without " giving them an opportunity to adduce evidence. Arguments were " addressed to us at considerable length on the operation of Section 622 " of the Civil Procedure Code, and the question raised is one of general " importance. By Section 622 power is given to the Hgih Court in certain " cases in which no appeal lies to call for the record and pass such orders " as the Court may think fit. The cases are three in number. First, the " case in which the Court below appears to have exercised a jurisdiction " not vested in it by law; secondly, the case in which such Court appears " to have failed to exercise a jurisdiction so vested; and, thirdly, the case " in which such Court appears to have acted in the exercise of its jurisdic- " tion illegally or with material irregularity. Treating the section as if it " consisted of three clauses, one may say that, as regards the present peti- " tions, the first and second clauses clearly have no application. The " question is whether the District Court has acted illegally or with " material irregularity within the meaning of the third clause. Numerous " cases have been decided with reference to this clause which, it should " be observed, did not appear in the section of the original Code of 1877.

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" The most important case decided by the judicial Committee in 1884 " is the case of *Amir Hassan Khan* v *Sheo Baksh Singh* (1)

" The appeal to the Judicial Committee was against an order passed " by the Judicial Commissioner of Oudh, reversing the judgment of the " Court of First Instance and dismissing the plaintiff's suit as being barred " under Sections 13 and 43 of the Code

[417] " The Judicial Committee after quoting the third clause of " Section 622 observed ' The question then is, did the Judges of the Lower " Courts in this case, in the exercise of their jurisdiction, act illegally or " with material irregularity It appears that they had perfect juris- " diction to decide the question which was before them and they did " decide it Whether they decided it rightly or wrongly, they had " jurisdiction to decide the case, and even if they decided wrongly, they " did not exercise their jurisdiction illegally or with material irregularity ' " This decision, as I read it, simply amounts to this, that the erroneous " decision of the Court of First Instance in that particular case did not " constitute an illegality or irregularity within the meaning of Section 622

" There are two other decisions of the Judicial Committee to which no " special reference is required *Muhammad Yusuf Khan* v *Abdul Rahman* " *Khan* (2) and *Brij Mohun Thakur* v *Rai Uma Nath Chowdhry* (3)

" The question has been frequently discussed in the High Courts " before and since the publication of the decision in 1884 in Amir Hassan " Khan's case I do not think it is necessary to deal with the cases in " detail It is enough to say that the greatest possible diversity of opinions " has been expressed What may be called an intermediate view was " propounded by West, J , in an elaborate judgment in *Shiva Nathaji* v " *Joma Kashi Nath* (4) (see also Mahmood, J , in *Magni Ram* v *Jiwa Lal*, " (5)) In Allahabad, Straight, J , took the extreme view that any error " affording a good ground of second appeal within the meaning of Section " 584 would equally form a good ground for revision under Section 622 " *Badmi Kuar* v *Dinu Rai* (6) On the other hand, in this Court a con- " struction has been put upon the section which goes to the other extreme " in limiting the powers of the High Court under Section 622 In the judg- " ment reported in *Manisha Eradi* v *Siyali Koya* (7) Sir T Muttusami " Ayyar, J , reviewed the cases prior to 1887 and held with reference " to Amir Hassan Khan's case that the last clause of the section must " be taken to apply only to those cases in which there is an error " of law or a material irregularity in the procedure by reason of " [418] which the Subordinate Court concludes that it has or has not " jurisdiction ' (Compare *Magni Ram* v *Jiwa Lal* (5), and *Badmi Kuar* v "*Dinu Rai* (6))

" In the same year the question was raised again, and the ruling of " the Court, in which Kernan, J , took part, can hardly be reconciled with " the opinion expressed in the earlier judgment of Sir T Muttusami " Ayyar, J , *Bheshyam* v *Jayaram* 8

" In this state of things, there being no uniform course of decisions " on the point, I am bound to form my own opinion, and I must say " that I am unable to concur in the narrow interpretation which has been " put upon the section According to the ordinary rules of construction " some effect has to be given to the third clause of the section That " would be so if this clause had been part of the original section, but the

(1) 11 C. 6. (2) 16 C 749 (3) 20 C 8
(4) 7 B 341 (369). (5) 7. A 336 (6) 8 A. 111 (114)
(7) 11 M 220 (228) (8) 11 M 303

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"intention of the legislature is still more marked when it is seen that the "third clause was added by way of amendment. In constructing the sec- "tion, we have for our guide the opinion of the Judicial Committee in Amir "Hassan Khan's case which may be said to amount to this—that the "erroneous decision of a Lower Court is not by itself any ground for the "exercise by a High Court of the powers given by the section. That deci- "sion excludes one class of cases, but as it appears to me, leaves it open "for us to consider in what other cases the clause may be applicable.

"As I read the decision, it does not compel us to hold that the "Court has no power except in cases where jurisdiction has been wrong- "ly assumed or declined—cases which are sufficiently covered by the "first two clauses.

"The possible cases to which it might be thought that the general "language used by the Legislature was applicable, may perhaps be "stated as follows. In failing to apply the rule of law which ought, "under given circumstances, to be applied, or in applying a rule "which ought not to be applied, or generally in disposing of a matter "otherwise than in accordance with law, it may be that the Judge "has, owing to misapprehension, wrongly concluded that the law was "applicable or inapplicable, or that he has proceeded erroneously owing to "inadvertence, or again that he was ignorant of the correct rule applicable, "or that knowing the correct rule he refused to apply it. In the first two "cases, [419] that is where the Judge has exercised his judgment and "decided wrongly or where his mistake is due to inadvertence or careless- "ness, I think that, with the decision of the Judicial Committee before us, "we are bound to hold that the High Court has no power to interfere. In "the last case, that is where a Judge consciously transgresses the law, the "matter stands on a different footing There is a material distinction "between an erroneous judgment and a perverse judgment, as there is "between a wrong verdict and a perverse verdict. If a perverse judgment "or a conscious departure from the rules of procedure does not give occa- "sion for the exercise of the powers given by the third clause. I am at a "loss to understand in what class of cases it can be said that a Judge has "acted illegally or with material irregularity.

"Under the circumstances of the cases referred to us, it is not neces- "sary to say whether the High Court is also at liberty to interfere when "it is shown that the Judge has acted in ignorance of the correct rule of "law, for it is not suggested that the District Judge did not know the law "in any of the cases before us. Perhaps the distinction between ignorance "and perversity is not very important, for while ignorance of a plain "rule of law is not likely to be admitted, it would probably in such a "case be right to impute knowledge and therefore perversity. On the "other hand, it may be noted that the case of a perverse judgment "is distinguishable from all the other cases in this respect—that the "remedy by way of review is practically unavailable. It may well be "supposed that the Legislature did not intend that the High Court should "give relief under Section 622 in those cases in which the ordinary relief "by way of review was open to the party aggrieved. In the cases before "us in which the question of limitation arises, it appears to me that there "was nothing more than inadvertence—in the other cases the Judge's "procedure was certainly not regular and may possibly have led to "injustice. It is by no means clear, however, that the petitioners have "been prejudiced and I do not think it can be said that the Judge acted "perversely.

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"For these reasons I think that in both classes of cases the question "should be answered in the negative"

Best, J —"This reference to the Full Bench was made in conse- "quence of a difference of opinion between Sir T Muttusami Ayyar, J, "and myself as to the correctness of the *dictum in* [420] *Manisha Eradi* v "*Siyali Koya* (1), which limited the meaning of words 'acts illegally or "with material irregularity,' in Section 622 of the Code of Civil Procedure, "to errors or irregularities 'by reason of which the Subordinate Court con- "cludes that it has or has not jurisdiction It is now admitted that the "opinion expressed in the *dictum* is not tenable, consequently *cadit quæstio*

"New ground has, however, now been taken The first of the points "now newly urged is that the words in question are only intended to "apply to cases in which the illegality or irregularity is due to 'perversity' "on the part of the Judge—the result of wilful disregard or conscious vio- "lation by him of a rule of law or procedure, and that they are inappli- "cable to illegalities or irregularities which are the result merely of "ignorance of law or carelessness This seems to me to be a distinction "that is in no way warranted by the language of Section 622 The word "'perverse' is certainly not used in that section, and I am altogether at a "loss to understand why this distinction should be made

"The other ground now newly taken is that Section 622 is inapplic- "able to a case in which it is open to the party aggrieved to apply to the "Court which has erred for a review of its judgment. This also seems to "me to be limiting the scope of Section 622 within narrower bounds than "what is justified by the language used, according to which revision is "allowed in all cases 'in which no appeal lies' The privilege of applying "for review of judgment under Section 623 of the Code, is not intended "to be *compulsory*, as is apparent on a perusal of that section It may "be that the Court to which application for revision is made under Section "622 may, in the exercise of its discretion, decline to interfere until appli- "cation for review has been made under Section 623, but I am not pre- "pared to hold that such application for review is an essential condition "precedent to an application under Section 622 I am unable to accept "as valid either of the objections now taken, and I adhere to the opinion "recorded by me before this reference was made to the Full Bench"

Davies, J —"In order to answer the question referred, it is neces- "sary to consider the scope of the last provision in Section 622 of the "Code of Civil Procedure When is the Court to be [421] deemed to "have acted in the exercise of its jurisdiction illegally or with material "irregularity?"

"I am clearly of opinion that this clause contemplates cases other "than those referred to previously in the same section, namely, where "the Court has either exercised a jurisdiction not vested in it or refused "to exercise a jurisdiction vested in it, and that it is intended to refer to "the class of cases where the Court having jurisdiction and exercising it "violates a rule of law or of practice relating to procedure, that is, in the "mode in which it exercises its jurisdiction The use of the word 'acted' "seems to indicate this to be the true position, and the current of autho- "rity in the numerous cases that have been cited at the bar also, I think, "bears out this construction. The Privy Council has decided that the "clause does not apply to erroneous opinions of law, *Amir Hassan Khan* "v *Sheo Baksh Singh* (2) and that is intelligible upon the principle that,

(1) 11 M. 220 (229)

(2) 11 C 6

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"in forming an opinion on a question of law, the Court merely goes "through a mental operation and cannot be said to be 'acting.'

"Taking it, then, that the clause is applicable only to errors of pro- "cedure, it is not in every case that the High Court would, in the "exercise of the discretionary power granted it by the section, interfere "in revision. Their interference would be confined to cases where the "illegality or one irregularity was such as had occasioned or might occa- "sion a substantial failure of justice.

"Now, in the first case under reference, that of an Appellate Court "disposing of a suit on a point taken by itself in appeal without affording "the parties an opportunity of proving what was necessary to meet that "point, there is, in my opinion, an irregularity in procedure as grave as "it would be to decide a suit without hearing the parties at all, and in "that view I would hold it to be a 'material irregularity' in procedure "within the meaning of Section 622. In the second case, the admission "and hearing of an appeal that was time-barred was, in the absence of a "special order for its admission, passed after the Court was satisfied "that there was sufficient cause for the delay, a patent illegality in "procedure, for under Section 4 of the Limitation Act 'every . . "appeal presented . . after the period of limitation prescribed there- "for . . shall be dismissed' subject of course, to the [422] "ex- "ception just stated, which did not exist in this case. One of the "principles of justice is that there should be finality to litigation in "certain events and the law of limitation, among others, supplies instances. "So the illegality here was one affecting the interests of justice. In both "cases, moreover, apart from theory, there has been, in fact, a failure of "justice, because in the allied suits in which a second appeal happened to "lie, the Division Bench has set aside the proceedings of the Judge in both "the matter now under reference.

"I would, therefore, answer the reference in the affirmative to the "effect that the errors in procedure were such as to be liable to revision "by this Court under Section 622 of the Code of Civil Procedure."

These petitions came on for final disposal after the expression of the opinion of the Full Bench, and the Court delivered the following

JUDGMENT.

According to the view of the majority of the Full Bench, these petitions must be dismissed.

They are dismissed accordingly with costs.

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APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Davies.

1894 March 2.

APPELLATE CIVIL.

17 M. 422.

RAMASAMI KAMAYA NAIK (*Defendant*), *Appellant* v SUNDARALINGASAMI KAMAYA NAIK (*Plaintiff*), *Respondent* *

[31st July and 1st, 2nd, 3rd, 7th, 8th, 9th, and 10th August, 1893 and 2nd March, 1894.]

Hindu law—Succession—Manu, Chapter IX, slokas 122 and 125—Rule of selection as between an elder son by a wife of an inferior class of caste and a junior son by a wife equal in caste—Dagger wife—Meaning of the term bhoga stree—Custom showing preference in succession for the sons by a senior wife to those by a junior wife—Nearness of blood as a ground of preference between brothers of the half and full blood respectively.

In case of disputed succession to indivisible property between sons who are born of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder [423] son of a wife of lower class Thus when a Sudra marries a woman of his caste but of an inferior class, as a dagger wife, in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of the mother being of a higher class

A valid custom prevails among the Kumbla zemindars whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of the marriage and not the age of the wife

Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible When, therefore, family property belongs to a co-parcenary family consisting of two brothers of a deceased *propositus*—one of the whole blood and one of the half blood—in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years

[F., 27 A 203 (252)=2 A.L.J 720=A W N (1904) 244, R., 1 C L J 388 (401), 9 Ind Cas 76 (78)=24 M L J 271 (273)]

APPEALS against the decree of C Venkobah, Subordinate Judge of Madura (West), in original suit No 21 of 1889

The facts of the case appears sufficiently for the purpose of this report in the judgment of the High Court

The Subordinate Judge passed the following decree

" I disallow the claim of plaintiff to the exclusive possession of the " zemindari and its appurtenances as described in Schedule A, and to the " trusteeship of the devastanams and choultry specified in Schedule B, and " also to the mesne profits claimed in respect to these properties I " declare the equal right of plaintiff and defendant to such of the pannai " lands and gardens as were acquired by their father since he became " zemindar in 1861 until his death, and to the lands items 1 to 8 in " Schedule D, and direct that an account be taken of the former, and that " the areas of the latter be fixed, and that the lands, after taking account " and fixing the precise areas, be divided into two equal shares, one of " which I direct should be put into plaintiff's possession. I declare " plaintiff's right to live in the new house, the description of " which should be supplied by the Commissioner who takes an account " of the lands I declare plaintiff's right to receive his half share of mesne

* Appeals Nos 78 and 95 of 1891.

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"profits on the lands above specified from 14 October 1885 till he is put "in possession or for three years from this date whichever event first "occurs. I declare plaintiff's right to a half share in the jewels, moveables "and Government securities, &c., mentioned in Schedule E or to such "of them as exist; their discovery, values and partition are left to a "Commissioner, who should be appointed for the purpose, [424] and who "should make over to plaintiff his share in them or their value. I think "plaintiff is entitled to proportionate costs on the claim allowed. Defendant should pay the same, while plaintiff should pay the costs of defendant "on the claim disallowed."

The defendant and plaintiff preferred these appeals to the High Court, respectively.

The Advocate-General (Hon. Mr. *Spring Branson*), *Rama Rau* and *Subramanya Ayyar*, for appellant.

Bhashyam Ayyangar, *Desikachariar* and *Ranga Ramanuja Chariar*, for respondent.

JUDGMENT.

This is a suit to establish the plaintiff's title to the zemindari of Saptur in the Madura district together with its appurtenances, and for the plaintiff's half share of such properties belonging to the late zemindar as are partible The suit is valued at some five (5) lakhs of rupees, and the following facts are admitted, namely, that the zemindari and its appurtenances are impartible; that the plaintiff is the son of Nagayasami Kamaya Naik, who was the last zemindar but one of Saptur; that the defendant is another son of the same person; that, after the death of their father in October 1885, his eldest son, also called Nagayasami, succeeded to the zemindari, that this Nagayasami died, while a minor under the Court of Wards, unmarried, on the 31st of December 1887, the succession to whom is now the subject in dispute, and that the plaintiff is the eldest surviving son of the previous Nagayasami, being aged 9 years at the time of suit, while the defendant was aged only 7 years at that time. The plaintiff claims the succession by his mother, Nagammal, as his next friend, as the senior in age of the surviving brothers of Nagayasami Kamaya Naik, the last male holder, according to the law and custom of primogeniture. The defendant pleads his right to the succession in preference to plaintiff on four (4) main grounds, namely, first, that plaintiff's mother, Nagammal, was not legally married to their father, and that plaintiff was, therefore, an illegitimate son; while he, the defendant, is admittedly the legitimate son by his mother, Muthuveerammal; secondly, that even if the plaintiff's mother was legally married to the late zemindar, she was a lady of a different and inferior caste and rank *to that of the defendant's mother;* thirdly, that by family custom, the defendant is entitled to succeed by reason of his mother having been married prior to the plaintiff's mother, and fourthly, that he is a full [425] brother of the last holder of the zamindari, while plaintiff is only the half-brother.

The first question then for decision is whether the plaintiff's mother was the lawful wife of his, the plaintiff's father; and this question has branched into two issues. One is whether the plaintiff's mother was married, in fact, to the plaintiff's father, or kept as his mistress, and the other is whether she was of a different and inferior caste to that of the father of the plaintiff, and therefore no valid marriage could be contracted between them. The Subordinate Judge has found that the plaintiff's mother was married to the plaintiff's father in 1875 in the dagger form;

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that a dagger is used by the Saptur zemindars, who are surnamed Kattari Kamaya in the case of inequality in the caste or social position of the bridge; that though the customary rites of the Kumbla caste were also performed, yet the use of the dagger was an essential addition, and that, though according to his finding she was of a different and inferior caste to that of the plaintiff's father, yet that did not invalidate the marriage.

In appeal No. 78 of 1891, the defendant, as appellant, contends that there was no marriage, in fact, between the plaintiff's mother and his father, and that the plaintiff's mother being of a different and inferior caste, could not, according to the custom of the plaintiff's father's caste, have been legally married to him.

The plaintiff, as appellant, in appeal No. 95, contests the finding of the Subordinate Judge that his mother was of a different and inferior caste to that of his father. As to the *factum* of marriage, there is voluminous evidence, both oral and documentary, to prove beyond a doubt that, on the 9th of July 1875, the plaintiff's mother was united to the plaintiff's father by a number of ceremonial rites. It is needless for us in appeal to repeat in detail what has been fully set forth on this subject in the judgment of the Subordinate Judge, because the defendant himself does not, and cannot, dispute that on the date named some ceremonial took place for the union between the plaintiff's mother and his father. That evidence establishes that on the 9th of July 1875, the marriages of three men were celebrated, two of whom were persons of the name of Thumbayasami and Thathaya Naik. On that same day the plaintiff's mother, Nagammal, and her sister, Kumaraammal, admittedly went through a form of marriage with the zemindar, the plaintiff's father, in which form a dagger played [426] a very prominent part. The defendant's case is that the zemindar did not appear in person at the ceremonial but was represented by this dagger, and that the third bridegroom who was present was not the zemindar but a bandy driver of his named Ramasami, and that, owing to the non-presence of the zemindar, there could not have been a valid marraige between him and the two ladies with whom he was undoubtedly united on that occasion (though as the defendant says only in concubinage) because the mere tying of the bottu in the presence of the dagger was not sufficient to constitute a valid marriage ceremonial. Exhibits XXXII and XXXII-A show that, in the year 1800, it was reported by the Collector that the mere tying of the bottu did not of itself constitute a marriage, but simply signified a promise of constancy. The plaintiff, on the other hand, asserts that the driver Ramasami was not married on this occasion, but six months before, and that the third bridegroom who was present was the zemindar himself, and that the dagger was used only as an addition or an ornament to the ceremony. It is the presence of this dagger which has given rise to all the uncertainty as to whether it was a form of marriage or of concubinage that was adopted on the occasion. The defendant's argument is that the dagger was that to represent the zemindar as he did not attend in person, and that, by his non-attendance, there could have been no joining of hands or other essential for constituting a valid marraige, for, to constitute a valid marriage, there must be, if the marriage is a sacrament, the due performance of nuptial rites (*Brindavana* v. *Radhamani*) (1) and, if it is a contract, there must be an intention to marry. It is argued that the very absence of the zemindar showed there was no intention on his part

(1) 12 M. 72.

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to marry, if the marriage was a contract, and that, if it was a sacrament, the essentials for the due performance of nuptial rites could not have been performed The plaintiff's argument is that the nuptial rites were duly performed, the zemindar being present, that the dagger was there merely as an ornament, and that it was customary for people of the zemindar's caste to have a dagger paraded on the occasion of marriages. The Subordinate Judge has found that the dagger was there for the purpose of indicating that the two ladies, Nagammal and her sister, Kumarammal, whom the zemindar married, were of an [427] inferior caste and rank. We consider that the evidence on behalf of the plaintiff as to the actual presence of the zemindar at the ceremonial is overwhelming. Not only is there the direct evidence of many of the plaintiff's witnesses, who were present on the occasion to the effect that the driver Ramasami was not married at that time, and that the zemindar himself was the third bridegroom, but there is also documentary evidence showing clearly that the zemindar and no one but the zemindar, was one of the three bridgrooms present on the occasion. Thus Exhibit C series, which are the zemindar's own palace accounts showing the money received and disbursed for the marriage festival, is unequivocally headed as for the marriage of the zemindar, and in those accounts there are items of expenditure which could apply only to the zemindar, such as the receipts of moyi or wedding presents which, from the persons who made them, could only have been made to the zemindar. There is an entry for the cost of horses, for the procession called the 'yekalichi' for the *outside* bridegrooms, with another entry for a similar procession, which, by inference, must be taken as referring to the inside bridegroom, the zemindar. There is an entry for the costs of a toe-ring put upon the zemindar. These accounts read with Exhibit D further show the purchase of two rich silk marriage cloths called kandangi, which could have been intended only for the ladies united to the zemindar; for the other two women, who were married on that day, were poor dependants of the zemindar who would not have had such valuable cloths bestowed upon them. These marriage accounts further show very liberal expenditure in other matters, such as the distribution of rice which was made on far too large a scale, if only persons of ordinary rank had been married. Another account (Exhibit E-I) is proof that drummers were paid for four marriages. This shows that the two ladies must also have been married; for, if the defendant's account were true, there could only have been three marriages

Against this, defendant has adduced no evidence of any value to prove that the zemindar was not present in person, and he has carefully avoided bringing forward any evidence as to what really did take place on the occasion in question. There is, therefore, no ground whatever for the assertion that the zemindar was not present at the time; and those witnesses who speak to his presence speak also to his going through the necessary acts which were necessary to constitute a valid marriage between people of the [428] Kumbla caste. The defendant's contention, therefore, that there could have been no valid marriage in consequence of the absence of the zemindar falls to the ground. Extraneous evidence, however, has been produced on the defendant's behalf for the purpose of showing that ladies united to the zemindar by marriage ceremonials in which the dagger was used were not deemed to be his lawful wives. For instance, it is shown that Kumarammal, the plaintiff's mother's sister, who was united to the zemindar at the same time as herself, and another lady Muttukamatchi Ammal, who was also on another occasion united to the

zemindar according to the dagger form, were called bhoga strees—a word indicating concubine. In common parlance it may be applied to a concubine, as it is the ordinary dictionary meaning of the term But it is also used in a secondary sense In Linga Bhattiya, kanda 2, verse 264, the term 'bhogini' is used to denote the wives of kings other than the royal wife, who is called 'mahishi,' because she is anointed The royal wife is called mahishi, because she is adored, the other wives being called bhogini for, with them, there is bhoga or enjoyment Again in Sabdha Ratnacara, page 817, the term, bhogini, is said to signify (1) a female servant, (2) a dancing girl, and (3) wives other than the one consecrated Further in Monier-Williams' Dictionary, page 723, the term 'bhogini' is explained to mean either the concubine of a king or a wife *not* regularly consecrated with him, we find also that there is other evidence counteracting the effect of the use of the word bhoga stree as applied to these ladies In the very papers (Exhibits II to IV), in which Muttukamatchi Ammal is referred to as a bhoga stree of the late zamindar, she is spoken of both by herself and by the zemindar as his wife, and with reference to Kumarammal who, at the heading of the account (Exhibit VI*a*) showing her funeral expenses, is referred to as a bhoga stree, we find that her funeral ceremonies were conducted as only those of a wife would have been This appears in the account VI*a* itself, as well as in the accounts JJJ and LLL series, for it is in evidence that ceremonies therein mentioned, such as fixing a grinding stone, with the due performance of the Shastras would only have been performed for a wife Further, we find that one Managleswari, who was an admitted concubine of the zemindar, not married to him in dagger or other form, is referred to by him as a moha stree not a bhoga stree The defendant has exhibited a document (Exhibit XXV) [429] which purports to be a genealogical tree of the Saptur zemindars, and which, it was said, was approved by the late zemindar himself In this document his wives are named, but we do not find the names of any of the dagger wives there appearing This document is, however, one of doubtful authenticity, and there is nothing certain to show that the zemindar ever saw it or approved of it Besides, at the time that it is said to have been prepared, namely, in 1874, the plaintiff's mother and her sister had not been united to the zemindar Reference has further been made to two birth registers, the one being Exhibit XXVII*a*, in which the plaintiff's birth on the 25th June 1880 is entered with only his mother Nagammal's name, no reference being made to the zemindar, and the other being Exhibit XXVII*b*, wherein the defendant's birth on the 23rd of September 1881 is entered with the zemindar as his father, but as we have nothing to show upon whose or upon what information the officers concerned made those registers, and no explanation has been taken from them for the difference in the one case for entering the mother's name and in the other for entering the father's name, the entries are conclusive of nothing. We cannot infer that the reason for the difference was the illegitimacy in the one case and the legitimacy in the other On the other hand, it has been shown on behalf of the plaintiff that his mother has always been treated as a wife of the zemindar One of the admitted wives of the zemindar has stated in Exhibit XXXIIIc that for about a year the dagger wives of the zemindar were living together with herself and the other admitted wives Though it appears that they afterwards lived in separate apartments in the palace, it was in the palace they lived and not outside it as the concubines did It also appears that when the late zemindar was committed to jail in 1884, and his wives were sent to Bodinayakkanur to be taken care of

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by the zemindar of that place, the plaintiff's mother, as well as another dagger wife, accompanied them (Exhibit XXXVIII*d*). In Exhibit VVV the defendant's mother herself treated Muttukamatchi Ammal, a dagger wife already alluded to, as a married wife of the zemindar, her husband. In Exhibit WWW the same Muttukamatchi Ammal and the plaintiff's mother joined two of the admitted wives in a petition to the Board of Revenue against the defendant's mother, claiming equality between themselves and the defendant's mother. Plaintiff himself performed the first annual ceremonies of his father jointly [**430**] with the defendant, as shown in Exhibit JJ, and there is nothing to show that the defendant's mother objected to the plaintiff's doing so; and after the death of the husband, the late zemindar, she, the plaintiff's mother, was treated as a wife by the Government officials concerned with the Court of Wards (see Exhibit S among others) It is unnecessary to refer to all the evidence proving that the plaintiff's mother was lawfully married to the zemindar, and her recognition as his lawful wife, because, except for the circumstances which have been mentioned above, as urged on behalf of the defendant and which have been explained, all the rest of the evidence is in her favour We have, therefore, no hesitation in agreeing with the Subordinate Judge that the plaintiff's mother was the lawful, though a dagger wife of his father, provided there was no impediment to their marriage. The impediment pleaded by the defendant is that the lady being of a different and inferior caste to that of the zemindar, could not be lawfully wedded to him It is not contended that in the absence of a particular custom such a marriage would be invalid in the face of the rulings of the Privy Council in *Inderun Valungypooly Taver* v *Ramasawmy Pandia Talaver* (1) and *Ramamani Ammal* v. *Kulanthai Natchear* (2). In the former case it was held that, by Hindu law, marriage between Sudras where the husband is of a superior caste to that of his wife, is valid, and in the latter case that a marriage between a man of one subdivision of the Sudra caste with a woman of another sub-division of the Sudra caste is valid by Hindu law But, what the defendant sets up is a local or caste custom among the Kumbla Naiks prohibiting such unions The learned Advocate-General has referred to Mr. Mandlik's work on the Mayukha and Yadnavalkya (pages 400 *et seq.*) to prove that usage will override the ordinary Hindu law, and contends that he has in this case proved the custom set up. On this point, we find with the Subordinate Judge that there is no reliable evidence whatever of any such custom prevailing among the zemindars of the Kumbla caste. The evidence in respect thereto is only oral and is of a meagre description. It is true that the plaintiff's mother has endeavoured to show by recitals in documents relating to herself or to her relatives (Exhibits B, GG, GGG, and DDD) that she was of exactly the same caste as the [**431**] zemindar's and it is true that the defendant has also endeavoured by evidence (Exhibits XA, XB and XIII) equally suspicious because the documents on both sides are all of recent date and after the death of the late zemindar, to prove that she was not so. The Subordinate Judge has, however, found that her caste was not Kumbla Totiya as the zemindar's was, but Parivara which he treats as an inferior caste. But one thing is certain, and that is that they were both of the Sudra caste and that legal marriage was possible between them. The zemindar would never have attempted to marry a woman whom he knew he could not marry, and the

(1) 13 M.I.A. 141. (2) 14 M.I.A. 346.

legal presumption is that when there is a marriage in fact there is a marriage in law (*Inderun Valungypooly Taver* v *Ramasawmy Pandia Talaver* (1). There is no proof of a special custom in this case prohibiting such marriage

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The second main point for determination in the case is whether, having found that the marriage of plaintiff's mother with his father was a valid marriage, the plaintiff's mother was of a caste and rank inferior to the defendant's mother's, and, if so, whether that would entitle the defendant to succeed in preference to the plaintiff Although they both were of the Sudra caste, we have no difficulty in deciding that the status and rank of the plaintiff's mother was inferior to that of the defendant's mother. The defendant's mother was the daughter of a zemindar, while the plaintiff's mother was the daughter of an ordinary ryot The defendant's mother had no strain of mixed blood, while the plaintiff's mother was of the Parivara caste or the descendant of parents of illegitimate origin—*vide* paragraphs 35 and 36 of the Subordinate Judge's judgment—the correctness of the conclusion in which there is no ground for disputing The inferiority of the plaintiff's mother's status as wife is the only reasonable explanation for the presence of the dagger at her marriage In the case of the admitted wives of the zemindar, there was no dagger used when they were married, so that the only way to account for its use at the marriage of the plaintiff's mother is that it was intended to indicate her status as an inferior description of wife or as a dagger wife If it was not intended to denote the inferiority of status of the plaintiff's mother, no other satisfactory explanation is afforded by the evidence for the use of the dagger The theory [432] for the defendant that it represented the zemindar who was absent has been already exploded There is no proof that the dagger was invariable used in the case of all marriages between people of this caste In fact, it is admitted that the use of the dagger is extremely rare, and only two or three instances of it are given in the plaintiff's evidence There are also other circumstances indicating that the marriage of the plaintiff's mother was not conducted in the same way in which the marriages of the zemindar's regular wives were celebrated Considerably less money was spent upon it than in the case of the admitted wives, and it was combined with the marriages of two other people of inferior rank—of persons who were poor dependents of the zemindar—one indeed of whom, Thumbayasami, was a brother of the plaintiff's mother Then the plaintiff's mother and the other dagger wives, as a rule, lodged separately and messed separately from the other wives It is therefore clear to us that the plaintiff's mother was in status and rank inferior to her husband and the defendant's mother The question then arises whether, having found the plaintiff's mother and the defendant's mother to be of the same main caste, namely, Sudras, though not of the same division, the difference in their rank or status would make them of a different class within the meaning of sloka 125, Chapter IX, Manu That sloka is to this effect "as "between sons born of wives equal in their class and without any other dis-"tinction, there can be no seniority in right of the mother, but the seniority "ordained by law is according to the birth" The learned vakil for the plaintiff maintains that Manu alluded only to caste, as he was there dealing with caste, and that any other construction would be meaningless. But the ancient author seems to have been dealing with the equality of wives generally, and it is quite possible, as in this case, that two ladies

(1) 13 M. I. A. 141 (158)

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may be of the same main caste and yet belong to different sub-divisions of that caste, and therefore be unequal in class or rank. The strict literal translation of the phrase rendered as ' wives equal in their class ' is ' like wives ' which would allow of the wider interpretation that if there were any substantial inequality in the rank or status of the wives they would not be ' like wives.' Within each of the four main divisions of Hindu caste it is notorious that there are many classes or ranks, and these are perhaps most numerous in the Sudra caste, and it appears to us that their Lordships of the Privy Council, in making use of the words ' caste [433] and class ' in their judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1), contemplated inequalities besides those in the main caste only, for otherwise the word ' class ' would be superfluous if it was taken to be synonymous with the main caste.

We are therefore prepared to hold with the Subordinate Judge that what is indicated in the text of Manu is inferiority of the class of the wife more than that of the main caste In this view, and finding for reasons already stated that plaintiff's mother was of an inferior class to that of defendant's mother, it remains to be decided whether that fact would be ground for preferring the defendant to the plaintiff. Sloka 122 of the same chapter in Manu is to this effect: " A younger son being " born of a first married wife after an elder son had been born of a wife " last married, but of a lower class, it may be a doubt in that case how the " division shall be made."

That is just the case we have here, but unfortunately Manu has not directly decided the doubt that he raises, and, as the Subordinate Judge points out, there appears to be no precedent. The point was noticed but not decided in the Privy Council case, *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru* (2) The two slokas 123 and 124 following the sloka 122 indicate that in the case therein contemplated the younger son of the first married wife being of a higher class would take a larger share of the property, and we are of opinion that this fact taken with the implication in sloka 125 that there would be a difference between the sons in cases where their mothers were of different classes is sufficient to show that the right of the junior son by a first married wife if she be of higher class is a superior right to that of the elder son of a wife of lower class. It follows that when the competition between them is, as in this case, to an indivisible property, the right of him who has the superior right, if the property were partible, must prevail. We therefore, agree with the Subordinate Judge in finding on this point in favour of the defendant.

We consider that this view is in accordance with the analogies of general Hindu law as applied to partible property. The decisions of the Privy Council both in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1) and in *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru* (2) are authorities only for [434] the proposition that as between sons born of *wives equals in class* and *without any other distinction*, there is no seniority in right of their mothers, but that the seniority recognized by law is according to birth. In the present case, however, the plaintiff's mother and the defendant's mother are not equal in caste or class. There is the further distinction between them, *viz.*, that the former is a dagger wife, whilst the latter was married by the pure Kumbla caste rites without the intervention of a dagger. In the Bangari

(1) 14 M.I.A. 570 (592, 594). (2) 8 I. A. 1.

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Palayam case, their Lordships of the Privy Council expressly stated that they did not decide what would be the proper rule of succession when the wives were of a different caste or class. The text of Manu, Chapter IX, 125, as interpreted by Kallukka Bhatta, on which their Lordships rest their decision, premises the case of sons born of wives of equal caste and without any other distinction. This case falls therefore to be decided on the principle laid down by their Lordships in the Urkad case in the following terms: "Now, no work of authority or decision directly relating "to the descent of property, which, at the present day, is governed by "the rule of primogeniture, was cited at the Bar, nor have we found any "materially bearing on the question. We must, therefore, decide it upon "principle, and by analogy to the existing general law of inheritance and "upon what we find laid down in early times when primogeniture by "general law conferred some special rights and privileges which no longer "exist." The question then is what is the rule suggested by analogy, first, to the existing Hindu law of inheritance and, next, to the Hindu law as it existed in early times when primogeniture conferred by the general law certain special rights and privileges? Under the former we may take, by way of analogy, the cases in which the rival claimants of an impartible estate are a legitimate junior son and an illegitimate senior son or an after-born son and an adopted son. In the first case, among Sudras, both sons take shares in partible property, but the illegitimate son takes only half a share (Mitakshara, Chapter I, Section XII, sloka 3).

This is the first exception to the general rule that, though sons may share in partible property, the son born of a concubine is only a secondary son and son born of a wife is the primary son and preferable heir to impartible property.

Turning to the case of a disputed succession to an impartible estate in which the rival claimants are an adopted son and the [436] after-born legitimate son, it is stated in Dattaka Chandrika, Section V, 32, that among Sudras, they take equal shares in partible property. But the succession to impartible property, nevertheless, devolves on the after-born son in preference to the adopted son, the reason being that the adopted son is a substitute for the *aurasa* son, and that, when the latter comes into existence, he excludes the substitute.

This is the second exception to the general rule under which of two sons who may be entitled to share alike in partible property, one is the principal or primary and the other as a mere substitute is a secondary son, and as such excluded by the other, though his junior in years, from succession to impartible property. The succession of a legitimate son to an impartible estate in preference to an illegitimate son, and of an after-born son in preference to an adopted son does not rest on mere inference. In Dattaka Chandrika, Section V, 26, a vedic text is referred to as ordaining that kings shall not appoint to the empire any of the twelve descriptions of sons, which included also the adopted son and the son of a female slave, when a legitimate son existed. It is hardly necessary for us to add that the Palayapats of Madura and Tinnevelly were, prior to the commencement of the British rule, in the nature of petty principalities or tributary chieftainships.

Looking again to the ancient Hindu law, we find an analogy in '*anuloma*' marriages. A Brahmin was in former times at liberty to marry a Brahmin wife, a Kshatriya wife, a Vaisya wife and a Sudra wife; so a Kshatriya was entitled to have a Kshatriya wife, a Vaisya wife and a Sudra wife; so it was permitted to a Vaisya to have a Vaisya wife and a

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Sudra wife. Hence it is stated in the Mitakshara, Chapter I, Section VIII, V. 2, that instances do occur of a Brahmin having four wives, a Kshatriya three, and a Vaisya two, the wives being of different varnas or castes or tribes. This form of marriage with women of inferior castes was called anuloma union, and it was a permitted connection, while *pratiloma* union, that is to say, of a man of an inferior class or varna with a woman of a superior class, was a prohibited connection. The author of the Mitakshara explains in Chapter I, Section VIII, V. 4, how rights of sons of wives of different classes, when partition was made between them, were regulated, and states that the sons of a Brahmin by a Brahmini woman took four shares *apiece*, his sons by a Kshatriya wife, three shares each, by a Vaisya [436] woman two, and by a Sudra one. In the same manner the sons of a Kashtriya born to him by women of the several tribes had three shares, two or one in the order of the tribes (castes). Likewise the sons of Vaisya by women of the several tribes have two shares and one in the order of the classes. Again, in Chapter XI, Section I, V. 47, the author of the Dayabhaga adverting to the texts of Manu, Chapter IX, 85, 86, and 87, states that the rank of wife belongs, in the first place, to a woman, of the highest tribe, and seniority is reckoned in the order of tribes. Thus, Manu says when regenerate men take wives both of their own class and others, the precedence, honour and habitation of those wives must be settled according to the order of their classes. Therefore (since seniority is by the tribe) a woman of equal class, though youngest in respect of the date of marriage is deemed eldest. The rank of wife (patni) belongs to her, for she alone is competent to assist in the performance of sacrifices and other sacred rites. This is the third exception to the general rule in which the son by the dagger wife is by analogy to *anuloma* marriage only a secondary son who, though senior in age, is excluded by a son of a wife equal in caste and rank.

Thus the rule deducible by analogy from this branch of ancient Hindu law is one of preference in favour of the son by a wife of the same caste or rank. It follows that when a Sudra marries a woman of an inferior division of his caste, as a dagger wife or as a wife of an inferior class in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of his mother being of a higher class, or having the rank of patni.

It is argued by the plaintiff's pleader that the Sudras are all of one caste, though they belong to different sub-divisions. It is so for the purpose of permitting a marriage between a man of one sub-division and a woman of an inferior sub-division, but it does not follow that there are no gradations in respect of caste, status or rank. Surely, it cannot be said that there is no distinction between a man of the purest Vellala or Mudali caste, and a woman of the Palli or Shanar or toddy-drawer's caste, though their main caste is that of Sudras. The ancient conception of Sudras as one of the four leading classes has attained a considerable extension after the Dekkan and Southern India came within the pale of ancient Hindu law. The ancient Brahminical theory was that [437] all the Sudras were intended to do service for or to be the servants of the regenerate classes. But this soon vanished when the class of Sudras came to embrace in it kings, rajas, provincial chieftains, aristocratic classes and numerous non-Aryan tribes, independent and influential, with peculiar marriage Customs and with peculiar notions of the incidents of a legal marriage. It is notorious that Sudra rajas and zemindars often imitated Kshatriya kings in

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many respects, especially as regards the number and rank of wives they married and the concubines they maintained.

It is not improbable that the notion of a secondary wife or a secondary son came to prevail among some Sudra zemindars by analogy to anuloma marriages among Kshatriyas. The real question is whether there are traces of such consciousness in the present case. The offspring of the anuloma form of marriage, where the mother was of a caste inferior to that of his father, was not equal in caste to his father. If his father was a Kshatriya and his mother was a Vaisya, though they might legally marry, the wife did not acquire the status of a Kshatriya lady, and the son born of her, though legitimate, had not the caste, status or rank of a Kashtriya, but had an intermediate caste and status. He was called 'mahisya,' and as compared with the son by a Kshatriya wife, he was only a secondary son. (See *Brindavana* v. *Radhamani* (1).) In the same way, it may be that the plaintiff's mother, Nagammal, was, by reason of her descent from a man of the Kumbla caste and a woman of the Vellala caste, of inferior caste. In this view the Parivara caste is inferior to the Kumbla Tottiya caste, as found by the Sub-Judge though their main caste is that of Sudras. It is noteworthy that when a special form of marriage is adopted to denote the wife's inferior caste or class, and she is since treated in the husband's family differently from a wife of equal class married by the pure caste ritual without the use of a dagger, the reasonable explanation is that she was taken and treated as a secondary wife not having the rank of patni within the meaning of the text of Manu (Chapter IX, 85 to 87).

The next or third point for determination (fourth issue in the Lower Court) is whether there is a custom prevailing among the Kumbla zemindars, to which admittedly the parties belong, that the son by a senior wife has a prior right of succession to a son by [438] a junior wife, although the latter may be the elder son, seniority referring to the date of marriage and not to the age of the wife. It is admitted in this case that the defendant's mother was married before the plaintiff's mother, but the alleged custom is not in accordance with the ordinary law of succession among Hindus where primogeniture is the rule irrespective of the seniority of marriage of the mothers. The law has so been clearly declared by the Privy Council in *Ramalakshmi Ammall* v. *Sivanantha Perumal Sethurayar* (2) and *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru* (3). It, therefore, lies on the defendant to prove the special family custom. It must be borne in mind that the contest here is between two wives, neither of which was the first married wife or 'pattama stree' as the first or royal wife is called. Several instances have been given in evidence where a younger son by the 'pattama stree' has taken precedence of an elder son by a subsequent wife, but those cases are not to the point in this case, and all the evidence in regard to them must be rejected as irrelevant. The first married wife, as Mr. Mayne points out (Hindu Law, para 87), has precedence over the others and her first-born son over his half-brothers, because a peculiar sanctity seems to have been attributed to the first marriage as being that which was contracted from a sense of duty and not merely for personal gratification, and it may be that among certain classes of people, the preference shown to her first-born son was extended to other sons born of her, so that it would not be fair to treat the case of her sons as on a par with the sons of subsequent wives. It is as between

(1) 12 M. 72 (2) 14 M.I.A. 570 (3) 8 I.A.

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such wives that the question of custom must be considered here. This will eliminate from the record all the evidence which was confined to the competition between a son of a ' pattama stree ' and of a junior wife which forms the major portion of the evidence. The evidence adduced in support of the custom falls under three classes.

First, statements giving the opinions of deceased persons who are likely to know of its existence; second, similar opinions by living persons, and third, particular instances in which the custom was recognized and acted on. Under the first class, the evidence was naturally documentary, and much of it was either irrelevant for the reasons above stated, or inadmissible for reasons now to be [439] stated. Section 32 (Clause 4) of the Indian Evidence Act, which allows of the admission of such evidence requires that it should have been given before any controversy as to such custom had arisen; and the statement must refer to a custom or matter of public or general interest, and not to a particular case or instance. Now, to take the documents exhibited under this head in their order of date, we find Exhibits XXVI *a* and *b*, the opinions of the zemindars of Valayapatti and Erasakkanayakanur taken in 1826 inadmissible, as they refer only to the line of descent in their own particular estates, and they are irrelevant as they contemplate the case only of the first and a second wife. The next Exhibit are the XIX series (*a* to *r*), opinions taken in 1849, with reference to the succession in the Perayur zamindari. These are objected to on the score that they were taken after controversy arose, but we find this not to be the case. The correspondence on the subject is to be found in Exhibits XXXIII series, and it shows that there was only a doubt whether the younger son by a senior wife should succeed before an older son by a junior wife. The Collector held the opinion that by custom the younger son should succeed and the Court of Wards being doubtful directed an enquiry to be made as to the custom, and it was found that it prevailed, and it was accepted and acted on. There had been a difference of opinion by the pundits who were at first consulted, but there was no dispute such as to render the evidence inadmissible. In order to effect this " there must be " not merely facts which may lead to a dispute but a *lis mota*, or suit, or " controversy preparatory to a suit actually commenced or dispute arisen " and that upon the very same pedigree or subject-matter which consti- " tutes the question in litigation." (*Taylor on Evidence*, page 556). The competition in this Perayur case was between the second wife's son aged 2 and the eighth wife's son aged 8, and opinions then taken are, therefore, relevant in the present case, so far as they refer to the general custom and to a contest between sons of wives other than the first married wife. All the persons, who gave them, are proved to be dead, and their original statements have been produced and proved in order to avoid the objection taken in the Urkad case that the originals had not been produced and proved. But some of these opinions must be rejected on other grounds. Thus the opinion of the Thevaram zemindar in Exhibits XIX and XIX*a* is inadmissible, as the opinion of a deceased person because it refers to the [440] rule of succession in his own particular zemindari only. The opinion of the Bodinayakanur zemindar in Exhibits XIX*b* and *c* is inadmissible for the same reasons; so also is the opinion of the zemindarni of Thottapanaickanur in Exhibit XIX*f* and those of the zemindar of Kannavadi in Exhibits XIX*j* and *k*, and of the zemindar of Mambarai in Exhibits XIX*q* and *r*. The opinion of the zemindar of Erasakkanaya-kanur in Exhibit XIX*l* is irrelevant, as it refers only to the case of the

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senior wife, as well as only to the particular estate Excluding these we have left the opinions of five zemindars, namely, those of Pulyankulam (Exhibits XIX *d* and *e*), of Uttapanaickanur (Exhibits XIX *g* and *h*), of Gandamanaickanur (Exhibits XIX *m*), of Kadavur (Exhibit XIX *n*) and of the Edayakottai (Exhibits XIX *o* and *p*) all speaking to the general custom among Kumbla zemindars of the son by a senior wife taking the succession in preference to an older son by a junior wife

The next documents in time are in connection with the Virupakshi case in 1858 (Exhibits XXXIV series) The opinions therein given are irrelevant, as the son by the second wife who succeeded to the allowance was the eldest of the surviving sons

The last batch of opinions forming the second main-stay in proof of the custom were in 1875, and are to be found in Exhibits XII *a* to *k* series, but we find one and all of them inadmissible, as the statements were undoubtedly made after controversy had begun There was a dispute as to the succession in the Bodinayakanur estate like the dispute in the present case as to whether the younger son by the fifth wife was to be preferred to the elder son by the sixth wife The Court of Wards recognized the right of the younger son, whereupon a suit was brought on behalf of the elder son in original suit No 5 of 1875 on the file of the Subordinate Court of Madura. The Collector, as Agent of the Court of Wards, was made a defendant in the suit, and, in forwarding a copy of the plaint in the suit to the Court of Wards, applied for instructions to defend the suit This was on the 13th July 1875 (*vide* Exhibit XXXVIIa), and it was after this the opinions were called for as appears from the Collector's letters (Exhibits XII *b*, *d*, *h*, and XVII) which are dated in August 1875, and the opinions given are, of course, all of subsequent dates There are other grounds on which these statements that have been used in evidence are inadmissible, such as that some of them are copies, their correctness as such also not being proved, but it is sufficient to reject them all [441] on the broad ground that they were not given *ante litum motam* This closes the first class of evidence adduced The second class consists of the opinions of living persons as to the general custom, and they are admissible under Section 48 of the Indian Evidence Act There are three such opinions, as are relevant in this case, those of the defendant's nineteenth, twenty-fourth and sixty-second witnesses The nineteenth defence witness says "In case the first wife had no sons but the second and third wives had "sons, the son of the second wife, even though younger in age, would "have the right to the succession, and so on according to the order "of wives The rule of succession stated by me is applicable "to all divisions of Kumblas," and this follows the opinion he gave in 1875 as a Kumbla zemindar (*vide* Exhibit XVII *a*). The twenty-fourth defence witness is a Kumbla of the Thevaram zemindari, and he says that "the succession in the case of Kumbla zemindars is regulated by "the seniority of the mother irrespective of ages of the sons " The sixty-second defence witness is the father of the first wife of the late zemindar of Saptur, the father of the parties to this suit, and he states as follows "Among our Kumbla-zemins the right of succession is according to the "order of wives What is meant by the order of wives is that should "there be a son to the first wife, the right of succession goes to that "son, but, if there be no son to the first wife, and the second wife has "a son, it goes to that son It is this what I mean by order Even "if the son of the second wife is older than the son of the first wife, that "right of succession is only to the first wife's son. Similarly in the case

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"of the sons of the other wives." The evidence of the defendant's eighteenth witness is to the effect that the sons of the eldest wife succeed one after another, of which there was an instance in his own zemindari, but this does not apply to the matter in question as it relates only to the rights of the sons by the first married wife.

The third class of evidence offered in proof of the custom consists of particular instances, in which it was observed evidence which is admissible under Section 13 of the Indian Evidence Act. The Perayur and Bondinayakanur cases referred to above are instances distinctly in point. In the former case the son of the second wife being only 2 years of age succeeded in preference to the son of the eighth wife who was 8 years old, and in the latter case, the younger son of the fifth wife took the succession in [442] preference to the elder son by the sixth wife. But there is this to be said with regard to the latter case that the elder son was an idiot and might have been disqualified on that ground alone, although the correspondence (Exhibit XXXVII) shows that the right of the younger son was recognized on the strength of the custom Beside these clear instances, evidence has been adduced to prove similar instances in other zemindaris of the same caste, but as all of them appear to relate only to the case of the first married wife or 'pattama stree,' they must be rejected as irrelevant for reasons already stated. Thus the case in 1861 in the Andipatti Poliem (Exhibit XXXV series) was between the son of the senior wife, and the son of the second wife, there being only two wives, and it was the same in the Uttapanaikanur case in 1866 (Exhibit XXXVI) to which defence witnesses Nos 20 and 21 speak. The instances given by the oral evidence of the witnesses Nos. 18, 19, 26 and 41 for the defendant also all refer to the sons of the first married wife, so that under this head of particular instances we have only the two instances of Perayur and Bodinayakanur as applicable to this case. But it must be remarked that cases of competition between the sons of junior wives in so small a community as the Kumbla zemindars are, must of necessity be, of rare occurrence when the son or sons of the first married wife always take precedence as much of the evidence shows they do.

The general result of the evidence as to the custom set up is that we have the opinion of five deceased persons and of three living persons *plus* two well-authenticated instances of its observance in proof of it, while there is nothing whatever on the other side to disprove it. It was contended for plaintiff that there was an instance in this Saptur zemindari itself where the son of a fourth wife succeeded in preference to the son of a third wife in the fact that in 1803 Vada Kamaya Naik, son of a fourth wife of his father became zemindar after his elder brother by the first wife was hanged, in preference to Sangaralinga Kamaya Naik, a son of the third wife.

Assuming these facts to be proved by the genealogical table (Exhibit XXV) and by the evidence of the plaintiff's first and forty-first witnesses, and that Sangaralinga Kamaya Naik, the son by the third wife, afterwards succeeded Vada Kamaya Naik, son by the fourth wife, as shown by Exhibit TTT, they do not prove the circumstance they are used for. In the first place Vada [443] Kamaya Naik was treated by the Government as the Istimrar zemindar by its sannad SSS after his brother had been executed, and it may have been an act of State and not a case of succession but one of selection; and in the second place, there is nothing to show that Sangaralinga Naik was then born. He might have been born long

after his brother had been recognized as the zemindar by the Government The evidence then being all one way, and extending back as far as living memory and existing records go, can the custom be found to be sufficiently established according to the standard laid down by the Privy Council in *Ramalakshmi Ammal* v *Sivanantha Perumal Sethurayar* (1) "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends" Now, out of the mass of evidence adduced, that which we have alone admitted as strictly applicable in this case is undoubtedly clear and unambiguous in favour of the alleged custom, and its antiquity and certainty seem to be proved as well as they can be among a set of people so absolutely lawless as these poligars were in former days In respect to its certainty the opinions are unanimous, and are supported by two actual instances, while no opinion has been adduced against it, nor any instance given of a departure from it And in respect to its antiquity it is spoken to as an old established rule, 'whereof the memory of man runneth not to the contrary' so far as is shown to us

In these circumstances we consider that the custom has been clearly proved to be ancient and invariable, and therefore one that our Courts must recognize We accordingly confirm the finding of the Subordinate Judge in this matter

The next question in the case is the fifth issue, namely, whether, on the death of the last zemindar, his full-brother, the defendant, is entitled to succeed to the zemindari, which is admittedly an ancestral, impartible estate held by only one member of the family [444] at a time, in preference to the plaintiff, his half-brother The Subordinate Judge decides it in the negative, and, in that opinion, we concur [Their Lordships here repeated *verbatim* that portion of the judgment in *Subramanya Pandya Chokka Talavar* v *Siva Subramanya Pillai* (2), which commences with the word 'apart' in the second line of the second paragraph on page 325 of this volume and ends with the word 'succeed' in the last line of the fourth paragraph on page 334]

The last points for our determination are matters of detail in regard to what properties in Schedules C, D and E of the plaint are to be considered as partible between the plaintiff and the defendant.

Schedule C refers to the 'pannai' lands, and the Sub-Judge has given excellent reasons for holding that such of them as were acquired by the grandfather of the parties are not partible, but must be considered as appurtenant to the zemindari, but he has held that those acquired by the father are partible It would appear that the Sub-Judge has here erred in treating the father as the last holder of the estate, because exactly the same reasons which he gives for holding the acquisitions of the grandfather to have been incorporated in the estates apply with equal force to the acquisitions of the father They all alike descended to the last holder, the brother of the parties to the suit The principles is laid down in the judgment of this Court in *Lakshmipati* v *Kandasami* (3), that it is a question of intention whether the zemindar, for the time being, who acquires fresh lands, means to incorporate them with the zemindari or to

(1) 14 M.I.A 570 (585) (2) 17 M 316 (3) 16 M 54

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treat them as separate private property. His object in acquiring them as private property could only be for the purposes of alienation, and the presumption is that if he does not alienate them in his lifetime or by testamentary disposition his intention was to add them to the estate.

For this and the other reasons discussed by the Sub-Judge upon the evidence in the matter, we are of opinion that all the lands comprised in Schedule C were merged in the estate proper and are, therefore, not partible. The properties in Schedule D are ryotwari lands and house properties, and we see no reason to differ from the Sub-Judge's finding in respect to these, namely, that items Nos. 1 to 8 being lands not situate within the zemindari, were [445] distinctly the private properties of the zemindari, and therefore partible, while the other items Nos. 9 to 15 were appurtenant to the zemindari as palaces and places of residence, &c., and therefore impartible. Schedule E relates to moveables which we agree with the Sub-Judge in finding to be partible, as the rule of impartibility applicable to zemindaris does not extend to the personal property left by a zemindar (*Maharajulun Garu* v. *Rajah Row Pantulu* (1)).

The result of our decision is that the appeal of the plaintiff is dismissed and the Sub-Judge's decree is confirmed in all respects excepting as regards some of the 'pannai' lands comprised in Schedule C of the plaint which are now all declared to be appurtenant to the zemindari, and plaintiff has therefore no right to share therein. The Lower Court's decree will be modified accordingly, and the proportionate costs there decreed payable by the defendant to the plaintiff will be reduced by that extent and added to the proportionate costs payable by the plaintiff to the defendant.

The appeal of the defendant is otherwise dismissed. In regard to costs in this Court, we shall leave each party to bear his own, each having failed on the main grounds of his appeal.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SESHAM PATTER AND ANOTHER (*Plaintiffs*), *Petitioners v.* L. S. MOSS (*Defendant*), *Respondent.**
[8th and 12th December, 1893 and 5th April, 1894.]

Indian Railways Act—Act IX of 1890, Sections 72 and 76—The Carrier's Act—Act III of 1865—Indian Contract Act IX of 1872, Sections 151, 152 and 161—Liability of Railway Companies as Bailees.

Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act In a suit for damages occasioned by such a loss, the plaintiff need not prove how the loss occurred, but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee.

[446] PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the decree of V. Kelu Eradi, District Munsif of Palghat, in small cause suit No. 839 of 1892.

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* Civil Revision Petition No. 655 of 1892.

(1) 5 M.H.C.R. 31.

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The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Mahadeva Ayyar, for petitioners.

Barclay, Morgan & Orr, for respondent.

JUDGMENT.

Under Section 72 of the Indian Railways Act, the responsibility of the Railway Company for loss of goods delivered to be carried by the Railway is, subject to the provisions of that Act, that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. Under Section 76 of the former enactment, it is not necessary for the plaintiffs to prove how the loss was caused. Act III of 1865, Sections 8 and 9 are declared by Section 72 not to affect the responsibility of the Railway Company as defined by the latter section. The plaintiffs must show in the first instance the alleged loss or deficiency, and then the Railway Company will be bound to show that the loss occurred under circumstances which would exempt a bailee from responsibility for it.

The District Munsif finds that the plaintiffs' allegation that the bags of pepper were cut open and their contents were extracted whilst they remained in the custody of the Railway Company is not proved. Adverting to the several possible causes of the loss on which the defendant relied, he finds that they are not made out, but as regards the carelessness of the weighing clerks, he does not record a distinct finding. He eventually dismisses the suit on the ground that the plaintiffs did not prove their allegation that the bags of pepper were cut open and their contents extracted. The District Munsif has not tried this suit with reference to the requirements of the Railway Act and recorded distinct findings as to whether the quantity delivered was proved to be what is alleged in the plaint, or whether the quantity entered in the forwarding note in excess of the quantity delivered is due to a mistake on the part of weighing clerks, and as to whether the Railway Company has proved any ground upon which they can be exonerated from liability as bailees. He will submit distinct findings on the questions mentioned above upon the evidence on record within three weeks of the re-opening of the Court after the Christmas vacation, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

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[447] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

MARIAN PILLAI AND OTHERS (*Defendants Nos. 1, 5 and 6*), *Appellants v.* BISHOP OF MYLAPORE AND ANOTHER (*Plaintiffs*), *Respondents.**

[23rd, 24th July and 3rd August, 1894.]

Dharmakartas or headmen of a Roman Catholic Church—Legal powers thereof.

The appointment of a committee of headmen or dharmakartas in a Roman Catholic Church by the Bishop to assist the Vicar in the secular affairs of the church gives the members of such committee no right to close the church or

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* Original Side Appeal No. 33 of 1893.

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oust the Vicar, and still less to appoint a priest not under the discipline and obedience to the Church of Rome.

[R., 13 Ind Cas 549=24 M L J 630 (635)=(1912) M W N. 152]

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in civil suit No. 48 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Shephard, J, gave judgment for the plaintiffs, and the defendants preferred this appeal.

Mr. *W. Grant*, for appellants.

Mr. *Kernan* and *R. F. Grant*, for respondents.

JUDGMENT

The church which is the subject of dispute is called the Church of the Blessed Virgin Mary of Assumption, and is situated in Big Parcherry in Black Town. It appears to have been built about 1640, and in the list of Roman Catholic Churches (Exhibit C) it is described as supported by the See of Saint Thome and by private contributions. There is no endowment, and as far as can be gathered it was built by Native Christians with the assistance of a Mr D'Souza, a rich Portuguese merchant. There appear to have been quarrels from time to time about its management, but for a long time—at any rate more than a century—it has been within the jurisdiction of the Bishop of Mylapore. At the time of the concordat between the Pope and the King of Portugal in 1886, it was placed within the territorial jurisdiction of the [**448**] Archbishop of Madras. But, subsequently by a decree of 1887 it was transferred back again to the jurisdiction of the Bishop of Mylapore

The present suit is by the Bishop of Mylapore and the Vicar of the church. It appears that the defendants who style themselves church-wardens or dharmakartas—they claim to be hereditary dharmakartas—have taken forcible possession of the church and its property. They claim a right to dismiss the vicar, to appoint a schismatic priest, to exclude the Bishop of Mylapore and the present Vicar from the church at their pleasure, and in fact they maintain that the proprietary right of the church is vested in them, and that the building is their own property.

It is not denied that for 250 years the church has been used for the purpose of divine worship according to the doctrine and discipline of the Church of Rome. Not a scrap of evidence exists to show that defendants are proprietors of the building in the sense that they might devote it to any other use than that for which it has been dedicated since it was built. Nor is there any evidence to show that defendants or any of them have succeeded by hereditary right to the office of church-wardens or dharmakartas. There is no evidence of endowment or of the constitution of a trust, and if the defendants are wardens and trustees of the church, it is mainfestly absurd to allege that they in such capacity are at liberty to use the property entrusted to their care for purposes not only inconsistent with, but antagonistic to the objects of the trust. If, therefore, the defendants are church-wardens, the Court would be justified in removing them for such acts as seizing the church by force, expelling the Vicar, repudiating the ecclesiastical authority of the bishop, and claiming the right to appoint a schismatic priest. But in order satisfactorily to determine the rights of the parties, it is necessary to consider whether the defendants are dharmakartas at all, and, if so, what are the limits of their powers.

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It is evident that for more than a century—at any rate from 1792—some of the Native Christians, under the designation of headmen, dharmakartas or directors, have been associated with the priest in charge in matters relating to the upkeep of the fabric and the keeping of the accounts of the church. It is not denied by the plaintiffs that there has been such a committee of directors, but it is contended that these headmen or directors have been appointed by the bishop to assist the vicar, [449] and that they are in no sense proprietors of the church, and no trust property is vested in them.

Exhibit B is an edict issued by the then Bishop of Mylapore on the 10th August 1792. It shows that in earlier times, when the church was under the authority of the Capuchins, the superior of that order was at liberty to nominate directors subject to the approval of the Bishop of St. Thome. The edict goes on to recite that various misappropriations and speculations have been committed by different headmen, amounting in all to 1,974 pagodas, which sum is ordered to be recovered from them. Seventeen directors are appointed for the functions of the said chapel, and it is provided that in the event of a vacancy by death or other cause, the superior shall nominate any director for the approval of the bishop. The care of the money received by subscriptions, &c., is vested in the superior, the president of the committee, and two of the headmen, and it is provided that disputes shall be settled by the body of the directors, whose decision, however, shall not be effectual if not in conformity with the opinion of the reverend superior.

The position of the directors as shown in this document is consistent with that shown in Exhibit O. This is a petition presented to the Episcopal Governor of Mylapore by the Pariahs of Big Parcherry, dated the 27th May 1817, and the order thereon. In the petition the Pariahs state that by a special miracle they have obtained possession of the church from the Reverend Jaao Fidelis, and in order that the Christians may not be deprived of divine worship, the petitioners, as dharmakartas of the church and describing themselves as "regularly appointed by the Bishop of St. Thome and by your Lordship," pray that the church may be reopened for mass and divine service. In the order dated the 29th May 1817 the Episcopal Governor gives a certificate authorising the opening of the church and appointing a Vicar for the same.

Exhibit V is a letter from the Vicar-General of St. Thome, dated the 9th October 1871, cancelling a rule that had been issued by the directors of the church and ordering that the rule which had been previously in force shall be observed. This letter is addressed to Marian Pillai and other dharamakartas of the church and shows that the discipline which was existent in 1792 and 1817 was still observed. This pastoral letter refers to an arrangement [450] for the conduct of church affairs dated the 30th June 1838 which had been made by Bishop Texeira, but this document was not produced. A document which was alleged to be a true copy of that arrangement was produced by the defendants, but we will consider this later on in dealing with the defendants' documents. Exhibit L is another pastoral letter from the same Vicar-General, dated the 4th July 1872, giving directions to the headmen regarding the monthly meeting and the income of the church. Exhibit Q is a letter, dated the 25th January 1873, addressed by Marian Pillai as church-warden to the Vicar-General complaining of the conduct of the Vicar and his ecclesiastical superiors and claiming that beyond performing the services of the church the Vicar has no further power, but that the administration of it is vested

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in the church-wardens. Upon this letter the Vicar-General has endorsed the following order: "I do not acknowledge any authorized church-"warden in the Church of the Blessed Virgin Mary of Assumption, Big "Parcherry, which was by mutual consent of the headmen and dharma-"kartas put in 1840 under the control of the prelates of the Bishopric of "St. Thome for onerous title besides the present headmen, president "confirmed by me and dharmakartas who obey my orders." Two of the documents produced by the defence, Exhibit XXI, dated the 5th January 1831, and Exhibit XIX, dated the 14th November 1847, go to confirm the contention of the Bishop as to the position and duties of the headmen, president and directors of Mathuranaiyagiammal's church.

Passing now to the documentary evidence adduced by the defendants, we find that it is of two kinds, first, documents adduced in order to prove that the ecclesiastical authorities have admitted the claims made by the defendants, and, secondly, documents from which it may be shown that defendants have asserted their rights.

In the first class are Exhibits VI, IV and VIII. Exhibit VI purports to be a Tamil translation of the agreement of the 30th June 1838 authenticated in 1871 by Father Amarante, Vicar-General of Saint Thome, which it is said was furnished to the headmen, together with letter IV, in which they were told that the original had been sent to the Archbishop of Goa. The genuineness of both these documents is denied by the plaintiffs, and the learned Judge has found that they are not proved to be genuine. We may observe, in the first place, that Exhibit VI purports to be a copy only; no reason is assigned why the original should not have [451] been procured either from the archives of the Bishop of Mylapore or from those of the Archbishop of Goa Nor is it clear why defendants themselves should not have made and kept a copy of the original document before transmitting it to the Vicar-General. The learned Judge has set out his reasons for discrediting the document. It is ungrammatical and almost untranslateable, and its alleged contents are such as to raise a very strong presumption against its genuineness Bearing in mind the high state of discipline always maintained in the Roman Catholic Church, it is inconceivable to us that a bishop of that church should really bind himself, in the event of his failing to follow the regulations of headmen appointed by himself, not only to forfeit his interest in the church, but to recall the vicar appointed by him. We have no hesitation in saying that the internal evidence of the letter is to us conclusive against its genuineness. Exhibit VIII is a letter addressed to Marian Pillai by the Vicar acknowledging receipt of the key of the harmonium and informing him that on his transfer from the church, he, the vicar, will return it. The letter concludes with the words "and will subject the rules of your church." The contention of the plaintiffs is that these words are an interpolation, and the learned Judge has so found. We agree with him for the words added are neither grammar nor sense.

Finding then that Exhibit VI is unproved, we find no trace of assumption of proprietary right in the church by the dharmakarthas until the letter (Exhibit Q) in 1873, and that claim was then repudiated by the Vicar-General. The next occasion on which we find it brought forward is in 1886, and on that occasion it was rather hinted at than distinctly stated. The year 1886 was, as we have before mentioned, the year in which the concordat was concluded between the Pope and the

King of Portugal. Exhibit XVI is a petition addressed by the church-wardens and congregation of this church to His Most Faithful Majesty the King of Portugal, in which the petitioners set forth their objections to the territorial boundaries fixed by the concordat and their strong attachment to the See of St Thome, whose jurisdiction over them, they pray, may be maintained But the last paragraph contains a hint that if the prayer be not granted, the petitioners may not submit themselves to the orders of the Pope and the King It is stated that should the five churches be possibly made over to the Irish missionaries, the members of the said churches will be under [452] the painful necessity of seeking other redress As we understand these words it is hinted that petitioners may have recourse to the Courts in British India to avoid submission to the authority of the Pope and of His Majesty This was followed on the 17th January 1887 by a letter (Exhibit XXVIII) from Marian Pillai to the Vicar-General in which the same threat is repeated Marian Pillai there states he cannot resist the removal of the priest, but he adds " you must know that any interference " with the church and its property will be legally proceeded with For this " I must inform you that as soon as the orders for the removal of the priest " are known here the church will be closed " Whether any action would have been taken upon these threats it is impossible to say, but the claims of the dharmakarthas were not at that time repudiated by the Mylapore Mission, possibly because, if the transfer was carried out, their control and authority exercised by them would have passed to the Archbishop of Madras We find, however, from Exhibit XXIX, that the petition was successful, and the church was re-transferred to the jurisdiction of the Bishop of Mylapore The conclusion we have come to, therefore, is that the documents put forward to show the admission of the defendants' claim of right by the Mylapore Mission are not proved to be genuine, and that the evidence only proves there has existed for a long time a committee of directors appointed by the bishop and permitted to choose a president from among themselves, but whose orders were subject to the control of the bishop and the vicar

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It appears to have been the duty of these headmen to assist the priest in the secular affairs of the church, in return for which they were allowed certain advantages in the payment of half-fees for marriages, funerals and other ceremonials We agree with the learned Judge that the appointment of such a committee could give the members thereof no right to close the church or to oust the vicar, and still less to appoint a schismatic priest not under discipline and obedience to the Church of Rome

We dismiss the appeal with costs

Branson & Branson.—Attorneys for plaintiffs

Pedroza:—Attorney for defendants.

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[453] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

CHAIRMAN, ONGOLE MUNICIPALITY (*Defendant*), *Petitioner* v. MOUNSEY (*Plaintiff*), *Respondent*.* [13th and 14th March, 1894.]

District Municipalities Act (Madras)—Act IV of 1884, Section 55—Profession tax—What amounts to an exercise of profession or the holding of office under the section.

An officer, whose head-quarters are within a Municipality does not *ipso facto* exercise his profession or hold such office or appointment within the Municipality so as to render himself liable for the payment of profession tax under Madras Act IV of 1884. Accordingly an officer who is not personally present at his head-quarters in the course of duty for a period of sixty days in the half-year is not liable for the tax under Section 55 of the Act.

[F., 22 M. 145 (147)=8 M.L.J. 164.]

PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the decree of V. Subrahmanyam Garoo, District Munsif of Ongole, in small cause suit No. 202 of 1892.

The facts of this case appear sufficiently for the purpose of this report from the judgments of MUTTUSAMI AYYAR and BEST, JJ. The District Munsif decreed in favour of the plaintiff, and the defendant preferred this appeal.

Krishnaswami Chetti, for petitioner.

Mr. *Brown*, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This was a suit to recover back the sum of Rs. 25 which was illegally collected by defendant from plaintiff as profession tax due by him to the Municipality for the year 1891-92. During that year, plaintiff held the office of Sub-Collector of Nellore. Defendant is the Chairman of the Municipality in the town of Ongole, which is the head-quarters of the Sub-Collector. His office buildings are at Ongole, but it has been found by the District Munsif, that during the year 1891-92, he resided at Ongole and did his work there, except for 22 days in the first-half, and for 20 days in the second-half of the year. It is in evidence that he was appointed as the Acting District Judge of [454] Salem on the 15th June, and reverted to his appointment as Sub-Collector on the 19th September. It is also in evidence that he obtained permission to hold his office at Nellore for two months from October. It is clear then that save for the forty-two days mentioned above, he was in circuit and did his work outside Ongole. It appears, however, that some clerk was left at the head-quarters when the Sub-Collector was in circuit, and that the whole office establishment did not accompany him. The question is whether upon these facts, plaintiff is liable to pay profession tax under Section 55, Act IV of 1884. The material words "hold office or appointment within the Municipality" mean carrying on business there as the holder of the particular office. The intention was to place public servants like the plaintiff in the same position in which others are, who exercise their profession within the municipal limits. It is the nature of plaintiff's duty often to go out on circuit, and if urgent work outside the Municipality requires his presence there for about six months, it

* Civil Revision Petition No. 747 of 1892.

cannot be said that he still works within the municipal limits The cause of his liability is his participation in the benefit and convenience conferred by the Municipality upon those residing within the municipal limits By Section 59 plaintiff is exempted from liability if he does not hold his office for sixty days or more in any half-year The contention that wherever he may do business as Sub-Collector, he must be presumed to carry on such business at his head-quarters, is one to which I cannot accede as sound within the meaning of the Municipal Act, for, under that enactment, it is an essential condition of liability that the profession should be exercised within the municipal limits The decision of the District Munsif is right and this petition must be dismissed with costs

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BEST, J.—The only question for decision in this case is as to the meaning of the words "exercised such calling or held any such office or "appointment within the Municipality" as used in Section 55 of the District Municipalities Act No IV of 1884 (Madras)

It is conceded on behalf of the petitioner, the Chairman of the Municipality of Ongole (in the Nellore District), that it is only in case of the calling having been exercised or office or appointment held within the Municipality for a period of not less than sixty days within a half-year that the tax is payable, and it is not denied that during each of the half-years in question Mr Mounsey, the counter-petitioner, did not personally exercise his calling or [456] hold office within the Municipality for the minimum period of sixty days It is contended, however, that as Ongole is the head-quarters station of the Sub-Collector of Nellore, and as Mr Mounsey held the appointment of Sub-Collector for more than the minimum period in each of the half-years, he is liable to pay the tax The question, therefore, is whether an officer, whose head-quarters are within a Municipality, is to be considered *ipso facto* as exercising his profession or calling, or holding his office or appointment, within such Municipality, although as a matter of fact he was absent from the Municipality and discharging the duties of his office elsewhere If the subordinates left in charge of the office at Ongole could be held to be doing the Sub-Collector's work, there would be ground for holding the contention on behalf of the Municipality to be valid, on the principle of *qui facit per alium facit per se* But the Sub-Collector's duties cannot be delegated by him to be done by his clerks His duties must be discharged by himself alone, and that at the place where he happens to hold his office from time to time This may be anywhere within his division, or even out of it, if sanctioned by the proper authorities As appears from the evidence in the present case, Mr. Mounsey was absent for some time of the period in question in the Salem district as Acting Judge of that district, for a portion of the period he held office at Nellore, with permission obtained from the Collector, and during other portions he was out on famine duty He consequently held his office in Ongole for not more than twenty-two days during the first of the two half-years in question and for even a shorter period during the second of the two half-years

I think that the District Munsif is right in holding that, under these circumstances, Mr Mounsey was not liable to pay profession tax to the Ongole Municipality for either of the two half-years in question

I would therefore dismiss this petition with costs.

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6.

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BENCH.

17 M 456 (F.B.) = 4 M.L.J. 198.

17 M. 456 (F.B.)=4 M.L.J. 198.

[456] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Shephard, Mr. Justice Best and Mr. Justice Davies.

RAJAH OF VENKATAGIRI (*Defendant*), *Appellant v.* NARAYANA REDDI (*Plaintiff*), *Respondent.** [25th September and 1st December, 1893 and 28th February, 1st and 6th March, 1894.]

Registration Act—Act III of 1877, Section 49—Suit for damages for breach of contract to execute a lease—Production in evidence of an unregistered kabuliat to prove contract.

Defendant entered into an agreement with the plaintiff to lease a certain property to him. The plaintiff delivered the kabuliat to the defendant and was put into possession of the property The defendant did not execute the cowle and did not register the kabuliat, and subsequently improperly deprived the plaintiff of his possession. Plaintiff brought a suit for damages for breach of contract:

Held, on a question as to whether the kabuliat was admissible in evidence having regard to Section 49 of Act III of 1877, since it had not been registered, that, since the plaintiff's action was not founded on an alleged title under a lease granted by the defendant, but was an action for damages for breach of the contract to execute the lease, the kabuliat was admissible in evidence to prove the contract *Harijivan Virji* v. *Jamsetji Nowroji* (9 B. 63) distinguished

[**F.**, 6 Ind Cas. 634 (635)=11 C L J 548; 17 M.L.J 218; **R**, 35 M 63 (65)=8 Ind Cs. 520=21 M L J 44=9 M L T. 142; 14 C W.N 65 (66); 15 C P L R 33 (36); 5 Ind Cas 615 (618)=7 M.L.T. 278, 11 Ind. Cas. 23; 17 Ind Cas 987=23 M L.J. 652 (656)=12 M L T. 579; 1 N.L.R. 47; 5 N.L.R. 70.]

APPEAL against the decree of C. Ramachendrier, District Judge of Nellore, in original suit No. 30 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the order of reference and the judgment of the High Court

The District Judge found in favour of the plaintiff, and the defendant preferred this appeal.

Mr. *Wedderburn*, Mr. *Brown*, and *Krishnasami Chetti*, for appellant

Pattabhirama Ayyar, for respondent.

This appeal coming on for hearing before the Chief Justice and Mr Justice Davies, the Court made the following order of reference to the Full Bench.

ORDER OF REFERENCE TO THE FULL BENCH.

This was a suit for damages sustained by plaintiff in consequence of the defendant [457] having cancelled a kararnama. The facts of the case are as follow . The plaintiff put in a darkast in April 1889, offering to take in izara two villages in defendant's zemindari for a term of five years from the 1st July 1889 to 30th June 1893 at a yearly rental of Rs. 1,400. This offer was accepted by the Dewan on 24th October 1889 (Exhibit IV, and see also Exhibit J). On the 30th November 1889, the plaintiff executed and delivered to the defendant's agents the kabuliat (Exhibit VI), and an hypothecation bond for securing the first year's rent (Exhibit VII), and was, on the same day, put in possession of the villages. On the 28th April 1890 the plaintiff gave notice to the defendant (Exhibit O) to register the plaintiff's kabuliat (Exhibit VI), and its counterpart, the cowle (Exhibit V). This latter document has not been

* Appeal No. 103 of 1892.

executed by defendant The defendant took no notice of this request, but a few days afterwards cancelled the lease This cancellation, the District Judge has found, was made without sufficient cause, and we agree with him

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FULL BENCH

17 M. 456 (F.B.)= M. L. J. 198.

It will be observed that Exhibits IV, V, VI and VII were produced and filed on behalf of the defendant At the hearing of the appeal the defendant's counsel objected that these documents could not be considered for any purpose by the Court, as they were unregistered (Section 49 of the Registration Act) No issue was raised on this point in the Lower Court The point referred to the Full Bench is,—can the Exhibits J, IV, V, VI and VII be considered to ascertain the nature and terms of the contract made between the plaintiff and defendant for the purpose of assessing the damages caused to the plaintiff by the wrongful act of the defendant or for any other and what purpose

This appeal coming on for hearing before the Full Bench, the Court delivered the following judgment

JUDGMENT OF THE FULL BENCH

In the course of the argument it was agreed that the only document as to which any question of registration arises is Exhibit VI, the kabuliat signed by the plaintiff and given to the defendant

The question is whether that document, although not registered, can be admitted in evidence in support of the plaintiff's claim If the plaintiff's action was founded on an alleged title in virtue of a lease granted by the defendant, and his case were that as lessee he had been unlawfully ejected from the demised land, there can be no doubt that the document VI could not be admitted in [458] evidence The plaintiff would then be seeking to use it as evidence of a transaction affecting immoveable property But it is clear that that is not the case made in the plaint The plaint sets out the agreement for a lease of the village which was to run from fasli 1299 and last for five years It is stated that certain things were done in pursuance of the agreement, among other things, that the plaintiff was put in possession Then it is charged that the defendant did not register the kabuliat and improperly deprived the plaintiff of possession The cause of action alleged is the failure on the part of the defendant to act up to the karar (*i e*, the agreement for a lease), and the improper resumption of the village

It is clear that the plaintiff does not assert his title under the incomplete lease, and that he does complain of the breach of contract on the part of the defendant in refusing to register the kabuliat and give him a cowle, and also in disturbing his possession The act of the defendant in thus disturbing the plaintiff's possession is merely a part of the defendant's conduct which the plaintiff complains of as a breach of the contract made with him It is not an essential part, for, if the plaintiff had never been in possession, he would have had his right of action

Having regard to the language of Section 49 of the Registration Act, we think there is no doubt that the kabuliat, although not registered, is admissible in evidence to prove the contract We do not think it is necessary to refer to the cases cited except the case of *Hurjivan Virji v Jamsetji Nowroji* (1), as to which it has to be observed that although the plaint included a prayer for damages, the judgment makes no reference

(1) 9 B. 63

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to it. The decision cannot, therefore, be cited as an authority against the admissibility of a document in this case.

In our opinion the answer to the question referred should be that the document may be admitted to prove the contract and the damages occasioned by the breach of it.

This appeal coming on for final disposal after the expression of the opinion of the Full Bench, the Court delivered the following judgment.

JUDGMENT OF THE DIVISION BENCH.

The undisputed facts in this case are that an offer made by the plaintiff to the Dewan of the defendant to take on [459] lease the village of Valamaid attached to the defendant's zemindari for a term of five years from the 1st July 1889 to the 30th June 1893 (fasli years 1299 to 1303) at a yearly rental of Rs. 1,400 was accepted by the Dewan (Exhibit I) on the 24th October 1889. On the 30th of November following the plaintiff, as directed (Exhibit IV) executed and delivered to the defendant's agents the kabuliat (Exhibit VI), and an hypothecation bond for securing the first year's rent (Exhibit VII), and was, on the same day, under previous orders of the Dewan (Exhibits J and R) put in possession of the village (Exhibits G and L). Disputes subsequently arose between the plaintiff and the ryots of the village, the plaintiff complaining that the ryots were, at the instigation of the village karnam, refractory (Exhibit XXI), and the ryots complaining that the plaintiff was oppressing them (Exhibits I and II), the result of which was that the plaintiff's lease was cancelled by beat of tom-tom in the village. A few days previously, that is, on the 28th April 1890, the plaintiff had given notice to the defendant (Exhibit O) calling on the defendant to have the plaintiff's kabuliat IV and its counterpart the cowle (Exhibit V), which had been prepared on the 30th November, registered, to which demand, however, no attention was paid. Those documents with Exhibit VII accordingly remain unregistered to this day—the cowle indeed never having been executed. The plaintiff now sues, by way of damages, for the loss he had sustained and would sustain by the defendant's failure to carry on the contract of lease.

The defendant contended, in the Lower Court, that the contract was not completed and was inoperative, as the lease had not been registered, and that the plaintiff had forfeited the benefit of the lease by his mis conduct. The District Judge found the contract was complete and that plaintiff had not by any conduct on his part worked a forfeiture of the lease, and awarded plaintiff as damages for the breach of contract Rs. 3,470 as against Rs. 4,000 claimed by him.

The defendant's appeal is really urged on but two grounds. It could not be contended on the facts as already set forth that the contract had not been concluded, especially when plaintiff had actually been put into possession under it, and on the merits it could not be shown that plaintiff had committed any act coming within the forfeiture clause of the lease. He had acted within his rights in letting out fresh land for cultivation, which was in sub-[460] stance the ryot's grievance against him. There was no proof that he unnecessarily harassed them.

The chief ground of appeal then is that it was by plaintiff's own default that the lease was not registered, and not being registered, evidence of its terms was inadmissible, and the other ground is that the damages decreed were excessive and too remote.

The first of these points was not made an issue in the Lower Court, and consequently was not argued there. The argument put forward here

1894 March 6 — Full Bench. 17 M 456 (F B.) = 4 M L. J. 198.

is that the plaintiff could have registered the document G as embodying the terms of the lease, or he could have compelled the registration of the kabuliat K by taking out process under Sections 36 to 39 of the Registration Act, and, by thus failing to get the lease registered, evidence to prove its terms cannot be received according to Section 49 of the Act The prohibition in Section 49 is that no document required to be registered (and, in this case, the lease being for five years, undoubtedly required to be registered) shall be received as evidence of any transaction affecting immoveable property The real nature of this suit is for compensation for disturbing the plaintiff in his possession, and doing the necessary acts to entitle him to possession, such, for example, as not executing the counterpart of the lease and duly registering it, so that the non-registration is itself part of the plaintiff's cause of action It may be that to save himself he could have adopted one of the courses suggested to effect registration, but that would not absolve the defendant from his liability, because the defendant's was the primary liability The plaintiff has done all that it lay on him to do He had executed his muchilika and handed it to the defendant's agent It was then left for the defendant to execute the counterpart and hand it to the plaintiff The proper answer, however, to the argument advanced is that this is not a suit brought upon the kabuliat and cowle (Exhibits VI and V), which, it should be noticed, were not filed for plaintiff as part of his case but by defendant, but a suit upon a breach of an implied contract by the defendant to do that which it was necessary for him to do in order to give effect to the agreement he had entered into with the plaintiff The other unregistered documents that have been put in showing the terms of the lease, have not been put in to enforce the lease, in which case they would not have been admissible as evidence as they would have been evidence of a transaction affecting immoveable [461] property, but they must be deemed to have been put in simply as evidence of the character of the breach of agreement by the defendant, and as a basis for calculating the measure of damages, neither of which things can, in the least, affect the land lying in the village of Valamaid The first objection must, therefore, be disallowed We, however, thought it right to refer this point to a Full Bench, as it has never been directly raised and decided by this High Court In regard to the other objection as to the damages decreed, there is no ground for holding that the District Judge is wrong either in his findings of fact or the principles he has adopted in assessing damages He finds, on sufficient materials, that the plaintiff could have made on an average an annual net profit of Rs 694 on his lease, and it is five times that amount for the five years' term of the lease that he has rightly decreed to plaintiff The plaintiff was as clearly entitled to prospective as to past profits in a suit for damages

The appeal accordingly fails, and it is dismissed with costs

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APPEL-
LATE
CIVIL.

17 M. 461.

17 M. 461.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

ABBOY CHETTI (*Defendant*), *Petitioner v.* RAMACHANDRA RAU AND OTHERS (*Plaintiffs*), *Respondents.**
[2nd and 7th February, 1894.]

Promissory note—Negotiation—Whether an assignment by the payee of all his property including the note amounts to negotiation in the absence of endorsement.

A promissory note payable to payee or order cannot be negotiated by the mere assignment by the payee of all his property including the note. *Pattat Ambadi Marar* v. *Krishnan* (11 M. 290) followed.

[**R.**, 28 M. 544 (545)=15 M.L.J. 384; 9 O.C. 174 (176); **D.**. 7 M.L.J. 231 (232).]

PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the decree of S. Krishnasami Iyer, District Munsif of Erode, in small cause suit No. 975 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

[**462**] The District Munsif decreed in favour of the plaintiffs, and the defendant preferred this appeal.

Mahadeva Ayyar, for petitioner.

Pattabhirama Ayyar and *Venkatarama Sarma*, for respondents.

JUDGMENT.

This case is governed by the decision in *Pattat Ambadi Marar* v. *Krishnan* (1), wherein it was held that an assignment by an agreement in writing of all the assignor's property, including a promissory note, was held not to be sufficient to sustain a suit by the assignee on the note in the absence of an endorsement. The ground of decision is that a promissory note cannot be negotiated by the mere execution of a deed of assignment. The right of suit did not pass to the plaintiffs by operation of law, for the company of which defendant was a member was wound up, and it is admitted that the plaintiffs' firm derived its right from assignment by Exhibits B and C. The promissory note purports to be payable to the payee or order, and it is not denied that it is a negotiable instrument. I set aside the decree of the District Munsif, and direct that the suit be dismissed with costs.

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* Civil Revision Petition No. 666 of 1892.

(1) 11 M 290.

17 M. 462 (F.B.).

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17 M. 462 (F.B.).

APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J H Collins Kt, Chief Justice, Mr Justice Muttusami Ayyar and Mr Justice Shephard

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RANGASAMI NAICKAN (*Plaintiff No* 1), *Appellant v* VARADAPPA NAICKAN AND OTHERS (*Defendants*), *Respondents* *
[11th December, 1891, 24th November, 1893, 26th January and 7th March, 1894.]

Code of Civil Procedure—Act XIV of 1882, Section 539—Whether a suit to remove a trustee to a charitable trust lies under the Section

A suit to remove a trustee to a charitable trust does not lie under Section 539 of the Code of Civil Procedure *Narasimha* v *Ayyan Chetti* (1), followed.

Per SHEPHARD, J.—The language of Section 539 is in part borrowed from 52 George III, cap, 101 (Sir Samuel Romilly's Act) and the decisions upon that statute are in a measure reproduced in the section Section 539 should, accordingly, be construed in the light of the decisions on that statute, so far as they are applicable **[463]** to the language of the section, and the statute having from the first been held to be inapplicable to cases in which the hostile removal of a trustee is required, Section 539 is likewise inapplicable to such cases

[**Diss.**, 20 A (51), 21 A 200 (203), 24 C 418 (425), 2 C L J 431 (439), 2 C L J 460 (467), 5 O C 110 (112), **Rel.**, 11 Ind Cas 728 (729)=21 M L J 784; 33 C 789=10 C W N 581, **R.**, 21 M 406 (409), 23 M 28 (29)=7 M L J 281, 5 Ind Cas 729=20 M L J 387 (390)=7 M L T 292=(1910) M W N 14; 7 Ind Cas 868 (869)=8 M L T 357=(1910) M W N 500, 5 Ind Cas 515 (517)=7 M. L T 45, 9 M L J 93 (97)]

APPEAL against the decree of H H O'Farrell, Acting District Judge of Trichinopoly, in original suit No 49 of 1889

The facts of the case appear sufficiently for the purpose of this report from the judgments of the Full Bench of the High Court

Mr *D'Rozario*, for appellant

Ramachandra Rau Sahib, for respondents, Nos 1 to 5, 7, 8, 10 and 11

This appeal coming on for hearing before the Chief Justice and Mr Justice Wilkinson, the Court made the following order of reference to the Full Bench.

ORDER OF REFERENCE TO THE FULL BENCH —*Narasimha* v *Ayyan Chetti* (1) was dissented from by two of the Judges who took part in *Subbayya* v *Krishna* (2) Two other Judges have followed the opinion of the majority of the Judges in *Subbayya* v *Krishna* (2) in two unreported cases, original suit appeal No 4 of 1891 and regular appeal No 199 of 1887 Considering the difference of opinion that exists on the point, we resolve to submit to a Full Bench the question " whether under Section 539 of the Civil Procedure Code a suit to remove a trustee will lie "

This appeal coming on for hearing before the Full Bench, the Court delivered the following judgments

JUDGMENTS OF THE FULL BENCH

COLLINS, C J —The question referred to the Full Bench for decision is " whether under Section 539 of the Civil Procedure Code a suit to remove a trustee will lie "

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* Appeal No 66 of 1891

(1) 12 M 157

(2) 14 M 186

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There has been a great diversity of opinion amongst the Judges of the Madras High Court on this point. In *Narasimha* v. *Ayyan Chetti* (1), Mr. Justice Kernan and Mr. Justice Wilkinson expressed doubts whether Section 539 empowered a Court to remove a trustee, whilst in *Subbayya* v. *Krishna* (2), Mr. Justice Muttusami Ayyar in a most exhaustive judgment reviewed the statutes and cases both English and Indian relating to the subject in question and came to the conclusion that Section 539 did not authorize the removal of a trustee. Best and Weir, JJ., took the opposite view and held that a trustee could be removed in a suit brought under this section. It appears to me that Section 539 of the Civil Procedure [464] Code was drafted on the lines of 52 George III., cap. 101, commonly called Romilly's Act, and the draftsman must have been well aware that it had been held that the Act did not not apply when the question arose as to whether a trustee should be adversely dismissed for misconduct. Is it probable, therefore, that if the Legislature intended the section to apply to a case where the removal of a trustee was in question that specific relief would not have been mentioned. The section enumerates the specific reliefs that are given and the first is appointment of new trustees under the trust. We are, however, asked to add words to the section and to say that the Legislature intended to give the power to remove adversely a trustee, although the Legislature refrained from saying so. The words "granting such further or other relief as the nature of the case may require" cannot, under the recognized rules of construction, be said to give a Court the power to remove a trustee.

The words of a statute cannot be construed contrary to their meaning as embracing or excluding cases merely, because no good reason appears why they should be excluded or embraced; see *Pike* v. *Hoare* (3) *per* Lord Northington, *per curiam* in *Dean* v. *Reid* (4). The duty of the Court is not to make the law reasonable, but to expound it as it stands according to the real sense of the words:—see *per Cresswell, J.*, in *Biffin* v. *Yorke* (5). It is far better, says Lord Campbell in *Coe* v. *Lawrence* (6) that we should abide by the words of a statute than seek to reform it according to the supposed intention.

I agree with the dictum expressed by the Judges in *Narasimha* v. *Ayyan Chetti* (1), and in the judgment of Mr. Justice Muttusami Ayyar in *Subbayya* v. *Krishna* (2) and answer the question referred to the Full Bench in the negative.

MUTHUSAMI AYYAR, J.—I adhere to the opinion expressed by me in the previous decision.

SHEPHARD, J.—The question is whether under the provision of Section 539 of the Civil Procedure Code two or more persons can, with the consent of the Advocate-General, institute a suit for the removal of a trustee on the ground of fraudulent and improper conduct.

[465] The terms of the section with reference to the relief which may be obtained are not merely general. The section particularizes the points to which the decree may be directed:—

(*a*) appointing new trustees under the trust;
(*b*) vesting any property in the trustees under the trust;
(*c*) declaring the proportions in which its objects are entitled;
(*d*) authorizing the whole or any part of its property to be let. sold, mortgaged or exchanged;

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(1) 12 M. 157. (2) 14 M. 186. (3) Eden, 184. (4) Peters, 524.
(5) 6 Scott's N. R. 234=5 M. & Gr. 428. (6) 1 E. & B. 516.

(e) settling a scheme for its management, or granting such further or other relief as the nature of the case may require.

The section is significantly silent with regard to that most important head of relief in connection with trusts, *viz*, the removal of fraudulent trustees The contention, therefore, that the section was intended to comprehend suits having that end in view can only be rested on the ground that by necessary implication jurisdiction to entertain such suits was conferred by the section Apart from this section there is no doubt that in the Presidency Town it was competent to the Advocate-General to initiate proceedings either for the purpose of removing a trustee or for the purposes mentioned in the section, including that of having a scheme of management settled by the Court, as was done in the Patchiappa case The powers of the Advocate-General in this respect to take action for the protection of charitable trusts are the same as those which the Attorney-General in England possesses· *Attorney-General* v *Brodie* (1) In the mufussil it was different. There was no public official who could take action in the Courts with reference to trusts and it was probably doubtful whether the Mofussil Courts had jurisdiction with regard to trusts such as is undoubtedly given by the present section At any rate no case can be found in which a Mofussil Court has exercised such jurisdiction

This being the state of things, while no alteration of the law was required for the Presidency Town, for the Provincial Courts with regard to charities in the mofussil, there was need that jurisdiction should be given to enable those Courts to deal more effectually with trust property Whether the Legislature had any further purpose in view and intended that District Court [466] should grant relief generally with regard to such trusts in suits instituted by a public official or by interested persons with his consent is the question we have to determine In favour of the construction of the section giving the Court this larger jurisdiction it may fairly be said that the case such as the present, in which the removal of the trustee is alleged to be required in the interests of the trust, is eminently one in which it might be thought that a power to invoke the aid of the Court should be given either to a public official or to persons interested in the trust Legislation to that effect with reference to charities not of a religious character would be in harmony with the enactment already in force with regard to trusts of a religious character, for under the Act of 1863 it is competent to persons interested in a religious establishment, on leave of the District Court being first obtained but without joining as plaintiff any of the other persons interested, to bring a suit against the trustee who has been guilty of breach of trust and to obtain his removal from office or other relief

It is incorrect to say that charitable trusts which are not within the Act of 1863 are left wholly unprovided for unless a general jurisdiction with regard to them is given by the section; see *Mohiuddin* v *Sayiduddin* (2) As has been pointed out by two of the learned Judges in *Subbayya* v *Krishna* (3), a jurisdiction to remove trustees has always been exercised by the Mofussil Courts. The remedy is not wanting altogether; but except in this section of the Code there is no provision of law empowering any public official to take action

In the course of the argument stress was laid on the difficulties which would arise if the jurisdiction claimed is taken to be conferred by

(1) 4 M I.A. 194 (2) 20 C 819 (816) (3) 14 M. 186 (199, 200).

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the section. It appears to me that no construction of the section is altogether free from difficulties. On the one hand if the section is to be restricted to proceedings not involving the removal of a trusee, it may be said that although the suit is launched upon an allegation of breach of trust and a breach of trust of a serious nature requiring the removal of the trustee may be proved, the District Court or the High Court, as the case may be, will have to stay its hand and remit the parties to an inferior Court to obtain the proper relief. Again, it would seem strange [467] that the Legislature should think it necessary to restrict to the High Court and District Court the jurisdiction in such simple matters as appointing new trustees, for although there may be a prayer for the settlement of a scheme the jurisdiction is complete notwithstanding that there is no such prayer. Again, seeing that for the Presidency Towns no amendment of the law was required, it is difficult to understand why the Advocate-General was mentioned and why an alternative jurisdiction was given to the High Court. On the other hand it may be objected that there being already a jurisdiction in the Mufussil Court to remove trustees an enactment giving jurisdiction to certain Courts only in the same matter would be anamolous. It might lead to the most inconvenient results if a suit could be instituted under the section in the High Court and at the same time another suit under the old procedure in a District Munsif's Court. Passing from these considerations, from which in my opinion no conclusion can safely be drawn, I come to consider the other enactments with regard to the same subject-matter which the Legislature had before them in 1887. In this country there was the Act of 1863 relating to religious endowments and containing the section already mentioned which gives a general jurisdiction to the Civil Court in the case of any breach of trust. In specifying the relief which may be granted, Section 14 expressly mentions the removal of the trustee or other person incriminated. If in 1877 it was intended to give the District Court a similar jurisdiction in suits launched by persons interested in non-religious trusts, and in the section as originally framed the words ' or religious ' do not appear, it is difficult to understand why all mention of this important head of relief, the removal of trustees, was not mentioned.

It is clear, however, that the language of the section was not borrowed from the Act of 1863 and that it was in part borrowed from the statute of George III known as Sir Samuel Romilly's Act. That being so, we are bound to have regard to the interpretation which has been put upon the latter Act—and the more so inasmuch as it appears that the decisions upon the statute are in a measure reproduced in the section of the Code. It is true that the circumstances under which legislation was required in England and in India were widely different. In England the ordinary mode of obtaining redress with regard to charities being by way [468] of information exhibited by the Attorney-General, what was required was not a *forum* or a new jurisdiction but a new mode of invoking the aid of the Court. The statute is intituled "An Act to provide a summary "remedy in cases of abuses of trusts created for charitable purposes" and it enables two or more persons to proceed by petition praying such relief as the nature of the case might require.

In this country what was required at least for the mofussil was the creation of a new jurisdiction. The chapter does not state that the jurisdiction is to be summary (compare title of Chapter XXXIX) and I cannot agree that it was intended that the proceeding being by suit should have

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that character. (*See* per Weir, J., in *Subbayya* v *Krishna* (1)) Notwithstanding these distinctions which may be drawn between the two enactments, I think we are bound to construe the language of Chapter XL in the light of the decisions on the statute, so far as they are applicable to that language The statute was from the outset held not to be applicable to cases in which the hostile removal of a trustee is required (*see* cases collected in Lewin on Trusts and Daniell, Ch P, cap. XXXVIII) and a further Act had to be passed in 1853 (16 and 17 Vic, cap 137), empowering the Court under certain circumstances on application made to order the removal or appointment of any trustee When it is found that the Legislature with those statutes and the decisions on them and also with the Act of 1863 before them omitted all reference to removal of trustees, the inference seems to me irresistible that that matter was not intended to be brought within the scope of the chapter. General words, it is true, are used similar to those used in the statute, but those words must be read with the words that go before and cannot be taken to include a distinct and substantive head of relief. In my opinion a jurisdiction to remove trustees as it is not given expressly by the chapter is not given by necessary implication, and therefore the question referred to us must be answered in the negative

This case coming on for final hearing, after the delivery of the opinions of the Full Bench, the Court delivered the following judgment

JUDGMENT FINAL

In accordance with the opinion of the Full Bench, we must hold that the suit is not maintainable in the District [469] Court The plaint ought to have been returned We must modify the decree accordingly. The appellant must pay the costs of appeal

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17 M. 469=4 M.L.J. 143.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

LINGA REDDI (*Defendant No 4*), *Appellant* v SAMA RAU AND OTHERS (*Plaintiff and Defendants Nos. 1 to 8*), *Respondents* *
[13th and 14th December, 1893 and 18th January, 1894]

Transfer of Property Act—Act IV of 1882, Section 68 (c)—Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct

Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under Section 68 of the Transfer of Property Act, instead of for possession of the land

[**Rel.** 16 Ind Cas 735 (736), **R.** 21 M 476 (481) (**F.B.**); 10 O C 53 (59), 1 O C 106; **D.** 26 B 241 (245)=3 Bom L R 876]

APPEAL against the decree of R S Benson, District Judge of South Arcot, in original suit No. 19 of 1890

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

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* Appeal No. 115 of 1891.
(1) 14 M. 186 (216).

1894 JAN. 18. APPELLATE CIVIL. 17 M. 469 = 4 M. L. J 143.

The District Judge passed a decree in favour of the plaintiff, and the fourth defendant preferred this appeal.

**Bhashyam Ayyangar* and *Krishnasami Ayyar*, for appellant.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

BEST, J.—The suit, out of which this appeal has arisen, was instituted by one P. Sama Rau (now first respondent) against Ranga Rau, his son Janakirama (a minor) and brother Ragava Rao (defendants 1, 2 and 3 respectively) as executants of the mortgage bond A (dated 10th July 1890) the other defendants in the suit being Linga Reddi (the present appellant) and three others holding prior mortgages over portions of the property mortgaged to plaintiff under the mortgage bond A.

Plaintiff's case was that of the Rs. 4,500 for which the mortgage bond A was executed, Rs. 3,000 were left with him [470] for redemption of the prior mortgages, and for payment to other creditors of defendants 1 to 3, but that his attempts to discharge the prior mortgage debts were frustrated by the machinations of the fourth defendant (now appellant), who induced defendants 1 to 3 to execute to himself on the 16th September 1890 a usufructuary mortgage of the property for Rs. 2,750, and to put him in possession of the property. Hence plaintiff's suit to recover from defendants 1 to 3, and on the responsibility of the property mortgaged to plaintiff under A, a sum of Rs. 2,256 paid by him to those defendants and certain creditors of theirs, up to 10th October 1890, with Rs. 450 as damages. Defendants 4 to 7 were included as defendants in consequence of their being in possession of portions of the properties.

First defendant's plea was that it was owing to plaintiff's failure to pay off the other mortgages that he was obliged to make other arrangements. Second and third defendants also pleaded adversely to the plaintiff, but it is unnecessary to consider their pleas for the purpose of this appeal.

Fourth defendant pleaded that plaintiff had no right to recover the money from the plaint property, as Exhibit A contained no pledge of the property. He also denied tender to him as alleged by the plaintiff. He further denied all knowledge of the payments alleged to have been made by plaintiff to, and on behalf of, defendants 1 to 3. He also denied the alleged collusion between himself and those defendants, and insisted on his right as prior mortgagee for a sum of Rs. 1,250 and also under the usufructuary mortgage bond of September 1890 for the further sum of Rs. 2,750.

It is unnecessary to state the pleas of the other defendants as the present appeal is by fourth defendant alone.

The District Judge has found that a sum of Rs. 2,181 was advanced by plaintiff to defendants 1 to 3 and is a valid mortgage debt, but that of the property mortgaged under A a portion had previously been sold to sixth defendant under Exhibit XI, and that the land so sold must be excluded from liability for the debt due to plaintiff. As for the damages claimed, the District Judge held interest at 10 per cent. per annum on the amount found to have been paid by plaintiff to be a sufficient award. He, therefore, passed a decree against first and third defendants personally and against their shares of the mortgaged property for Rs. 2,181, [471] with interest thereon as above, second defendant's share being held liable

* For arguments of Counsel, see 4 M.L.J. 143—ED.

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only for a portion of the debt, and that only in case it is not satisfied out of the first and third defendants' shares, fourth defendant has been held jointly liable with first and third defendants for plaintiff's costs on the amount decreed to plaintiff, because the Judge found the litigation to be due to the intervention of fourth defendant who "induced first and "third defendants to abandon their mortgage to plaintiff and give him "one instead."

The present appeal is, as already observed, by fourth defendant, the respondents being plaintiff and defendants 1 to 3

The points urged at the hearing are—

(1) That as a usufructuary mortgagee, plaintiff is not entitled to sue for sale of the property

(2) That the suit is premature, as under the mortgage bond A the money is not repayable till after the expiration of three years

(3) That plaintiff is entitled to sue only for possession of the property and redemption of prior mortgages

(4) That Section 68 of the Transfer of Property Act is not applicable

(5) That the amount claimed is excessive

(6) That the damages cannot be made a charge on the property

It is true that Exhibit A allows three years for payment of the money, but the finding is that owing to appellant's machinations the plaintiff was unable to get possession of the property. Section 68 of the Transfer of Property Act provides that the mortgagee has a right to sue for the money (*inter alia*) where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver possession to him or to secure the possession of it to him No doubt in the present case the money for redemption was left with the plaintiff, and the mortgagor had to take no active part in placing him in possession of the property, and consequently the case is not one coming within the letter of the section, but there can be no doubt it is within the spirit of the rule contained therein, and as it was owing to the combined action of the mortgagors and appellant, that the respondent (plaintiff) was unable to get possession of the property, the latter must be allowed to elect to sue at once for the money instead of for possession of [472] the land, though no doubt a suit for possession was also open to him I would, therefore, disallow the objections Nos 1 to 4

As to the fifth objection the Judge's finding is supported by Exhibit L and the receipts referred to in paragraph 13 of the judgment

As to the last objection, under the mortgage A, plaintiff was entitled to the usufruct of the land in lieu of interest at 10 per cent per annum It is this same interest that is awarded as damages. I think it has been rightly made a charge upon the property As remarked by Romer, J, in the recent case of *Cradock* v. *The Scottish Provident Institution* (1), to constitute a charge in equity by deed or writing, it is not necessary that any general words of charge should be used It is sufficient if the Court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security.

I would dismiss this appeal with costs

Objection has been taken on behalf of first respondent (plaintiff), under Section 561 of the Code of Civil Procedure, to the part of the decree which directs the property to be sold subject to the mortgages evidenced

(1) 69 L T J (N S) 380 (382)

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by Exhibits IV, V, and VI. As these mortgages are of date prior to that under which this suit has been brought, the Judge's decree is correct. The mere fact of the amounts due under these mortgages being included in the mortgage bond VII executed to fourth defendant by defendants 1 and 3 subsequently to the execution of A is no reason for holding that A is unaffected by them.

I would, therefore, dismiss first respondent's objections also with costs.

MUTTUSAMI AYYAR, J.—I agree.

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17 M. 473=4 M.L.J. 192.

[473] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RANGA RAU (*Plaintiff*), *Appellant v.* BHAVAYAMMI (*Defendant*), *Respondent* * [3rd and 4th April, 1894.]

Evidence—Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of 1879, Section 39—Whether secondary evidence of a lost document can be admitted on payment of penalty.

Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person.

In the case of a lost document no penalty can be levied and secondary evidence admitted, for Section 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming.

Kopasan v. *Shamu* (1), followed.

[R., 16 Ind. Cas. 950=33 P.R. 1913=279 P.W.R. 1912=11 P.L.R. 1913.]

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 39 of 1890.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The plaintiff preferred this appeal.

Rama Rau and *Bhashyam Ayyangar*, for appellant.

Subramanya Ayyar, for respondent.

JUDGMENT.

Appellant is the zemindar of Bobbili, and respondent's late husband, Sitaramaswami, was the sister's son of appellant's paternal grandfather. The property in litigation is the proprietary estate called Chilikala Jaganathapuram, and it has admittedly been in the possession first of Sitaramaswami and after his death in that of his widow, the respondent, from February 1862. In that year, appellant's paternal grandfather transferred the estate for valuable consideration to respondent's husband under the patta VI. Appellant brought the present suit to eject the respondent from that estate and to recover possession of it with *mesne* profits for three years, 1887 to 1889. Appellant's mother, Chellayammi, was the daughter of Gopayammi, [474] who was the sister of appellant's paternal grandfather and wife of one Rajagopala Rao. The estate in dispute was first granted to Rajagopala Rao in 1848,

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* Appeal No. 58 of 1893.

(1) 7 M. 440.

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and, on his death in 1856, his widow and the grantor applied to the Collector for its being registered in the name of the latter. The Collector accordingly registered the estate in the name of the grantor who, after continuing in possession for six years, transferred it for value under the patta VI to Sitaramaswami as stated above The ground on which the appellant rests his claim is that the first grant to his maternal grandfather Rajagopala Rao was absolute and unconditional, that it is not true as stated by his paternal grandfather and maternal grandmother in 1856 (Exhibits XVI and XVII), that the grant was subject to the condition that the estate was to revert to the grantor in the event of the grantee dying without male issue, and that the allegation made to that effect in 1856 was collusive and made in view to defraud the reversioner He alleged that his maternal grandmother Gopayammi died in March 1872, that his mother died in May 1887, that he was adopted in February 1871 and attained his majority in 1881 It will thus be seen that appellant claims the estate as the daughter's son by adoption of Rajagopala Rao the grantee of 1848 The respondent resisted the claim on the ground that the grant to Rajagopal Rao was not absolute but conditional, that the estate reverted to the grantor on Rajagopal's death without male issue, that the transfer of 1862 to her husband was valid, and that the appellant's claim was barred by limitation The Judge held that the grant of 1848 was conditional, and that, although the claim was not barred by limitation, the appellant was estopped from asserting that his paternal grandfather was not competent to transfer the estate under patta VI and that the transfer was valid. The Judge accordingly dismissed the suit with costs Hence this appeal.

We are unable to agree with the Judge that the doctrine of estoppel applies to this case It cannot apply when the person making the representation was not the person as whose representative the plaintiff claims the property, and in the case before us the appellant claims the estate in the right of his maternal grandfather, and not of his paternal grandfather, who was the person that declared that he was competent to transfer it under the patta VI This limitation of the doctrine of estoppel is mentioned not only in the case referred to by the Judge (*Syed Ameer Ali* v *Syed* [475] *Ali* (1), but also by the Privy Council in *Syed Nurul Hossein* v *Theosahai* (2) As to the question of limitation, the decision must depend on the further question whether the retransfer to the appellant's paternal grandfather was the result of collusion between him and his sister Gopayammi Act XIV of 1859 was the law of limitation in force until April 1873, and if the appellant's right were barred by that enactment, it could not be revived either by Act IX of 1871 or by Act XV of 1877, under which the death of the female on which the reversion becomes an estate vested in possession is the event from which time begins to run against the right of the reversioner to sue Assuming that there was no collusion between Appellant's paternal grandfather and maternal grandmother, and that the retransfer to the grantor was *bona fide*, the resumption by the grantor in 1856 would be an act done in enforcement of an adverse title against both the widow and the reversioner, and not merely an act done under an alienation by the widow The suit would then clearly be barred by Act XIV of 1859 It was also so held in *Tarini Charan Ganguli* v *John Watson* (3) and *Aumirtolall Bose* v *Rajoneekant Mitter* (4)

(1) 5 W R C R. 289 (2) 19 I A 221
(3) 3 B.L.R 437. (4) 2 I A 113

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The real question then for determination is whether the collusion alleged between Gopayammi and appellant's grandfather is proved. The *onus* of proving the fraud is clearly upon the appellant, and we are of opinion that his oral evidence is not reliable. It is true that his first three witnesses depose to a conversation between appellant's grandfather and maternal grandmother in which it was contrived that they should falsely represent to the Collector that the grant of 1848 was conditional. But we are unable to attach weight to their evidence. In the first place they are all *Ghosha* ladies in a position of dependance on the appellant, and in receipt of maintenance from him. They say they never mentioned what they then heard to any one before this suit, and it is improbable that they should be able to remember, at this distance of time, the particulars to which they depose.

We are further of opinion that the Judge is right in refusing to admit in evidence an alleged copy of the grant of 1848, on the ground that the original was not sufficiently stamped under Regulation 13 of 1816 which was in force in 1848. The copy [**476**] shows that the stamp used was of Rs. 8 value, whilst it ought to have been of Rs. 50 value. The value of the property is not mentioned in the copy. The Judge was, however, in our opinion, justified in ascertaining the value by reference to Exhibits I and II, and the value of the stamp which should have been used must be calculated with reference to that value. We also agree with him that the copy should not be admitted on payment of penalty, for the provision of the Stamp Act regarding payment of penalty (Section 39 of Act I of 1879) prescribes that such payment shall be endorsed on the document, and presupposes that the document is forthcoming. It was also held in *Kopasan* v. *Shamu* (1) that in the case of a lost document no penalty can be levied and secondary evidence admitted. As regards the contention that the *onus* of proving that the grant was conditional rests on the defendant, we are of opinion that the contention cannot be supported. In the written statement it was denied that any *patta* in writing was granted in 1848, and that there was any grant in April of that year at all, but it was alleged that there was a conditional grant in August 1848. Under these circumstances, we think it is incumbent on the plaintiffs to show that there was an unconditional grant in writing, this being part of his case. As was observed in *Poslin Beharee* v. *Watson and Company* (2) the averment in the written statement is not in the nature of a plea of confession and avoidance so as to shift the burden on to the defendant. Even assuming the *onus* of proof to have been on the defendant, the Judge's finding that the grant of 1848 was conditional is supported by several of defendant's documents XIV, XVI and XVII, the first of which contains an admission by the appellant's mother in 1874 that the original grant was conditional. The appeal therefore fails and we dismiss it with costs.

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(1) 7 M. 440. (2) 9 W.R. 190.

17 M. 477.

[477] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best.

1894 March 29.

Appellate Civil.

17 M. 477.

SIVAMMA (*Petitioner*), *Appellant* v SUBBAMMA (*Counter-petitioner*), *Respondent* * [20th February and 29th March, 1894]

Succession Certificate Act—Act VII of 1889, *Section* 7 (3)—*Power to grant certificate to applicant if he has the best* prima facie *title thereto—necessity for some inquiry prior to such a grant.*

The intention of sub-clause (3) to Section 7 of the Succession Certificate Act is not to save the Court the trouble of making any inquiry at all where the applicant is not heir to the deceased, but it is to allow the *prima facie* title to the certificate to prevail when a question of law or fact arises on inquiry too difficult to be determined in a summary proceeding

[**Appr.**, 23 C 431 (436), **R.**, 21 B 53 (54), 5 C W N 494 (496), 11 Ind Cas 835 (837)=21 M L J 824=10 M L T 164=(1911) 2 M W N 142, **Com.**, 24 M L J 198 (199).]

APPEAL against the order of W. M Thorburn, District Judge of Cuddapah, dated 16th September 1892, passed on civil miscellaneous petition No 169 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Parthasaradhi Ayyangar, for appellant

Krishnamachariar, for respondent

JUDGMENT.

This was a petition for a certificate under Act VII of 1889 to collect the debts due to one Sesha Reddi, deceased Sesha Reddi had a son named Venkatanarama Reddi, and the latter died in November 1886, leaving behind him a widow named Subbamma. The faher died on 22nd of March 1889, leaving him surviving, besides Subbamma, a widow named Chalamma and a daughter named Sivamma The daughter applied for the succession certificate and rested her claim on a will left by Sesha Reddi, dated 4th March 1889, and on a maintenance agreement executed by Subbamma on the 4th August 1889 Petitioner's case was that by the will she was constituted her father's heir, and that his daughter-in-law, Subbamma, acknowledged her preferential right It is alleged that no application was made by Subbamma, and the order made by the District Judge is " to give certificate to Subbamma, [478] on security " No reasons are assigned for the order, and it is urged for petitioner (and there is nothing to the contrary on the record) that no inquiry was held at all in regard to the will and the release set up by petitioner The petitioner's pleader contends that the procedure followed by the Judge is at variance with Act VII of 1889, and we are of opinion that the contention is well founded The procedure to be followed is prescribed by Section 7 of the Act It contemplates that in every case there should be a summary inquiry, and the Court should make an order for the grant of a certificate according to the result of such inquiry In any case in which it becomes necessary, in order to decide the right to the certificate, to determine any question of law or fact which is too intricate and difficult for determination in a summary proceeding, the Court is empowered to grant the certificate to

* Appeal against Order No. 145 of 1892.

1894 MARCH 29 — APPELLATE CIVIL. — 17 M. 477.

the applicant if he appears to be the person having *prima facie* the best title thereto. The intention is *not* to save the Court the trouble of making any inquiry at all where the applicant is not the heir to the deceased, but it is to allow the *prima facie* title to the certificate to prevail when a question of law or fact arises on inquiry too difficult to be determined in a summary proceeding. In cases in which no complicated issues are involved, and the issues are capable of being decided without difficulty in a summary proceeding, the Court is bound to determine the right to the certificate by summary inquiry. The difficulty felt must be the result of summary inquiry, and *not the a priori* theory that every inquiry into a special ground of claim urged to the certificate necessarily involves an inquiry too intricate for determination in a summary proceeding.

We set aside the order of the Judge and remand the case for disposal in accordance with law. Costs will abide and follow the result.

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17 M. 479.

[479] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SANKARALINGAM CHETTI (*Plaintiff*), *Appellant v.* SUBBAN CHETTI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.**
[12th and 29th March, 1894.]

Divorce—Caste custom—Whether immoral and therefore invalid or not

There is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's orginal marriage (*parisam*).

SECOND appeal against the decree of T. M. Horstall, District Judge of Tinnevelly, in appeal suit No. 346 of 1892, reversing the decree of V. Malhari Rao, District Munsif, Srivilliputtur, in original suit No. 100 of 1891

The plaintiff and defendants were members of the potters caste in Tinnevelly Plaintiff sued for the recovery of his wife, the second defendant, who, having left her husband, was living with the first defendant as his wife. The defence raised by the second defendant was that the plaintiff had ill-treated her and that according to caste custom she had repaid the plaintiff the *parisam*, or expenses of her marriage, thereby dissolving the marriage, and had married the first defendant.

The District Judge, reversing the decree of the District Munsif, dismissed the plaintiff's suit, and the latter preferred this appeal.

Narayana Rau, for appellant.

Venkatasubba Ayyar, for respondent No. 1.

JUDGMENT.

The question in issue is whether there has been a valid and legal divorce between plaintiff and second defendant, the District Judge finds in the affirmative.

The only point argued before us is whether the caste custom is valid, appellant's pleader contending that it is immoral, and, therefore, that

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* Second Appeal No. 696 of 1893.

the Courts will not recognize it Exhibits A and B go [480] to show that it has been recognized by the caste as an ancient and reasonable custom

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We do not think that the case of *Uji* v. *Hathi Lalu* (1) is in point, since the question there was whether the caste could sanction a woman's re-marriage without a *divorce*, *i e*, without a proceeding to which both husband and wife were parties Here the finding is that there has been a divorce according to the custom of the potters in Tinnevelly

The finding further is that divorce in this form is consistent with the 'original' customs of the potters, and, if this be so, the custom is sufficiently ancient. We do not see that it is immoral, since it does not ignore marriage as a legal institution, but provides a special mode by which it may be dissolved The fact that there is a money-payment does not make the custom immoral, and among the inferior caste similar customs are known to prevail

The second appeal fails and we dismiss it with costs

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17 M. 480.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Best

ESHOOR DOSS (*Plaintiff*), *Appellant* v VENKATASUBBA RAU (*Defendant*), *Respondent*.* [16th April and 11th September, 1894]

Indian Contract Act—Act IX of 1872, Section 30—Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing—Indian Evidence Act Section 92

A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs, for delivery on the following 30th of November On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November. A did not perform his contract to sell, and B sued him for damages, amounting to Rs 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell A denied that the transactions were *bona fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on the 30th of November, and that such a contract being, by way of wager, was void under Section 30 of the Indian Contract Act

[481] *Held*, per *Davies, J*, that neither party intended *bona fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract:

Held on Appeal (1), that the burden of proof that the agreements were wagers, *i.e*, that they were not in substance what they were in form, lay on A, as the party so alleging,

(2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, Section 92) *Anupchand Hemchand* v *Champsi Ugerchand* (I L.R, 12 Bom 585) followed, *Juggernauth Sew Bux* v *Ram Dyal* (I L R 9 Calc 791), dissented from,

(3) per *Muttusami Ayyar, J*, that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract,

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* Original Side Appeal No 36 of 1893

(1) 7 B H C.R.A.C J 133.

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APPELLATE CIVIL.

17 M. 480.

(4) *per Best, J.*, that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contract not to call for or give delivery from or to each other; see *Tod* v. *Lakshmidas Purshotamdas* (I.L.R. 16 Bom. 441) and *Grizewood* v. *Blane* (11 C.B. 526) and that no such common intention having been proved the contract was a valid one.

[**Affirmed**, 18 M. 306 (**F.B.**); **F.** 85 P.R. 1898; U.B.R. (Civil) (1897—1901) 399; **R.**, 22 B. 897 (903); 30 B. 83 (91)=7 Bom. L.R. 385; 12 Bom. L.R. 1062=8 Ind. Cas. 1051.]

APPEAL from the decree of Davies, J., sitting on the original side of the High Court in civil suit No. 74 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgments of the High Court.

DAVIES, J., dismissed the plaintiff's suit, and the plaintiff preferred this appeal.

The Advocate-General (Hon Mr. *Spring Branson*) and Mr. *R. F. Grant*, for appellant.

Mr. *Wedderburn*, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This is a regular appeal from the decree of Mr. Justice Davies. Plaintiff (appellant) is a sowcar and defendant (respondent) is a Pleader of the High Court, both residing at Madras. On divers dates between the 24th October and the 4th November 1891, the former agreed to buy and the latter to sell promissory notes of the Government of India, 4 per cent. loan, to the extent of 4¼ lakhs of rupees at premia varying from Rs. 5—4 to Rs. 5—11 per cent., the promissory notes themselves being deliverable on the 30th November 1891. On the 28th November 1891, two days prior to the date fixed for delivery, defendant agreed to buy and plaintiff to purchase a similar amount of securities of the same kind to be delivered on the same date but at a premium of 7 per cent. The plaint [**482**] stated that defendant broke his contract to sell and thereby became liable to pay plaintiff a compensation of Rs 7,109-6-0, which represents the difference between the price at which he was bound to buy and the price at which he was bound to sell. Defendant denied the claim *in toto* though he admitted the execution of the agreements. He contended that they were only nominal transactions, that neither he nor plaintiff ever intended that there should be an actual sale or transfer of Government paper, that the real contract was only to pay the differences, and that such contract, being by way of wager on the varying prices of Government promissory notes in the market, was not actionable. Another ground of defence was that plaintiff had agreed not to claim the difference until the expiration of six months from the date on which it became due, and consequently that the suit was premature. It was further urged by defendant that plaintiff neither tendered the price of the securities which he had agreed to buy nor the promissory notes which he had agreed to sell, and that he was not ready or willing to do either. The first four issues raised the question whether the agreements sued on were contracts of sale made *bona fide* in the ordinary course of business or by way of wager, and the fifth and sixth issues related to two other questions, *viz.*, whether the suit was premature and whether the plaintiff was ready and willing to perform his part of the agreement on the 30th November 1891. The learned Judge decided the fifth issue against the defendant, and all the other issues in his favour and in the result he dismissed the suit but without costs. Hence this appeal.

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Three questions of law arise for consideration in this appeal and on each of them the decision of the learned Judge is correct The first is as to the burden of proof. The contracts sued upon are in form agreements to sell promissory notes of the Government of India, and there can be no doubt that it is the party who alleges that those agreements are not in substance what they purport to be, that ought to prove his case. In the absence of proof to the contrary, the presumption is that a transaction is in substance what it is in form The second question is whether oral evidence is admissible for the purpose of showing that an agreement in writing to sell Government paper is really an agreement made by way of wager on its market price on a future day. On this point, there is a conflict of opinion, the High Court at [**483**] Calcutta holding that it is not admissible whilst the High Court at Bombay holds that it is I agree in the opinion of the learned Judge that the Calcutta decision does not give, whilst the Bombay decision gives, due effect to the provisions of Section 92 of the Indian Evidence Act, compare *Juggernauth Sew Bux* v *Ram Dyal* (1) with *Anupchand Hemchand* v *Champsi Ugerchand* (2). The first proviso of that section enacts that any fact may be proved by oral evidence which would invalidate any document or which would entitle any person to a decree or order relating thereto, and assuming that in the case before us, defendant is entitled to a decree in case he shows that the agreements which form the subject of this litigation are gaming contracts, he is clearly entitled to adduce oral evidence in proof of its averment, but not precluded from doing so by that fact not being stated in the documents themselves The third question is as to the specific incident which distinguishes agreements by way of wager from agreements to buy or sell made in the ordinary course of business The general rule is that when two parties agree that the one is to sell and that the other is to buy Government promissory notes at a certain premium, and that the promissory notes are to be delivered by the one and accepted by the other on a future day, whatever may be the rate of premium at which those securities may sell in the market on that date, the agreement is perfectly valid, the reciprocal promises to buy and sell being the consideration for each other. An agreement to sell or buy Government paper is a contract which the law permits in common with any other contract to sell or buy goods. To this general rule, however, Section 30 of the Indian Contract Act introduces an exception and provides that agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which the wager is made. If two parties bet, therefore, on the premium at Which Government securities may sell in the market on a future date, and the one promises to pay certain sum of money to the other according as the actual market price on that date is one way or the other, the transaction is not a real sale as recognized in the ordinary course of business, but a gambling on the premium at which Government [**484**] securities sell in the market from time to time. Such gambling is forbidden on considerations of public policy by Section 30 of the Contract Act which enacts that no suit will lie to recover anything won on the wager It is true that both in contracts of sale and in gaming contracts the market rate of premium on the future date is uncertain and that both may be highly speculative and risky, resulting in considerable profit to

(1) 9 C 791 (2) 12 B 585.

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one party and loss to the other. But in the one, the actual sale or transfer of Government paper is the basis of the speculation, and in the other, it is a naked speculation, having no connection with any business which is intended to be carried on. The essential difference, then, between the two classes of transactions consists in this—that in agreements by way of wager, there is no intention at the time when they are made to sell or buy Government paper or to do more than to speculate and pay the difference. In *Thacker* v. *Hardy* (1) Lord Justice Cotton says that the essence of gaming and wagering consists in the agreement that one party is to win and the other party is to lose upon a future event, which at the time of the agreement is of an uncertain nature, that is to say, that if the future event turns out one way, the plaintiff is to win and if it turns out the other way, he is to lose. In *Grizwood* v. *Blane* (2) the Lord Chief Justice observes " we ought to see what was the plaintiff's intention and " what was the defendant's intention at the time of making the agree- " ment, whether either party really meant to sell or buy and if they did " not, it was a gambling transaction." Thus, in coming to a decision as to whether the agreements which the plaintiff seeks to enforce are agreements by way of wager, we have to consider whether the real intention at the time when those agreements were made was to buy and sell Government paper.

The Privy Council ruled in *Ram Loll Thackoorseydas* v. *Soojumnul Dhondmull* (3) that a wager upon the average price which opium should fetch at the next Government sale at Calcutta was not illegal or contrary to public policy, but that decision proceeded on the ground that the Statute VIII and IX Vict., c. 109, did not extend to India. But the Contract Act which came into force in this country in Sepember 1872, altered the law as it stood in 1848 when the Judicial Committee decided that case.

[485] I now proceed to consider the evidence so far as it bears on the intention of the parties when the agreements which form the subject of this litigation were made.

As his first witness, defendant states that he entered into the agreements on the understanding that he was to pay only the difference in the premia, that he never considered himself to be under an obligation to deliver Government paper, and that though the sale notes E1 to E7 referred to such delivery, he knew that resale notes would be executed so as to cancel them at the end. He goes on to observe that he had no sufficient means to undertake to deliver Government paper to the extent of 4¼ lakhs and that he would not have made the contracts in question if he had to deliver Government paper. He has not been cross-examined as to his means and there is no other evidence to contradict him. It appears further from Exhibit A which is a letter of demand addressed to defendant by plaintiff's solicitors on the 30th November which is the day fixed in the sale notes for delivery, that defendant was called upon to pay the difference, but *not* to deliver Government paper. If defendant's evidence is reliable, as I think it is, there can be no doubt that at all events he had no intention to deliver Government paper and that the agreements were at their very inception mere contracts to pay the difference in the premia.

The only other witness, who was present when three of the seven agreements E1 to E8 were made, is the broker, Syed Meah, defendant's

(1) L.R. 4 Q.B.D. 685. (2) L.R. 11 C.B. 526. (3) 4 M.I.A. 339 (346).

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third witness. He deposes that though he negotiated three sales as broker, he does not know whether the agreements evidenced by E1 to E8 were intended to be only contracts to pay the difference or *bona fide* contracts of sale He admits in his evidence that the majority of dealings in Government paper, as carried on in the bazaar, and without the intervention of a bank, are contracts to pay the difference only Seeing that the plaintiff, on whose behalf the broker acted, was not present when the agreements were made and that the latter was aware that most of similar dealings in the bazaar were contracts to pay the difference, it is anything but natural or likely that Syed Meah should not have distinctly ascertained whether Government paper was really intended to be transferred The evidence of this witness appears to me, therefore to be evasive, and it discloses also traces of basis in favour of Raja Eshoor Doss This is all the direct evidence [**486**] bearing upon the specific agreement which form the subject of this suit

But these agreements were made in the bazaar, otherwise than through a bank There is strong evidence to show that the majority of dealings in the bazaar in Government paper are only contracts to pay the difference Defendant and his second witness, a broker, swear that all the dealings in the bazaar are of that description, whilst defendant's third witness, another broker, and plaintiff's second witness, who is a stock broker, and his third witness who often assists him in his business depose that the majority of them are contracts to pay the difference This circumstance raises a presumption in favour of the defendant's case

The extent to which such dealings were carried on in the bazaar both by defendant and plaintiff as contrasted with their means of life renders it probable that they were mere contracts to pay the difference Defendant states that his transactions in the bazar amounted to 7 lakhs of rupees in September 1891, to 20 lakhs in October and to 21 lakhs in November His position in life is that of a Vakil of the High Court who, finding his practice not sufficiently remunerative, has resorted to this form of speculation though on his own showing he has no means to deliver Government paper to the extent of 4¼ lakhs. As for the plaintiff, he states that he is worth 6 or 7 lakhs, and I am of opinion that the learned Judge is warranted in saying, after discussing his evidence and Exhibit, I, that it is not probable that in one month he would venture the whole of his wealth in speculation.

It is a peculiar fact in the case before us that there is a resale note (Exhibit III), or cancelling contract as the defendant calls it, the amount and description of Government securities resold to defendant being the same as those originally sold by him This is generally the case with dealings in the bazaar Defendant says in his evidence in connection with those dealings, " we exchange, bought and sold notes at first and " cancel them at the end with the same parties or other parties whom " they nominate, paying the difference There are 30 or 40 people so " speculating and the plaintiff is one of them." On this point defendant's second witness, Muni Subbarayulu, states that the entry about delivery of Government paper in the original sale notes is only nominal It is a sale in the sense that the difference in the premia is to be [**487**] adjusted. If the transactions take place in the bazaar, it is the difference only that is adjusted If there is to be a real delivery of Government promissory notes, it is done through the bank. if the amount is at all considerable.

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Considering again what took place on the 28th November, which is called the settling day, there is strong reason to think that the agreements sued on were merely contracts to pay differences. As to what took place on that day, defendant, his second and third witnesses, plaintiff and his third witness, Venkatachella Chetty, give evidence of which the following is the effect:—

About the 28th November the price of Government promissory notes was rising in the market and plaintiff and others, who had agreements from defendant to sell, attended to call on him to settle with them. Plaintiff's third witness, Venkatachella Chetty, called on defendant to close his transaction by giving counter-contracts of purchase, and defendant, saying he was in difficulties, offered to pay 8 annas over and above his selling price. Two persons named, Krishnasami Chetty and Namboo-perumal Chetty, agreed to those terms but Goverdana Doss, plaintiff, and Venkatachella Chetty insisted on full terms and went away. However, they returned again, according to the evidence, at 6 o'clock in the evening and renewed the discussion and on defendant's repeating his old terms plaintiff went away asking Venkatachella to settle for him on the same terms on which Goverdana Doss and Venkatachella should settle for themselves. Some one present then suggested that full differences should be paid and that six months' time should be given for the payment. Defendant agreed to this sugestion and Goverdana Doss accepted those terms. Venkatachella Chetty also did so on his own account and on behalf of the plaintiff. Then Goverdana Doss gave a resale note to defendant for 6¼ lakhs and took from the latter a promissory note for the difference in the premia. Then Venkatachella resold 4¼ lakhs on plaintiff's behalf and 2¼ lakhs on his own account. On the 2nd or 3rd December next Venkatachella brought to him from the plaintiff his resale note III and delivered it to defendant.

Thus, what took place on the 28th November furnishes strong ground for the opinion that no Government paper was originally intended to be sold. Otherwise it is not possible to account for not a word being said about the delivery of Government paper or about the tender of its price or for plaintiff meeting defendant two [488] days before the date fixed for delivery. The explanation given by defendant is probably true. As it was thought that the price of Government securities might rise or fall by the 30th, each party desired to take advantage of this element of uncertainty and adjust the difference in the best way he could to his best advantage. Nor do I see why, if a real sale was originally contemplated, a resale note for the amount of the original sale note should be executed in every case. Looking again to the number of persons that settled with defendant on the 28th November, and the aggregate value of Government paper on which he agreed to pay the difference, it is impossible to believe that with his limited means he could have intended a *bona fide* sale of Government paper or that his original intention could have remained unknown to plaintiff who systematically speculated on the difference in the premia. Passing on to plaintiff's witnesses, the first witness is plaintiff himself. He was not present when the agreements were made and his statement that they were *bona fide* sales of Government paper is not entitled to much weight. He does not explain why a resale note was executed. He admits a number of transactions of very considerable value in which he received only the difference.

His second witness is one Mr. Berry, a stock-broker at Madras. His evidence is that sales of Government paper in the bazaar are generally met

by native dealers by payment of the differences He appears to me to overlook the class of cases in which the original intention was only to pay differences and to assume that there is in the first instance a *bona fide* sale in every case I do not desire to be understood as holding that *bona fide* sales of Government paper may not be adjusted by payments of the difference between the contract price and the market price on the day fixed for delivery so as to supersede the necessity for delivery of Government paper But what I do hold is that when there is no original intention to deliver Government paper and when the contract is at its inception a contract to pay only the difference, such contract is in law a gaming contract

Plaintiff's third witness is one Venkatachella Chetty, who had also a similar agreement whereby defendant engaged to sell Government paper for 2½ lakhs to him.

Adverting to the transactions in Government paper in the bazaar the witness states as follows "I did not expect that Government promissory notes would pass from hand to hand [489] The profits and loss of each transaction between the selling price and the market price on the day of settlement would be compared, a balance struck and the difference paid The practice was to buy and sell the same quantity of paper, but it did not matter from whom it was bought and sold. There was no intention at the time of purchase that Government promissory notes should be actually delivered or money paid" He gave a resale note to defendant on account of his own transaction, and he states that plaintiff also gave a similar note to defendant

Thus, in favour of the view that when the agreements in suit were made there was no intention to deliver Government paper, there is first defendant's evidence, there is next the fact that the broker, with whom three such agreements were made does not contradict him and swear to the contrary; and there is, again, the presumption arising from defendant's and plaintiff's means in life and from the general character of dealings in Government paper in the bazaar There is further the cancelling contract or a resale of the same quantity of paper by plaintiff to defendant There is also the statement of plaintiff's third witness that at the time of purchase there is usually no intention to deliver Government paper or to pay its price There is further the fact that plaintiff had a large number of transactions in which differences were alone paid as shown by Exhibit I There is again the conduct of plaintiff and other dealers with defendant on the 28th November which raises a presumption in favour of his contention.

In favour of the view that the agreements were *bona fide* sales, there is the form of the agreements and there is Raja Eshoor Doss' statement Weakened as it is by the circumstanees mentioned in the last paragraph, upon the whole evidence there is no reason to doubt that it was the defendant's intention only to pay the differences That being so, the plaintiff was aware or not aware of such intention If the former was the case, it was a gaming contract; if the latter, there was no *consensus* as to a matter which is of the essence of the contract, and therefore no valid contract. However, the broker's evasive evidence and his omission to contradict the defendant, the position of Raja Eshoor Doss as a sowcar, who is in frequent communication with brokers and dealers in the bazaar, and presumably familiar wtih the general character of dealings in Government paper in the bazaar, the defendant's statement that plaintiff is one of the thirty or forty in the bazaar that [490] speculate in the manner described by him and the accession of strength which that story receives

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from the execution of a resale note, and from the difference being demanded before the due date and from conduct of the parties on the 28th November, and from the extent of dealings carried on by them as compared with their means—these circumstances lead me to the conclusion that the learned Judge was right in upholding the defendant's contention.

I would accordingly dismiss this appeal with costs.

I would also disallow the memorandum of objections.

BEST, J.—The suit was brought for the recovery from defendant of a sum of Rs. 7,109-6-0 (with interest thereon) as the amount due to plaintiff from defendant on account of dealings in promissory notes of the Government of India 4 per cent. loan.

Plaintiff's case is that he purchased from the defendant on various dates in October 1891 and on the 4th of the following month at rates varying from Rs. 105-4-0 to Rs. 105-11-0 Government promissory notes of the aggregate value of 4½ lakhs deliverable on the 30th November 1891—and resold the whole lot to defendant on the 28th November at the rate of Rs. 107 per cent., the date of delivery being the same 30th November, and that the amount due to him (plaintiff) on account of these dealings is Rs. 7,109-6-4, which he now seeks to recover with interest at 12 per cent. per annum from 30th November 1891.

The defendant admitted the facts of sale and purchase of Government notes as stated in the plaint, but pleaded (1) that the transactions were of the nature of gambling, and therefore, void under Section 30 of the Contract Act; (2) that plaintiff had failed to perform his part of the contract; (3) that the suit is premature, plaintiff having agreed to allow defendant six months' time for making the payments in question.

The learned Judge in the Court below found the two latter pleas to be invalid; but on the first plea he found in favour of the defendant and dismissed the suit.

The question for consideration is, therefore, whether the learned Judge is right in holding the agreements between plaintiff and defendant for purchase and sale of Government securities to be void as gaming transactions.

The law on the subject is clearly stated by FARRAN, J., in [491] *J. H. Tod* v. *Lakhimidas Purshotamdas* (1) in the following words:—"Contracts are not wagering contracts unless it be the intention of *both* "contracting parties *at the time of entering into the contracts under no* "*circumstances to call for, or give delivery*, from or to each other." See also *Grizewood* v. *Blane* (2). The question is, therefore, was it the intention of both plaintiff and defendant in this case at the time of making the agreements for sale by defendant to plaintiff of the Government securities that there should be no actual sale and purchase of Government promissory notes, but only payment of differences in the price of the securities on the 30th November. In this latter case the suit has been rightly dismissed, but in the former, defendant's plea under Section 30 of the Contract Act must be disallowed. This question is one of fact and no doubt the burden of proof is on the defendant.

Before the evidence is considered, it is necessary to dispose ot the objection taken on behalf of the appellant (plaintiff) that oral evidence is inadmissible to vary or contradict the terms of the contracts which are evidenced by the bought and sold notes. Such was no doubt the ruling of the Calcutta High Court in *Juggernauth Sew Bux* v. *Ram Dyal* (3),

(1) 16 B. 441 (445). (2) L.R. 11 C.B. 526. (3) 9 C. 791.

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but as observed in *Anupchand Hemchand* v *Champsi Ugerchand* (1), the effect of proviso I to Section 92 of the Evidence Act does not appear to have been considered by the learned Judges who decided the Calcutta case, relied on by the appellant Under that proviso oral evidence is clearly admissible to prove any fact which would invalidate a document, and it is for such a purpose that the oral evidence has been tendered and admitted in the present suit.

I now proceed to consider the evidence The first witness is the defendant himself He no doubt says that the understanding with which he sold was that differences (in price) should be paid on the day of settlement, and that he himself "would not have entered into a contract for "the actual delivery of 4½ lakhs of Government paper," as he "could not have done it" not having sufficient means There is every reason to believe that this latter statement is quite true, but his intention alone is not sufficient to make the transactions one of gaming and therefore void As already observed it is only if both parties intended at the time of [492] entering into the agreement that there should be nothing more than payment of differences that defendant's plea will be of avail to him. Defendant admits that he "never saw the plaintiff personally till "28th November," *i.e*, the date on which took place the resale to defendant of all the 4½ lakhs of Government securities that had been previously purchased by plaintiff from defendant He says "I don't know that plaintiff said anything to me" even then, and he admits that plaintiff "went away without setting anything, and that it was Venkatachella "Chetty (plaintiff's third witness) who resold to him the 4½ lakhs on "plaintiff's behalf."

Venkatachella Chetty's evidence is to the effect that when he made the contract for plaintiff on the 28th November he was "not instructed "to make it specially with the defendant," but was free to make it with any one, plaintiff having simply directed him to sell the 4½ lakhs of paper in the market, without giving any special directions whatever This witness further states that the broker, through whom the sale to defendant of the 4½ lakhs, was effected on the 28th November, was Muni Subbarayalu

This Muni Subbarayalu has been examined as defendant's second witness. He merely saw plaintiff on that day, as he was coming downstairs from defendant's office, when plaintiff told him that he objected to defendant's offer to pay 4 or 8 annas per 100 rupees All the above witnesses speak merely to the transaction of 28th November, and not to the understanding between the parties at the time when the original purchases were made by the plaintiff

The broker by whom the first three of those purchases were made is Syed Meah Sahib, who has been examined as defendant's third witness He no doubt states that the "majority of dealings in Government paper "in the bazaar are contracts merely for the payment of differences," but he also expressly states that he "cannot say whether this was one of those or not," and in cross-examination he further states that he is "quite "sure when these contracts were entered into, nothing was said about "adjusting differences by counter-sales," and that he himself "did not "know at the time whether paper was really to pass or only differences "to be paid." He has no doubt stated that a few days after the contracts, plaintiff asked him if defendant would be able to fulfil his contract

(1) 12 B. 585.

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"Whether he would pay differences, for he seemed to be dealing recklessly." But in cross-examination he gives a [493] more particular account of the conversation as follows:—What he said was "I hear "Venkatasubba Rao (the defendant) is selling papers recklessly and I "fear very much about it." Then I said "He is a straightforward "gentleman; there will be no fear." Then Raja (*i.e.*, plaintiff) said "Will he pay the differences? If so I shall buy paper from others and "give delivery to others to whom I have sold paper." "His meaning "was," says the witness, "to close the contracts with the defendant on "the delivery day or it may be earlier to save trouble, and *buy elsewhere* "*to supply people to whom he had sold.*"

This is all the evidence for the defence and I am of opinion that it is far from sufficient to prove that at the time of entering into the contracts with defendant for the purchase of the Government securities, the understanding on both sides was, that there was only to be payment of differences.

The fact of plaintiff having resold the whole of the 4¼ lakhs to defendant on the 28th November is not evidence of intention on the several dates of purchase by plaintiff. Nor is the intention on the part of defendant to pay differences sufficient to render the contract void. As appears from defendant's own evidence in the connected case (original suit appeal No. 37) such was also his intention in contract for Government paper entered into by him with the Madras and Agra Banks in which contracts, he says "my intention was only to pay differences." He further admits that he has also entered into what he calls "cancelling contracts" with the banks.

There being a mutual understanding for sale of a certain quantity of Government securities on a fixed date at a fixed price, the mere fact of an undisclosed intention on the part of defendant to pay differences only cannot invalidate the contract. As observed by Sir F. Pollock in his principles of contracts, fifth edition, page 5—"the law does not allow a "party to show that his intention was not in truth such as he made or "suffered it to appear."

Plaintiff declares that he had the intention of buying and was both in a position to pay and willing to do so. He admits that he bought with the intention of selling again and making a profit. This amounts to speculation, it is true; but there is no law against speculation. As pointed out by Lindley, J., in *Thacker* v. *Hardy* (1), [494] it required in England a statute, VII Geo. II, ch. 8, to prevent gambling in the public funds; and further, "notwithstanding the strong condemnation of such "gambling in the preamble, the Act itself was repealed in 1860; and even "when the Act was in force, gambling in shares and foreign stocks was "held not to be illegal either under the Act or at common law."

I am unable to attach weight to the argument founded on the circumstances of plaintiff's dealings being equal in amount to the value of his whole estate. He is admittedly a wealthy man and there is no reason for supposing he could not have met his liabilities. Nor do I think the fact of his having resold the whole amount to defendant on the 28th November is a circumstance entitled to weight against the plaintiff. Defendant was thus afforded an opportunity of reducing his losses if the price of Government notes should rise during the next two days, and defendant himself has admitted (as observed above) that such "cancelling contracts," as he calls them, are allowed by respectable banks. It

(1) L. R. 4 Q.B.D. 685 (688).

is true that plaintiff has admitted that if defendant had paid him the difference between selling price and the market price on the date of delivery he would have been satisfied, that this was the profit he intended to make, and that if the price of Government paper had gone down he himself should have paid the defendant the difference between the contract price and the market price, but he adds " that was not the understanding " at the time of making the contract," and explains this last sentence of his by saying that it was only if the defendant had asked him for the difference he should have paid the difference, and that the intention was that the notes should be delivered.

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Plaintiff's second witness, Mr Berry, is a stock-broker, who has been concerned in the purchase and sale of Government paper for the past twelve years He says " there are many transactions in Government " paper, in which Government paper does not change hands. On settling " days *either the difference is paid or the notes delivered* Native dealers " in the bazaar make contracts for the actual delivery of paper, but they " generally meet them by asking the purchaser to take delivery from " somebody else and paying or receiving the difference or by selling back " He further states " there are fixed settling days once a month, generally " at the end of the month, for completing transactions that have been " entered into This is done on the principle of a bank [**496**] clearing " house The reason is to avoid the risk of large quantities of paper " being handed about over the market Unless there were a settling day, " there would have to be a delivery on every purchase The paper would " soon get dirty and want renewal, and numerous endorsements are " saved "

Having carefully considered the evidence on both sides, I am unable to concur in the finding arrived at by the learned Judge in the Court below, that the understanding between both the parties was from the beginning that there should only be payment of differences

As to the memorandum of objections filed on behalf of the respondent, I agree with the learned Judge in finding that defendant failed to prove the alleged agreement to allow six months' time for payment, and I also concur in the finding that there is nothing in the objection as to want of tender by the plaintiff, as there was in fact nothing that plaintiff had to tender

As to the defendant's costs in the Court below, I am of opinion that, considering the nature of the defence set up, defendant was rightly disallowed his costs

I would, therefore, disallow all the respondent's objections, and give plaintiff a decree for the amount claimed by him But as my learned colleague has come to a different conclusion, the decree of the learned Judge in the Court below must be affirmed, and this appeal dismissed under Section 575 of the Code of Civil Procedure

Branson & Branson, attorneys for appellant

Wilson & King, attorneys for respondent

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Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATACHELLA CHETTI (*Plaintiff*), *Appellant v.* VENKATA SUBBA RAU (*Defendant*), *Respondent.** [16th April and 11th September, 1894.]

Indian Contract Act—Act IX of 1872, Section 30—Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Contracts for payment of differences only

A having on various occasions sold certain amounts of Government promissory notes to B, aggregating on the whole to 2½ lakhs, for delivery on 30th November 1891, B on the 28th of November sold the same amount to A for delivery on the 30th November. On that day B, through his attorneys, called upon A to retain the 'paper' contracted to be sold by A to B in respect of that contracted to be sold by B to A, and to pay the differences in the prices of the two contracts to B, and subsequently sued him for the amount.

Held, that on the evidence B having admitted that the original contract sued on was for payment of differences only, that it was a wagering contract, and therefore void;

Held, on appeal *per Muttusami Ayyar, J.,* that the above judgment should be confirmed;

Per Best, J., that on the evidence it was not proved that at the time of entering into the original contract the intention of both parties was merely for payment of differences, and that consequently the contract was not a wagering contract, but a valid one.

APPEAL from the decree of Davies, J., sitting on the original side of the High Court in original suit No. 75 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of Mr. Justice Davies, which was as follows:

" The judgment in this case follows the judgment in the connected " case No. 74 of 1892, the facts and the pleadings being similar and the " evidence in that case having been treated as evidence in this. The " differences here are (1) that the amount involved is in connection with " transactions for 2½ lakhs of rupees, the amount of difference claimed " being Rs. 3,312-8-0; (2) that the plaintiff is not a man of wealth like " the plaintiff in the other [497] suit; and (3) that he has put himself " out of Court by practically admitting that the contract was for payment " of differences only and therefore was a wagering contract in the eye " of the law.

" For the like reasons as are given in my judgment in the other suit, " this suit is dismissed but without costs."

The plaintiff thereupon preferred this appeal.

The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *R. F. Grant,* for appellant.

Mr. *Wedderburn,* for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The learned Judge rests his decision in this case against the plaintiff on his practically admitting that the contract sued on was for payment of differences only, and on the reasons assigned by him for his decision in original suit No. 74 of 1892. I concur in that

* Original Side Appeal No. 37 of 1893.

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opinion for the reasons mentioned in my judgment in regular appeal No 36 of 1893 I would dismiss this appeal also with costs, and disallow the memorandum of objections

BEST, J —This suit was tried with original suit No 74 of 1892, which forms the subject of appeal in original suit appeal No 36 of 1893

The learned Judge has dismissed the suit for the reasons given in his judgment in the connected suit with the remark added that the plaintiff in this suit has "put himself out of Court by practically admitting that the "contract was for payment of differences only" But on referring to the evidence in the case I am unable to find any such admission on the part of the plaintiff Plaintiff's statement (as his own first witness in the case) is that the "intention was to get actual delivery of paper, but *if he "sold again to the same party then differences only were to be paid,"* and as a matter of fact a sale to defendant was made on the 28th November, *i e.*, two days before the date on which defendant was to deliver under the original contract I have no doubt whatever the plaintiff was, in a sense, gambling in Government paper, but such gambling, however demoralizing and reprehensible, is not illegal, as observed in *Thacker* v. *Hardy* (1) In the absence of proof that at the time of entering into the original agreement the understanding of both parties was that it was merely for payment of differences I am of opinion—for reasons stated in my judgment in [498] original suit appeal No 36 of 1893—that the contract between the parties cannot be held to be void within the meaning of Section 30 of the Contract Act

If the same objections have been filed in this case, I would disallow them for the reasons stated in my judgment in that case, and, also for reasons stated in that judgment, I would allow this appeal, but as my learned colleague's finding is in favour of the respondent, the decree of the learned Judge in the Court below must be affirmed, and this appeal dismissed with costs under Section 575 of the Code of Civil Procedure

Branson & Branson, attorneys for appellant

Wilson & King, attorneys for respondent

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17 M. 498.

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr Justice Best

BALA PATTABHIRAMA CHETTI (*Defendant No* 1), *Appellant v.* SEETHARAMA CHETTI AND ANOTHER (*Plaintiff and Defendant No* 2), *Respondents* * [29th and 30th March, 1894.]

Code of Civil Procedure—Act XIV of 1882, *Sections* 510, 524*—Reference to arbitration—Refusal of person appointed arbitrator to act—Appointment of arbitrator by Judge under Section* 510*—Effect of Section* 524 *on such appointment*

The words 'so far as they are consistent with any agreement so filed' in Section 524 of the Code of Civil Procedure do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that Section 510 has otherwise no application. The reasonable construction is that the action of the Judge under Section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject

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*Appeal No 107 of 1893

(1) L.R. 4 Q.B D., 685.

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[R., 9 Ind. Cas. 173 (F.B.)= M.L.T. 251=21 M.L.J. 263=(1911) M.W.N. 151 (155); 38 P.L.R. 1901=110 P.R. 1900.]

APPEAL against the decree of D. Irvine, District Judge of Coimbatore, in original suit No. 19 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Ramachandra Rau Saheb, for appellant.

Mr. *Grant* and *Lakshmana Chetti*, for respondent No. 2.

Bhashyam Ayyangar, for respondent No. 1.

JUDGMENT.

[499] MUTTUSAMI AYYAR, J.—Three was a controversy among three brothers governed by Hindu law as to the partition of their family property. They entered into an agreement on the 3rd October 1890, referring the matters in difference between them to two arbitrators and one umpire for decision. The arbitrators named in the agreement were one Kasturi Chettiar, nominated by one of the three coparceners called Bala Pattabhirama Chetti, and one Padmanabha Chettiar named by the other two coparceners, Seetharam Chetti and Subbaratnam Chetti. The agreement was filed in the District Court of Coimbatore under Section 523 of the Code of Civil Procedure, and the Judge made an order of reference in accordance therewith. But Kasturi Chettiar refused to act as arbitrator, and the late Judge, Mr. Irvine, appointed Adinarayana Chettiar in his place under Section 510 of the Code of Civil Procedure. The arbitrators, thus constituted, made an award on the 3rd August 1891, and the Judge, modifying it in certain matters under Section 518, adopted it, and passed a decree in its terms as altered by him. Hence this appeal. For the appellant it is contended that there is no legal basis for the award. It is urged (i) that the words in Section 524, "so far as they are consistent "with any agreement so filed," signify that the award should be made by the arbitrators named in the agreement, and that if any of them is unwilling to act, the agreement, which is the basis of the award, becomes inoperative, and (ii) that the Judge's finding that Kasturi Chettiar consented to arbitrate previous to the order of reference is not warranted by the evidence in the case.

As regards the first contention, I am unable to accede to it. The words in Section 524, "so far as they are consistent with any agreement "so filed," do not mean, as argued by appellant's pleader, that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that the Judge may act in conformity to it, and that Section 510 has otherwise no application. The reasonable construction is that the action of the Judge under Section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject. Section 524 should be read as if it contained the words "in the absence of anything in the "agreement to the contrary, Section 510 is applicable." This view appears to me to be in accordance with the scheme of arbitration contained in Chapter XXXVII of the Code. That [500] chapter provides for arbitration in three modes (i) by an order of reference in a suit already pending; (ii) by an order of reference based on an agreement filed for that purpose; and (iii) by enforcement of an award already made by arbitrators without the intervention of the Court. It enacts distinct provision as to various matters in order that the order of reference made in a suit pending may not prove abortive, but result in an award according to the

original intention of the parties In dealing with orders of reference made upon an agreement, the Code gives effect to the intention of the parties embodied in the agreement, in cases to which Section 510 would apply, if the order of reference were made in a pending suit, by providing that the foregoing provisions, *viz*., Sections 509 to 522, shall apply, that is to say, be taken to be intended by the parties to the agreement to apply, provided that there is nothing inconsistent in that agreement with such intention. When a number of incidents are considered to be the ordinary incidents of a contract, such as of a lease or mortgage, &c , and the intention of the legislature is to preserve the contractual freedom of the parties, *quod* those incidents, it is usual for the legislature to indicate that intention by saying that in the absence of a special provision to the contrary the incidents specified shall be taken to be the incidents intended to be included in the particular contract in dispute It is a rule of convenience designed to avoid repetition The first contention must be disallowed.

1894 MARCH 30. — APPELLATE CIVIL. — 17 M. 498.

As regards, however, the finding that Kasturi Chetti consented to arbitrate previous to his nomination, I do not think that the evidence supports it. Kasturi Chetti denies that he was ever consulted or agreed to act as arbitrator. The other arbitrator, Padmanabha Chetti deposes that Kasturi Chetti was unwilling to act when he was communicated with after the reference had been made He was not asked whether previous to the reference Kasturi had consented or not These are disinterested witnesses, and their evidence does not show that it was ascertained that Kasturi Chetti had consented to act prior to the order of reference Though the second defendant says that Kasturi consented to act, yet his evidence is that of an interested party, and it is not safe to rely upon it unless it is corroborated. The reason assigned by Kasturi for his reluctance to arbitrate is that both parties are his relatives, and it is not unnatural that he should be unwilling to [501] occupy a position in which his decision may be obnoxious to one or other of his relatives It has already been held in the cases of *Puaardin* v *Moidin* (1) and *Bepin Behari Chowdhry* v. *Annoda Prosad Mullick* (2) that Section 510 is not applicable unless, as its language implies, the arbitrator who is superseded for being unwilling to act, previously consented to arbitrate On the ground that Kasturi Chetti never consented to his appointment as arbitrator and that Section 510 is not applicable, I would set aside the decree appealed against, and direct that this suit be dismissed with costs

BEST, J.—I concur.

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17 M. 501.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar.

ORR (*Plaintiff No.* 1), *Appellant v.* MUTHIA CHETTI (*Defendant No.* 1), *Respondent* * [22nd December, 1893 and 24th January, 1894]

Receiver—Appointment of a receiver by a Court under Section 503 of the Code of Civil Procedure—Misappropriation by the receiver—Whether, subject to the receiver's liability, the creditor or judgment-debtor must bear the loss

In cases in which a receiver, appointed at the instance of the judgment-creditor under Section 503 of the Code of Civil Procedure, misappropriates

* Appeal against Appellate Order No 63 of 1892

(1) 6 M 414. (2) 18 C 324

1894 JAN. 24.

moneys collected by him, the decree is not satisfied *pro tanto,* but the loss falls on the estate or its owner, subject to the receiver's liability.

[Affirmed, 20 M. 224; Appl., 2 C.L.J. 602 (611).]

APPEL-LATE CIVIL.

17 M. 501.

APPEAL against the order of T. Weir, District Judge of Madura, dated 26th August 1892, passed on C.M.A. No. 8 of 1892, confirming the order of S. Dorasawmy Ayengar, District Munsif of Sivaganga, passed on execution petition No. 274 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The Lower Courts decreed in favour of the defendant and the plaintiff preferred this appeal.

Bhashyam Ayyangar, for appellant.

Sundara Ayyar, for respondent.

JUDGMENT.

[502] In original suit No. 415 of 1884 on the file of the Disrtict Munsif of Sivaganga, appellant obtained a money decree against respondent. In execution of the same, the produce of the village of Kumbanur in fasli 1299 was attached by appellant, and on his application, a receiver was appointed under Section 503 of the Code of Civil Procedure to superintend the harvest and to recover the melvaram. The receiver collected a sum of Rs. 845-2-7 on account of the melvaram, but instead of remitting the amount to the Court, misappropriated it to his own use. Thereupon, respondent instituted Criminal Proceedings against him, and the receiver absconded and is still absconding. Appellant then applied for execution against respondent in respect of the balance due under the decree, and the latter contended that the decree must be taken as satisfied to the extent of the sum of money misappropriated by the receiver, from whom, it would appear, no security was taken, for the due performance of his office. Both the Courts below disallowed the contention, hence this appeal. The question which arises for determination is, whether in cases in which a receiver appointed at the instance of the judgment-creditor under Section 503, misappropriates his collections, the decree ought to be treated as satisfied *pro tanto,* on the ground that he is the agent of the judgment-creditor on whose application he was appointed.

The only case cited at the hearing is that of *John Tiel and Co.* v. *Abdool Hye* (1). That was decided under Section 243, Act VIII of 1859. There the manager exceeded the powers conferred upon him by the Court, and mortgaged the attached property with the consent of all the parties concerned, so as to leave some proprietary interest in the judgment-debtor. The question for determination was whether any judgment-creditor coming after the appointment of the manager and the making of the said mortgage, had a right to attach and sell what remained of the judgment-debtor's interest in the property. The Court held that he was entitled to attach, and stated the ground of decision in these terms: "A manager appointed under Act VIII of 1859, Section 263, so far as he "is an officer of the Court, is, at the most, the *hand* of the Court for the "purpose of gathering in on behalf of the judgment-debtor the moneys "due to him, in order that they may immediately be applied to the satis-"faction of the decree. If [503] he does more than this and deals with "the subject of the property itself, he must do so as the agent of the "judgment-debtor, and not properly as the officer of the Court." In the

(1) 19 W.R. (C.R.) 37.

case before us, the receiver collected the melvaram in the exercise of the power conferred upon him by the Court, but instead of paying the collections into Court, as he was bound to do, in order that they might be applied in satisfaction of the decree, misappropriated them to his own use in breach of his duty as receiver. I am of opinion that the Judge is right in holding that the present case is not on all fours with the other case I do not think, however, that the decision of the Judge can be supported He considers that the receiver in the present case was the judgment-creditor's agent because it was on his application that the appointment was made The appointment is the act of the Court and one made in the interests of justice or *ex debito justitiæ* He is an officer or representative of the Court, and subject to its orders His possession is the possession of the Court by its receiver, and the tenants in possession, when he is appointed to receive rents and profits of immoveable property, become virtually tenants *pro hac vice* of the Court, their landlord His possession is the possession of all the parties to the proceeding according to their titles The moneys in his hands are in *custodia legis* for the person who can make a title to them The Judge observes that very wide powers are conferred upon receivers by Section 503 including a power to remove the property in possession, but it does not follow from it that his relation either to the Court or to all the parties interested in the proceeding undergoes any change in proportion to the extent of his powers For, it has been held in England in similar cases that a receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, parties to the suit or proceeding. This being so, it is clear that if a loss arises from the default of the receiver, the estate must bear the loss as between the parties to the suit or proceeding It is true that when the party entitled to an estate is ascertained, the receiver will be considered his receiver and their principle is applicable in the case of a suit in which title to property is decreed, and not to the case before me, for the decree under execution is money decree, the title in the property under attachment continuing to vest in the judgment-debtor The first-mentioned rule is only the result of the general principle that the loss must fall on the estate or its owner, subject [504] to the receiver's liability. The terms " receiver " and " manager " are synonymous, and though the appointment of a receiver may, in certain cases, operate to change possession, yet it has no effect whatever on the title of either party to the property which is placed in the possession of the receiver For any loss arising from his default, the receiver is certainly responsible, but when he cannot be proceeded against the question as between innocent parties is who ought to bear the loss which is imputable to neither, and the only answer is that it must devolve on the estate to which the appointment relates There is also another reason in support of this view Moneys in the hands of the receiver belong to the Court which appointed him, and are in *custodia legis*, and he cannot spend them except under the orders of the Court If they are lost, whilst in custody of the receiver notwithstanding the exercise by him of due care, it cannot be denied that the loss must devolve on the estate, for the loss is not imputable to his default or that of any other The Courts below are in error in introducing a theory of agency without reference to the title to the property, for the collection of the rents of which the receiver has been appointed I set aside the orders of both the Courts below and direct that appellant be allowed to execute his decree without being compelled to deduct from the amount thereof the amount misappropriated by the receiver. Respondent will pay appellant's costs throughout.

I.L.R. 18 MADRAS.

18 M. 1 (P.C.)=21 I.A. 128=4 M.L.J. 233=6 Sar. P C.J 478.

PRIVY COUNCIL

PRESENT

Lords Hobhouse, Macnaghten and Morris, and Sir Richard Couch. **1894 JULY 28.**
[On appeal from the High Court at Madras]

PRIVY COUNCIL.

18 M. 1 (P.C.) = 21 I.A. 128=4 M L. J. 233=6 Sar. P.C. J. 478.

CHERUKUNNETH MANUKEL NILAKANDHEN NAMBUDIRAPAD AND ANOTHER (*Plaintiffs*) *v* VENGUNAT SIVAPATHIL PADMANABHA REVI VARMA VALIA NAMBIDI AND OTHERS (*Defendants*) * [13th June and 28th July, 1894]

Uraiyama, or rights of Uralan--Trustees and guardians of a temple in Malabar—Melkoima, or right of superintendence inherited by a family—Usage of the temple —Effect of compromise

The appellants, who were Uralan, managing as trustees and guardians the affairs of a temple in South Malabar, claimed to exclude the respondents from the management jointly with themselves The respondents, representing the Nambidi family, the descendants of the former rulers of the locality, were entitled to rights termed Melkoima, of superintendence over the temple Disputes having arisen, the predecessors of the parties in 1845, and again in 1874 had compromised litigation, and had agreed, with the result that they had since then continued to act upon the agreement that they should jointly exercise the powers of management·

Held, that the compromise so agreed to was binding upon the appellants, that the usage, which had been followed since 1845, was the best exponent of the Melkoima right, and that the compromise could not be re-opened

[**F.**, 16 Ind Cas 225 (232)=23 M L J 134=12 M L T 269, **R.**, 24 C 216 (237), 29 M 194 (**P.C**)=8 Bom L R 374=4 C L J 305=10 C W N 545=33 I A 67=16 M L J 160, 24 M L J 75=13 M L T 106=(1913) M W N 176 (178)]

APPEAL from a decree (28th November 1890) of the High Court (see I. L. R , 14 Mad , 153) affirming a decree (10th December 1888) of the Subordinate Judge of South Malabar at Palghat

The principal ground on which both the Courts below decided that the plaintiffs were precluded from claiming exclusive rights in the management of the Kachankurissi temple, an ancient [2] devaswom, in the taluk of Palghat in South Malabar, and from disputing the right of the defendants to joint management thereof with the plaintiffs, was that a compromise of suits relating to such rights had been entered into by persons through whom the plaintiffs claimed, with the predecessors of the defendants. Nothing was known of the early management of the temple. The Nambidis of Venganad, ancestors of the defendants, were the original rulers, or Naduvayi, of the country in which it was situated; and continued to rule until the British Government was established over Malabar in 1792. As rulers, the Nambidi possessed a right, not well defined, of superintendence over all religious endowments without having the ownership. This right was termed Melkoima As to this reference was made to H. H. Wilson's Glossary, Indian Terms, 338, where the word is translated " superior power or function, " and the words " Melkoima

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sthanam " are said to be " the exercise of chief authority in the affairs of a temple." Though indicating the right of a ruler, " Melkoima " was in this case also applied to the person in whom the right was vested. The plaintiffs claimed that their family (illom) had Uraiyama right, or held the office of Uralan, or Urallers, or trustees and guardians, of Kachankurissi devaswom in South Malabar from time immemorial. A second office of trustee had, in course of time, been vested in the family of the second plaintiff Cherumpatte Manakkel. Since 1835 the offices had been held by them without dispute. They claimed to be exclusively entitled to manage the temple affairs, admitting, however, that the ancestors of the defendants, the Nambidi of Vergunad, had formerly had the Melkoima. This right they contended had been extinguished when the British Government was established, having been possessed by the defendants' ancestors only so long as their power as rulers remained. Resisting the defendants' interference with the temple affairs, the Uralan then in office had, for the sake of peace, executed a karar in 1845, and a razi in 1874. But the plaintiffs' predecessors were not entitled to alienate or confer any right in respect of devaswom affairs; and the karar and razi were not valid on that ground and also for want of parties.

The first and second defendants—the second, Dhatri Valia Amma, being guardian of seven minor defendants—filed separate written statements that their family had originally been proprietors of the temple and its lands; and they relied on the compromise [3] and admissions made by the plaintiffs' predecessors in office. They also set up limitation.

The issues raised questions as to the respective rights of the parties, as to the effect of the compromise effected by the karar of 1845, the razi of 1874, and as to the application of limitation.

In the English year 1773, when Haider Ali ruled in Malabar, he granted to the then Raja of Vengunaud, the predecessor of these respondents, exemption from the full payment of land revenue in respect of the temple lands. From a memorandum in a revenue record of 21st March 1809 this exemption appeared to have been recognized in favour of the appellants' family after the annexation of Malabar by the East India Company. The documentary evidence relating to this exemption and to the other matters of temple management before the year 1845 was summarized as follows by the Subordinate Judge:—

" The earliest document filed is Exhibit I, a certified copy of a statement, dated 985 or A.D. 1809 obtained from the Collector's records, " which shows that the lands of the temple were exempted from revenue " in 948 (A.D. 1773) by Haider Ali at the request of the Nambidi.

" The document next in date is A, a paimash account of the year " 998 (A.D. 1822) in which Cherukunnat and Kariat Nambudripads are " described as the Uralers of this temple. The Nambidi is described as " the ' Naduvayi or chief of the district.' He is mentioned as being the " Uralan of another temple but not of the plaint temple.

" Exhibit B is a decree of the Palghat Munsif in a suit No. 175 of " 1830 brought against first plaintiff's predecessor as Uralan. The pre- " decessor of second plaintiff or of first defendant was not a party to the " suit.

" Exhibit A. M. is the deposition of first plaintiff's predecessor taken " by the Tahsildar in 1012 or A.D. 1836 during an enquiry into a petition " presented by certain parties alleging that heavy mortgages were raised " on devaswom properties by first plaintiff's predecessor. In this

"deposition the latter stated that he and Tekimadat Nambudripad were "the Uralan of the temple

"Exhibit A.N. is a deposition given in the same year by the same "person stating that a portion of the temple lands were exempted from "revenue in 983 (A.D. 1808) If this statement [4] is correct it contra- "dicts the statement in defendants' Exhibit I that the exemption was in "948 or A.D. 1772.

"These are all the exhibits relating to the temple prior in date to "the karar C of 1020 (A D 1845) and they tend to show that first plaint- "iff's, Illom Cherukunnat was always regarded as possessing the Uraima "right in the temple, that the Nambidi as the Naduvayi, or ruler, of the "district possessed what plaintiffs assert he possesses, and what the "Nambidi himself since 1020 or A D 1845 declared that he possessed, a "Melkoima right."

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In 1845 a suit was brought by the second Uralan against the first Uralan the Nambidi and a tenant to set aside a tenancy which had apparently been granted without the consent of the second Uralan This suit was compromised by a karar (D) of the 18th August 1845 on the basis of an agreement (C.) between the two Uralan of the 16th August The agreement recited the suit relating to land "belonging to Kachankurichi "devaswom over which we both have equal Uraima right and the Nambidi "of Vengunaud has Melkoima right" It then proceeded as follows

"As this suit has been compromised on the condition that all the "affairs of the said devaswom are to be caused to be managed in future "also, the daily expenses of the devaswom being defrayed by the collection "of interest, rent, &c., and the ceremonies, &c , being performed just as "they were hitherto jointly caused to be managed through the Samudayam "by us the two Uralan and the Nambidiri who is the Melkoima, and that "the affairs which are to be conducted unanimously by us both and the "Melkoima shall be so conducted, and that no management shall be "exercised by any one of his own will and pleasure, and that the affairs "which are managed under the entrustment made to the Samudayam "shall, for the preservation of the property of the devaswom, be conduct- "ed with the approval of the three persons, and that the three persons "shall jointly examine and settle each year's account in the month of "Chingom (August-September) of the same year"

Notwithstanding the above, and the subsequent joint management, or. suing certain tenants of the temple lands, the uncles of the present appellants, being then the heads of their family, alleged that a Nambidi defendant had no right whatever regarding the temple, his former right of Melkoima having become extinct

[5] Valia Nambidi, the second of these respondents, who was then, during the minority of her son the first respondent, representing the family estate, on the 4th September 1874 filed her written statement in answer to that suit She denied the plaintiffs' allegations, and asserted the original right of her family to the temple

On the 24th October 1874 a joint petition was presented to the Court of the Subordinate Judge in which that suit was pending on behalf of the plaintiffs and defendants expressing their mutual desire to have the suit compromised on the footing "of the future joint management of the temple "affairs by the plaintiffs and Valia Nambidi," who were to appoint new officers and agents for the temple.

On the 19th November 1874 a joint appointment of a new pattamali or agent was accordingly made, and on the 21st November the second

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compromise was filed in the Court of the Subordinate Judge under Section 98 of the then Code of Civil Procedure, Act VIII of 1859, and it was prayed that the suit should be dismissed on the terms of that compromise. This was ordered by the Court on the 3rd December 1874.

Those terms provided for the future joint management of the affairs of the temple by the first and second plaintiffs in that suit, and the second defendant, the present second respondent. The joint management continued down to a short time before the institution of the present suit.

The judgment of the High Court, Muttusami Ayyar and Best, JJ., was the following:—

" The institution in question is an ancient Hindu temple in South " Malabar, and the first respondent is the representative of the Nambidi " family which ruled in former times over that tract of country in which " the temple is situated, whilst the Uraima right is vested in the illom, " or family, of the first appellant, a Nambudri Brahmin, from time im- " memorial. There is no legal evidence before us to show when and by " whom the temple was founded, or what was the nature of management " prescribed by its original constitution. There are, however, certain " facts which are established beyond doubt and which are indeed not " disputed by the appellants, and the Subordinate Judge rests his decision " upon them. The appellants admit, and there is considerable evi- " dence to show that at least from 1845 the appellants' and the respon- " dents' families have been in joint management in [6] accordance with " the terms of karar C. and razi D ., dated the 16th August 1845, which " were re-affirmed, except in one particular which is immaterial to our pre- " sent purpose, by document E., dated the 21st November 1874. The " circumstances under which documents C., D. and E. were executed " and their contents are set forth by the Subordinate Judge in paragraphs " 16 to 20 of his judgment, and it will be seen that the documents referred " to the first respondent's predecessors as Melkoimas and the appellants' " ancestors as Uralan, and that they were executed in adjustment of " pending litigation regarding the respective rights of those persons. It " is not urged, as pointed out by the Subordinate Judge, that either fraud " or a wilful suppression of material facts vitiates the deeds of compromise; " but it is contended that they do not bind the appellants because, first, " all the members of their families, as constituted in 1845, had not joined " in their execution, secondly, that the compromise practically created a " new right and thereby varied the original trusts of the institution; " thirdly, that the Melkoima right being a right of sovereignty, it ceased " on the introduction of the British rule; and fourthly, because no joint " right can be acquired by prescription.

" As regards the first ground of claim it is clearly untenable. Prior " to 1848 the first appellant's grandfather's brother was the karnavan of " his illom, and from 1848 to 1859 it was under the management of " the appellant's father. From 1859 to 1876 the appellant's uncle " was the managing member, and from 1876 to 1882 the appellant's " elder brother was in management. The first appellant has been the " head of his family since 1882, and although all the members of the " appellant's family in 1845 did not sign documents C. and D., the then " head of the family signed them, and the arrangement made by him was " acted upon by his successors and expressly recognized in 1874 and " acquiesced in by all the junior members of his family for more than two " generations and during a period of upwards of forty years. The conten-

"tion, therefore, that the arrangement had not the sanction of the whole "family in 1845 appears to us to be entitled to no weight

"As regards the second contention, the Subordinate Judge is right in "holding that after the compromise of 1845 and its ratification in 1874, "the appellants are not at liberty to re-open the question, whether the "right of joint management recognized [7] in 1845 was then a subsisting "right and whether as Melkoima, the first respondent's family was "entitled to participate in management It is sufficient to say that the "right of joint management was brought into controversy in a Court "of justice and that it was, by way of compromise, recognized as a "subsisting right, and as being in accordance with the prior usage of "the institution. It was held by the Privy Council in *Sri Gajapathi* "*Radhika* v *Sri Gajapathi Nilamani* (1) that when a state of facts is "accepted as the basis of a compromise whereby a suit pending decision "is amicably adjusted, and when the compromise is not vitiated by fraud, "those who were parties to it and their privies should not afterwards be "heard to say, for the purpose of reviving the controversy, that the real "state of things was otherwise The principle is the same whether the "mistake alleged to have been made is one of law or of fact We may "here draw attention to the words, "as hitherto" in document C, as "indicating that it did not purport to vary the prior usage of the institu- "tion. Even assuming that the appellants may now be permitted to show "that the respondents' family had no joint management prior to 1845, the "evidence before us cannot be held sufficiently to establish such conten- "tion In 1821 the Collector of this district called upon the then Nambidi "to pay up the arrears of the revenue due on devaswom land and this "implies some control on his part over the temple income Again, in "Exhibit A, which is the temple paimash of 1822, the Nambidi is "described as having a Melkoima right over it Further, Exhibit I shows "that it was the Nambidi who got the devaswom land exempted from "assessment by Haider in 1773 Though the paimash account is of itself "no evidence of title, it is of value as confirming the view since taken by "the Uralan as to the possession of the Nambidi"

After some notice of arguments by the pleaders on both sides as to parts of the evidence, the Judges further examined the exhibits and stated the opinion that it was impossible to hold upon the evidence that, prior to 1845, the Nambidi had no connection with the temple, nor control over its affairs, and that the recital that document C recognized and regulated the prior practice was not *bona fide* The Judgment then continued thus —

[8] "The next contention is that the Melkoima right is the sovereign "right of supervision and that when the Nambidis ceased to be rulers, their "Melkoima ceased likewise, and that it was therefore not a subsisting "legal right in 1845 This is the substantial question raised for decision "in this appeal. The learned pleader for the appellants relies on the defi- "nition of Melkoima given by Mr. Græme, the Special Commissioner of "Malabar, about 1820, 'as the right which the sovereign power possessed "over property of which ownership is in others It is a right of superintend "ence, an incident of sovereignty' The Melkoima right was also decribed by "Mr. Justice Holloway, whilst District Judge of North Malabar, in appeal "suit 118 of 1861 in the following terms 'This is not only not the same, "but absolutely incompatible with ownership. It was the right of the

(1) 13 M.L.A. 497

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"sovereign power possessed over property of which the legal ownership "was in others. That sovereign power, and the right of interference "which nothing can prevent these Malabar Rajas from asserting, have of "course wholly ceased.' Mr. Wigram, a former District Judge of Malabar, "gives a similar definition (Wigram on Malabar Law and Custom). On "the other hand, the respondents' pleader refers to Logan's Treatise on "Malabar, Vol. II, p. 177, wherein the Uraima right is included among "the four functions of a Desavali, and to Exhibit A in which the Nambidi "is described as Naduvali. It appears from Logan's Glossary, page 211, "that no one was called a Naduvali who had not at least 500 Nayars "attached to his range; any number below that ranked a person as a "Desavali. Our attention is also drawn to the ancient constitution of "Hindu temples in Malabar as described by Mr. Conolly, a Collector of "Malabar, in his letter to the Board of Revenue which is cited in R. A. "35 of 1887. 'The pagodas of Malabar,' says Mr. Conolly 'generally are, "and have always been, independent of Government interference. They "are either the property of some influential family, the ancestors of "which either built or endowed them or, as is more commonly the case, "are claimed and managed by a body of trustees who derive their right "from immemorial inheritance and conduct the affairs of the temple "under the patronage or superintendence of some Raja or person of con-"sideration. This latter state of things, it will be seen, is nearly that which "the Government are now desirous of introducing everywhere.' It will be "seen that the above passage [9] throws light also on the policy which the "British Government was inclined to adopt, *viz.*, that of continuing the "supervision of the Raja who was the patron, as it originally existed, in "the interests of certain temples, instead of referring that supervision "solely to the *status* of the person exercising it as sovereign for the time "being, and declaring it to have ceased on the annexation of Malabar. "There is some indication of such policy having been pursued in this case "as in the Guruvayur devaswom case (Appeal Suit 35 of 1887), for the "Revenue authorities have corresponded with the Nambidi relating to "matters connected with the temple, whilst there are traces of the "continuance of the right of interference by the Nambidi family sub-"sequent to the annexation of Malabar. The real question then which "we have to decide is this: Are we to ignore the state of things which "has existed admittedly from 1845, and probably from the commence-"ment of the century, and which was submitted to by the Uralan as one "consistent with the ancient usage and constitution of the institution and "continued and countenanced by the British Government and conducive to "the protection of the interests of the institution; and are we now to "deduce a rule of decision from the abstract theory of Melkoima as it "existed prior to British rule and to change the usage and unsettle what "was set at rest by a compromise forty years ago? We have no hesitation "in answering the question in the negative. In cases in which there is a "conflict between an ancient theory and the modern usage in a religious "institution, Courts of Justice must see whether the usage is referable to "some other legal origin with reference to the facts of each case, if not to "the ancient theory. As observed by the Judicial Committee in the Ram-"nad case (12 Moore's I.A., 390) with reference to a theory deduced from "the ancient Hindu Law of Niyoga or appointment in connection with "the law of adoption, the abstract theory has a judicial value for the pur-"pose of explaining and upholding the existing usage and not for the "purpose of ignoring it. It is, then urged for the appellants that the joint

"enjoyment, however long, can be referred to no legal origin But it must "be observed that from what has been stated above such legal origin may "be found in the continuance of what was Melkoima in ancient times as a "co-trusteeship subsequent to the British rule with the tacit sanction "of the British Government, or in the *status* of the Nambidi family as "[10] patrons of the institution as part of its ancient constitution, a "*status* which did not cease on the introduction of the British rule It "must have been well known in 1845 that the sovereign power vested in "the British Government, and the term Melkoima in document C must "therefore be taken to be a word of description or distinction The parties "concerned took for their guide the subsisting usage of the institution "and agreed to continue it without caring to ascertain to what legal "relation of the Nambidi to the temple the continued participation in "management subsequent to the British rule might be referred

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"As regards the last question, *viz.*, of limitation, it has been decided "by the Privy Council that the twelve years' rule is applicable where there "is no question for recovering any property for the trusts of the institu- "tion and when the plaintiff sues only for his personal right to manage "or to control the management of the endowment (L.R 10 I A 96). "When two persons have been in joint management for more than forty "years, the presumption is that they have a joint right of management "This is not a case of exclusive possession of portions of the same "property at different periods or a case of *contraria possessio* and the "case in L R 12 App Ca 544, is not in point The decision of the "Subordinate Judge that the claim is barred by limitation is also right

"The appeal fails and is dismissed with costs "

On this appeal Mr *J D Mayne*, for the appellants, argued that their predecessors in office as Uralan holding a trust could not effectively transfer the rights and duties belonging to it by the compromises of 1845 and 1874 They had no power to give up a portion of their Uraima rights to the Nambidi, or to invest any of the latter with the right of management of the temple If the effect of the two agreements was to confer on the defendants' predecessors any of the powers held by the Uralan as trustees, the agreements could not be carried out, as the office of trustee of the temple could not be transferred either wholly or in part It was submitted, however, that the agreement of 1845 with the Nambidi as Melkoima recognized no right in them, but their right, of that description, and did not operate to detract from the powers of the Uralan, who remained the sole guardians and trustees, with executive powers This agreement was acted upon till 1874, when the suit of that year was partly directed at checking the encroachments of the Nambidi [11] as Melkoima, the defence of the latter showing that they asserted rights of exclusive property, rights which the razi of that year was framed to negative. The Melkoima rights could be recognized notwithstanding these documents of compromise, and without any unreasonable construction of them The plaintiffs asked for a declaration that they were entitled to exercise the full powers of Uralan of the temple, subject only to the superintending influence of the Melkoima as formerly recognized Reference was made to *Raja Vurma Valia* v *Ravi Vurma Mutha* (1) as showing that persons holding such a trust as that of Uralan of a temple are incapable of transferring it at their own will, and to Wigram on "Malabar Law and Custom "

(1) 4 I.A. 76=1 M. 235

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Mr. *R. V. Doyne*, for the respondents, was not called upon.

Their Lordships' judgment was delivered by Lord MORRIS.

JUDGMENT.

The appellants are the plaintiffs in a suit which was dismissed by the Subordinate Judge of South Malabar on the 10th December 1888, and was again dismissed on appeal by the High Court of Madras on the 28th November 1890. The appellants sought for a declaration that they as Urallers were entitled to the exclusive management of the affairs of the temple of Kachankurissi, and that the respondents had no right over or right of management in the said temple, an ancient Hindu temple of such antiquity that nothing is known as to its foundation or original constitution. The respondents are the representatives of the original rulers of the district in which the temple is situated, who so continued till the British sovereignty was established over the country in the year 1792. The family of the appellants appear to have always held the office of Urallers or managers of the temple, while the Nambidi possessed certain sovereign rights of superintending the temple, called Melkoima rights. As long since as the year 1845 disputes arose between the ancestors of the appellants and respondents, and a suit was commenced as to the management of the temple, which was settled by a karar on the 16th August 1845; and in accordance therewith the parties two days afterwards filed a razi withdrawing the suit. The karar provides that the affairs of the temple were to be managed and that the ceremonies were to be performed jointly "just "as they were hitherto," and for a period of thirty years afterwards, namely, until 1874, that arrangement was carried out. In [12] 1874 fresh disputes sprang up between the Urallers and the Nambidi, and led to a suit in which the Urallers sought to recover certain lands belonging to the temple from a tenant who held under a demise granted by the Samudayam appointed by the Urallers and the Nambidi according to the agreement contained in the karar of 1845. This suit was compromised, and in a razi of the 21st November 1874, terms were set out, which again determined that there should be a joint management of the affairs of the temple by the Urallers and the Nambidi This razi was acted upon until the date of the present suit, and Urallers and the Nambidi jointly appointing a Samudayam and a Pattawali and joining in suits to recover temple lands and in applications to execute decrees.

Their Lordships are of opinion that the state of things which has admittedly continued since 1845, and which was probably the state existing before that time and since the establishment of British sovereignty, cannot now be questioned, and that the compromise of their rights entered into in 1845 and 1874 by the Urallers and Nambidi is binding upon them and their successors, and cannot be now re-opened upon any theory of the extent of the Melkoima right in the abstract. The usage which has existed for so long a period is the best exponent of the Melkoima right vested in the respondents, a right twice acquiesced in by the appellants or their predecessors in legal proceedings in which the opportunity was afforded of a definite decision as to the rights of the respective families. Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed and the appeal dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellants:—Mr. *R. T. Tasker*.

Solicitors for the respondents:—Messrs. *T. L. Wilson & Co.*

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[13] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

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KRISHNABHUPATI DEVU (*Plaintiff*), *Appellant v* VIKRAMA DEVU (*Defendant*), *Respondent* *
[24th, 25th, 26th and 30th July, 1894.]

Code of Civil Procedure—Act XIV of 1882, *Section* 13—Res judicata

Where all the conditions prescribed by Section 13 of the Code of Civil Procedure as necessary to bar the trial in a subsequent suit of an issue adjudicated upon in a previous suit exist, the fact that in the first suit the defendant was an execution creditor and in the second he is a purchaser at an execution sale makes no difference as to the second suit being *res judicata* A privity exists between an execution creditor and a purchaser at a Court sale, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree Thus when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale, as his representative or as one claiming under him *Surat Chunder Dey* v *Gopal Chunder Laha* (19 I A 203) followed

[**R**, 7 Ind Cas 530 (533)=8 M L T 167=(1910) M W N 342, **D.**, 1 N L R 150 (151)]

APPEAL against the decree of H R Farmer, District Judge of Vizagapatam, in original suit No 28 of 1890

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

The Advocate-General (Hon Mr *Spring Branson*) and *Subramania Ayyar*, for appellant

Subramania Ayyar, for respondent

JUDGMENT

This appeal arises from a suit brought by the plaintiff (appellant) to obtain a declaration that the instrument of gift, (Exhibit E) which his father, Lingam Lakshmaji, executed in his favour on the 13th October 1878, is true and valid, that he is entitled under it to the village of Venkatarajapuram and the hamlet of Sitanna Cheruvu Istuva, which is the property now in litigation, and that the execution sale at which respondent purchased them for Rs 15,900 on the 15th October 1888 is void and inoperative as against him.

The sale was held in original suit No 3 of 1885 on the file of the District Court of Vizagapatam, in which, one Chodimella Ramamurti, had obtained a decree against Lingam Lashmaji for [14] Rs 6,456-10-0 for interest on Rs 5,000 from the date of suit to date of decree at 9 *per cent. per annum*, for costs of the suit and for interest thereon at 6 *per cent per annum* from date of decree to date of payment Subsequent to the date of this decree (Exhibit VI), *viz* , 29th June 1885, the decree-holder, Ramamurti, obtained two other decrees against Lingam Lakshmaji, one in original suit No 374 of 1885 on the file of the District Munsif of Vizianagrum for Rs. 2,253 on the 28th October 1885, and the other in original suit No. 355 of 1886, on the file of the same District Munsif In execution of the decree in original suit No. 374 of 1885, Ramamurti attached the village of Venkatarajapuram, together with some other lands, which are comprised in the deed of gift. The appellant intervened under Section 271, Code of

* Appeal No 62 of 1893.

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Civil Procedure, as a claimant, pleaded the gift of 1878 in support of his claim, and prayed that the village, &c., might be released from attachment; but his claim was disallowed and his application dismissed on the 9th March 1887. He then instituted original suit No 13 of 1887 on the file of the District Court of Vizagapatam to have his title recognized and the property released from attachment. The parties to that suit were the decree-holder, Ramamurti, and the plaintiff in the present suit, and the third issue fixed in that suit was " whether the deed of gift or settlement " on which the plaintiff bases his claim to the property is valid and can " be given effect to, or void and inoperative." The District Judge decided it against the present appellant and dismissed his suit with costs. In support of his decision he observed as follows: " The property attached " admittedly belonged at one time to Lingam Lakshmaji. In 1878, he " was in jail for forgery, but was released about the middle of the year. " He is now undergoing a long sentence of imprisonment in the Vellore " Central Jail for another forgery. These facts are notorious and were " admitted at the trial. In 1878, just after his release, he executed in " favour of his minor son, the plaintiff, then about two years old " Exhibit E transferring to him property admittedly worth at least " Rs. 60,000. The property now in suit is part of the property so " transferred. There is no evidence that this document has ever " been given effect to. Ramayya, first defence witness, who was " formerly Lakshmaji's confidential agent, deposes that Lakshmaji told " him that it was nominal only, intended to shield him from creditors. " The witness has since collected the rents of the village and paid them " [15] over to Lakshmaji. The witness for the plaintiff was the writer of " E and the only reason he can assign for the transfer is that the Madugole " Zemindar asked Lingam Lakshmaji to make it. It has been found in " another case similar to this, in which case the son was the plaintiff and " Lakshmaji one of the defendants; that the alleged transfer evidenced " by E was nominal only, inoperative and one that could not be given " effect to. My finding is that the plaintiff has not made out any title to " the land, and that his suit must therefore be dismissed with costs."

In execution of his decree against Lingam Lakshmaji in original suit No. 355 of 1886, C. Ramamurti again attached the village of Venkatarajapuram. On this occasion appellant did not intervene as a claimant, but he brought in the District Court original suit No. 19 of 1888 to establish his title to the property under the same instrument of gift, but the District Judge dismissed that suit also with costs. He remarked in his judgment (Exhibit XVII) that the case was " clearly barred under Section 13;" that the plaintiff, Lakshmaji's son, brought the then suit " to show that the village is under the deed of gift his, and not his father " Lakshmaji's," and that this was " the very point in issue in the former " suit and which was decided against the plaintiff."

In execution of the decree in original suit No. 3 of 1885, the village of Venkatarajapuram, together with the hamlet Sitanna Cheruvu, was again attached on the 12th January 1888, the decree-debt due on the 19th April 1888 being Rs. 8,809-3-11, and it was advertised for sale on the 12th May 1888. After various adjournments, it was brought to the hammer on the 15th October 1888 and purchased by the respondent—Venkatarajapuram for Rs. 14,350 and Sitanna Cheruvu Istuva for Rs. 1,550. Although the sale took place in original suit No. 3 of 1885, it appears from Exhibit XIV that the property was sold not only on account of the decree-debt therein, but also on account of three other debts, *viz.*

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the debt in original suit No 374 of 1885 already mentioned, the debt due under the decree obtained by one Putta Ramanna against Lingam Lakshmaji in original suit No. 688 of 1886 on the file of the District Munsif of Vizagapatam, and the debt due to one Palakurti Ramamurti under the decree in original suit No 1 of 1886 on the file of the same District Munsif During the period of attachment and prior to the sale in original suit No 3 of 1885 the appellant did not intervene, though his father objected to the sale and failed The District Munsif of Vizagapatam disallowed the [16] objections of Lingam Lakshmaji to the sale on the 9th March 1889 by his order (Exhibit XII) and made over possession of the property to the purchaser by his order (Exhibit C), dated the 22nd February 1890 The appellant brought this suit on the 25th August 1890

His case is that the property now in dispute vested in him under the instrument of gift in 1878, and ceased at once to belong to his father, Lingam Lakshmaji, and its sale in 1888, as the latter's property and in satisfaction of a decree passed against Lakshmaji did not operate to divest appellant of what had already become his property Respondent contended that the gift set up by appellant was a mere sham contrived to defraud Lakshmaji's creditors The sixth issue raised the question whether the gift was valid and *bona fide*, and the Judge determined it in the negative

Apart from the objection to the claim on the merits, respondent raised four preliminary questions, *viz*

(i) whether the suit is maintainable under Section 42, Specific Relief Act,

(ii) whether the plaint is properly valued,

(iii) whether it is barred by the Law of Limitation, and

(iv) whether the suit is *res judicata*.

He abandoned the second preliminary ground of objection, and the Judge held that the suit was neither *res judicata* nor barred by limitation, but he held that the suit was not maintainable for two reasons, *viz*, (i) that appellant's omission to intervene as a claimant under Section 278 when he was in a position to do so could not better his position, but rendered him liable to the same consequences as if he had intervened and his claim had failed, and (ii) that it was in the discretion of the Judge either to pass or decline to pass a declaratory decree under Section 42 of the Specific Relief Act, and that he would exercise the discretion unwisely if he granted a declaratory decree under the circumstances mentioned in paragraph 7 of his judgment Whilst stating in paragraph 10 of the judgment that the suit is not *res judicata*, he observes that, though the principle of *res judicata* may not apply, the effect of *res judicata* is indirectly produced In the result, he dismissed appellant's suit with costs, and against this decision the plaintiff has appealed The defendant supports it on the ground that the claim is *res judicata* and that the plaintiff is now estopped from relying on the gift as a valid transaction by reason of the decision in original suits Nos. 13 of 1887 and 19 of 1888 which have become final

[17] The only question which it is necessary to decide for the purposes of this appeal is whether the suit is *res judicata* We are of opinion that the question raised by the sixth issue in the present suit is clearly *res judicata*, and that the adjudication upon it in original suit No. 13 of 1887 is conclusive. The appellant is not at liberty to re-open it and is estopped from doing so by Section 13 of the Code of Civil Procedure.

The suggestion made by the Judge that appellant was in a position to have intervened as a claimant under Section 278 during the execution of the decrees in original suits Nos 3, of 1885 and 355 of 1886, and that

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his omission to do so rendered him liable to the same consequences that would have ensued if he had intervened and his claim had been dismissed, is one to which we cannot accede. Section 278 of the Code of Civil Procedure is permissive; it does not impose an obligation on persons having claims to prefer to property attached in execution to prefer them during such execution and annex in cases of failure to do so, forfeiture of their right to establish their title to the property by a regular suit. As regards the one year's limitation prescribed by Article 12, Second Schedule, Act of Limitations, the Article presupposes an order already made under Sections 280, 281 and 282, and it has no application in cases in which no claim has been preferred and no order has been made.

Nor do we see our way to adopting the opinion of the Judge that it would be unwise on his part to pass a declaratory decree in appellant's favour, even if he established his title under Section 42 of the Specific Relief Act, which vests in him (the Judge) a discretion to refuse to make a declaration. The discretion given by that section is a judicial discretion, and the ground upon which it is exercised must be open to no legal objection. It is clearly a mistake to treat Section 278, which is permissive, as imperative, and to adopt this erroneous construction as the basis of the discretion to be exercised under Section 42 of the Specific Relief Act.

Again, it is not clear how, if the principle of *res judicata* does not apply, its effect can be produced either indirectly or directly. The decision reported in *Ram Kirpal Shukul* v. *Mussumat Rupkuari* (1) proceeds on the ground that a final decision in execution proceedings cannot be questioned at a later stage of those [18] proceedings upon general principles of law or, in other words, the principle of *res judicata* applies, although Section 13 does not mention execution proceedings.

Upon the facts already stated, however, it is clear that the decision in original suit No. 18 of 1887 is conclusive on the question raised by the sixth issue in the present suit, and that, on this ground, the appeal must fail. All the conditions prescribed by Section 13 as necessary to bar the trial in a subsequent suit of an issue adjudicated upon in a previous suit exist in this case. The issue was substantially the same in both suits, and the District Court which investigated the former suit is competent to entertain the present suit. The question whether the gift was valid and *bona fide* or a mere sham was a matter directly and substantially in issue in both suits. The only difference is that in the previous suit the execution-creditor, Ramamurti, was defendant, whereas in the present suit the purchaser at the execution sale is the defendant. Does this make a difference? We are of opinion that it does not. It is a well-known principle that a purchaser at a Court-sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution-creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree. Hence it follows that the purchaser is a party claiming in this case under the execution-creditor, Ramamurti, within the meaning of Section 13, and the Judge has apparently overlooked the privity in law which exists between the two. The decision in *Surat Chunder Dey* v. *Gopal Chunder Laha* (2) is a clear authority for the proposition that when the plea of estoppel is available to a decree-holder, it is likewise avaliable to the purchaser at the execution sale as his representative or as one claiming under him.

(1) 11 I. A. 37. (2) 19 I. A. 203.

The cases cited at the hearing by the learned Advocate-General in *Shivram Chintaman* v *Jivu* (1), *Hira Lal Chatterji* v *Gourmoni Debi* (2), *Zanki Lal* v *Jawahir Singh* (3), *Jagat Narain* v *Jag Rup* (4), and *Viraghava* v *Venkata* (5) are only decisions on the question how far a purchaser at an execution sale represents the judgment-creditor for the purposes of Section 244 of [19] the Code of Civil Procedure, and they do not appear to us to touch the doctrine of privity in law as part of the doctrine of *res judicata* The case in *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon* (6) was not that of a purchaser

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It is provided by Section 244 that no separate suit shall be brought by a party to the decree or his representative for the determination of questions arising between them and relating to the execution of the decree The question considered in the cases cited was whether the purchaser was entitled to maintain a separate suit and whether he was a representative within the meaning of that section The question arising for determination in the case before us is whether a plea of estoppel which would be available if the judgment-creditor were a party to the present suit is likewise available to the purchaser who is a party to it Moreover, the appellant was not the holder of the decree in the execution of which respondent became purchaser and the respondent was not a party to it but a stranger who represents the execution-creditor and execution-debtor only to the limited extent already mentioned

We confirm the decree of the District Judge and dismiss this appeal with costs on the ground that the plaintiff is estopped from insisting on the gift in his favour as valid against the respondent

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18 M 19.

ORIGINAL CIVIL

Before Mr Justice Shephard

In re MANTEL *v.* MANTEL * [1894]

Insolvent Act (11 *and* 12 *Vic*, *c* 21), *Section* 63—*Insolvency of married woman—Property settled on her for separate use without power of anticipation—Whether comprised in the vesting order or not—Married Women's Property Act—Act III of* 1874, *Section* 8

A creditor's right to be satisfied out of the separate property of a married woman is, in the case of post-nuptial debts, restricted to the property as to which there is no restraint on anticipation Section 8 of Act III of 1874 was not intended to give married women the power of evading such restraint—*Hippolite* v *Stuart* (7) dissented from

[F, 30 M 378 (380)=17 M L J 363=2 M L T 322]

APPLICATION in insolvency The Official Assignee and the Official Trustee appeared in person

JUDGMENT

[20] This is an application with regard to certain funds held by the official trustee as trustee of the marriage settlement of Stella Ernastine Dagmar Mantel She and her husband have filed their petition in insolvency, and the question arises whether the said funds are affected by the

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* Insolvency Petition No. 115 of 1894

(1) 13 B. 34 (2) 13 C. 326. (3) 5 A 94 (4) 5 A 452
(5) 16 M 287. (6) 4 I A. 66. (7) 12 C 522

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vesting order. According to Section 63 of the Act the vesting order operates on all property of a married woman " over which she shall have " any beneficial power of disposition, notwithstanding her coverture, to " the extent of the benefit which she might acquire therein by the exercise " of such power."

It seems clear that the funds now in question are not Mrs. Mantel's property in that sense, for the property is settled upon her for separate use without power of anticipation. My attention, however, was called to the case of *Hippolite* v. *Stuart* (1), in which it was held by Sir R. Garth; C. J., and Wilson, J., that a creditor in respect of a debt incurred after marriage was entitled to proceed against the separate property of a married woman, notwithstanding the restraint in anticipation. The judgment proceeds on the ground that as the provisions of Section 9 of the Married Woman's Property Act (which are to the same effect as those of Section 12 of the English Married Woman's Property Act of 1870 and which deal with ante-nuptial debts) have been held in England (see *Sanger* v. *Sanger* (2)) to extend to such property, so Section 8 must receive the same construction. The decision has been questioned in Bombay and, as it appears to me, with good reason (see *Cursetji* v. *Rustomji* (3)). I fully concur in the observations of Farran, J., in that case. To enact that a married woman may contract with reference to her property settled to her separate use without power of anticipation, and bind it by the contract, is tantamount to saying that the restraint on the power of anticipation is inoperative, and that cannot have been intended. Moreover, it is inconsistent with the provision of Section 10 of the Transfer of Property Act, which provides that property may be so settled on a married woman as to prevent her from charging it. Full meaning can be given to Section 8 of the Married Women's Property Act without importing to the Legislature an intention to ignore conditions in restraint of alienation which are distinctly recognized in the latter Act. I cannot find in the English case anything to support the view which has been taken in Calcutta. The authority is as far as I can see, all [21] the other way, unless I except the over-ruled judgment of Malins, V. C., in *Pike* v. *Fitzgibbon* (4). (See *Chapman* v. *Biggs* (5) and the judgment of Wills, J., in *Bickett* v. *Tasker* (6)). In *Pike* v. *Fitzgibbon* (4), although no reference is made to the statute, the position of a married woman and her separate property as considered in a Court of Equity, is explained by Cotton, L. J., in language which has equally application to the provision of the Act. The argument in the case was that a Court of Equity would deal with a married woman who has separate estate as if she were a *feme sole*. On this Cotton, L. J., observes that this proposition is only correct if the distinction between a married woman, and a *feme sole* with regard to the restraint upon anticipation which may be imposed on the former but not on the latter is borne in mind. " She is regarded as a *feme sole* only as regards property " which, under the trust, she is entitled to deal with as if she were a " *feme sole*, but as regards property which she is restrained from anticipat- " ing, she is not, as regards a person other than her husband, in the posi- " tion of a *feme sole* " (page 464). He goes on to cite a passage from a judgment of Turner, L. J., which concludes with the words " She is considered in a Court of Equity as a *feme sole* in respect of property thus " settled or secured to her separate use." Cotton, L. J., adds, " that is

(1) 12 C. 522. (2) L.R. 11 Eq. 470. (3) 11 B. 348.
(4) L.R. 17 Ch. D. 454. (5) L.R. 11 Q.B.D. 27. (6) L.R. 19 Q.B.D. 7.

"to say as regards property which, under the trusts, she can dispose of "and alienate, she is considered as a *feme sole*" These observations, when applied to Section 8 of the Act of 1874, as they properly may be, make it to my mind abundantly clear that the creditor's right to be saisfied out of the separate property of a married woman is, in the case of post-nuptial debts, restricted to the property as to which there is no restraint on anticipation, and that it was not intended to give married women the power of evading such restraint as can be lawfully imposed on them In the Consolidating Statute of 1882 I observe that Section 19 expressly saves property settled on a married woman without power of anticipation, in so far as concerns post-nuptial debt

For the reason, I am of opinion, that the property comprised in the marriage settlement of Mrs Mantel is not affected by the vesting order

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18 M. 22.

[22] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

MUTHUKUTTI NAYAKAN (*Defendant No* 1), *Appellant v* ACHA NAYAKAN AND OTHERS (*Plaintiffs Nos* 1 *to* 8 *and Defendant No* 2), *Respondents* * [10th April, 1894]

Code of Civil Procedure—Act XIV of 1882, *Sections* 508 *and* 516*—Arbitration—Omission to fix time for delivery of award—Signing of an award by the arbitrators in the presence of each other*

An award is not invalid merely because no time has been fixed for the making of the award, Section 508 of the Code of Civil Procedure being directory and not mandatory,—*Har Narain Singh* v *Bhagwant Kuar* (1) followed

It is necessary, as provided by Section 516 of the Code, that all the arbitrators agree to the terms of the award, but there is no provision of law requiring them to sign it in the presence of each other

SECOND appeal against the decree of L A Campbell, District Judge of Coimbatore, in appeal suit No 125 of 1892, confirming the decree of V Malhari Rao, District Munsif of Coimbatore, in original suit No 569 of 1890

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Pattabhirama Ayyar, for appellant

Respondents were not represented

JUDGMENT

It is argued that, no time having been fixed for the making of the award, the award is invalid We cannot accede to this contention Section 508 is directory merely and not mandatory, as observed in *Har Narain Singh* v *Bhagwant Kuar* (1), and the mere omission to fix a time is not fatal In the case before us the award was not made till about a year after the submission to artibration but there is no allegation that either party attempted to recede from the submission, and, having regard to the fact that rights to immoveable property were in question, it is not unreasonable to hold that the parties did not consider there was

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* Second Appeal No 1571 of 1893.

(1) 10 A. 137

1894 April 10. — Appellate Civil. — 18 M. 22.

any undue delay. Under these circumstances, we must disallow the objection that the award is invalid under the final clause of Section 521.

[23] Another objection is that the award was not signed by the arbitrators in each other's presence. We consider it sufficient, if they all agreed to it as provided in Section 516. There is no provision of law requiring them to sign in the presence of each other—*Bhabasundari Dasi* v. *Makhunlal Day* (1).

It is next urged that some of the arbitrators were absent from a certain meeting. There is no specific allegation or issue as to this, nor is there evidence as to what was the object of that meeting. The evidence of one witness, who speaks to such absence, is contradicted by other witnesses examined in the case, and we are unable to give any weight to the objection.

The appeal fails and is dismissed with costs, and so also is the petition under Section 622.

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18 M. 23.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

HANUMAYYA AND ANOTHER (*Plaintiffs*), *Appellants* v VENKATASUBBAYYA AND OTHERS (*Defendants*), *Respondents.**
[2nd May, 1894),]

Code of Civil Procedure—Act XIV of 1882, *Section* 503—*Appointment of receivers—Waste or misappropriation of property as a ground for appointing a receiver.*

The fact that the acts complained of amount to misappropriation rather than waste makes no difference for the purposes of Section 503 of the Code of Civil Procedure.

[R., 6 Ind. Cas. 659=36 P R. 1910=72 P.L R 1910=53 P.W.R. 1910.]

APPEAL against the order of G. T. Mackenzie, District Judge of Kistna, passed on miscellaneous petition No. 558 of 1893 in the matter of original suit No. 25 of 1893.

In a suit for the partition of the estate of a trading joint family, which estate belonged to the plaintiff and his brother, the eldest surviving member of the family, it appeared that the latter had for some time past misappropriated large sums of money and had thrown the accounts into confusion. The plaintiff therefore applied to have a receiver appointed to the estate.

[24] The District Judge dismissed the petition on the ground that no case had been established under Section 503 of the Code of Civil Procedure, and the petitioner preferred this appeal.

Pattabhirama Ayyar and *Sriramulu Sastri*, for appellants.

Venkataramiah Chetti, for respondents.

JUDGMENT.

The reason assigned by the Judge for declining to appoint a receiver is that the acts complained of amount to misappropriation rather than waste, and that petitioners can hereafter institute a criminal prosecution. These are clearly not sufficient reasons. Section 503 of the Code of Civil

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* Appeal against Order No. 9 of 1894.

(1) 8 B.L.R., 128.

Procedure authorises the appointment of a receiver for the preservation or better custody of property the subject of a suit Whether property is wasted or misappropriated makes no difference for the purposes of this section. The future institution of a criminal prosecution will not enable a party to recover property that may have been misappropriated

1894 MAY 2. — APPELLATE CIVIL — 18 M. 23.

We cannot support the Judge's order

It is therefore set aside and the case remanded for disposal according to law

The costs hitherto incurred will abide and follow the result

18 M. 24.

ORIGINAL CIVIL

Before Mr Justice Shephard

In re ACKRILL * [29th October, 1894.]

Deceased insolvent-debtor—After-acquired property—Whether it vests in his administrator or in the Official Assignee

The Official Assignee sold a policy of insurance on the life of an insolvent, who, after obtaining his personal discharge, died The purchaser having bought the policy mainly for the benefit of the insolvent, paid most of the sum realised by him upon it to the Administrator-General who was about to take out letters of administration to the estate of the insolvent

Held, that the Administrator-General was entitled to the proceeds of the policy in preference to the Official Assignee

APPLICATION in insolvency The Administrator-General and the Official Assignee appeared in person

JUDGMENT

[25] The facts giving rise to this application are as follows Among the assets of the insolvent was a policy of insurance on his own life for Rs 2,500, which was sold by the Official Assignee and realized Rs 180 Shortly after the sale the insolvent, who had obtained his personal discharge, died, and the purchaser collected the amount due on the policy It was then brought to the notice of the Administrator-General by the purchaser himself that he had not bought the policy entirely for his own benefit, but mainly for the benefit of the insolvent, and accordingly the money received on the policy *minus* the price paid for it and a small sum due by the insolvent to the purchaser was paid over to the Administrator-General The question is whether the money rightly came to the hands of the Administrator-General or whether it is affected by the vesting order

I think that the money must be treated as after-acquired property By the sale the Official Assignee parted with all interest in the policy Under the circumstances I think it is clear that the personal representative of the deceased insolvent is entitled to take and to administer the money as the assets of the deceased This is taken for granted in the cases, and must necessarily be so, seeing that future-acquired property does not vest in the Official Assignee from the date of the filing of the petition It is only by a proceeding subsequently taken during the lifetime of a discharged insolvent that it may be made available for the scheduled creditors when a judgment is entered up under Section 86 of the Insolvency Act

* Insolvency Petition No 75 of 1893

1894 Oct. 29. — Original Civil. — 18 M. 24.

See *Barton* v. *Tattersall* (1), *Ward* v. *Painter* (2). Accordingly if there is a second insolvency, property acquired by the debtor before the date of it, but after the vesting order in the first insolvency, is distributed in the first instance among the creditors in the second insolvency and can only be available to the prior creditors under a judgment in the first insolvency —*Curtis* v. *Sheffield* (3). On the death of the insolvent the Court of Chancery has, notwithstanding the insolvency, jurisdiction to administer his assets (see *per* North, J., in re *Smith* (4)), though at the same time in the administration the claim of the schedule-creditors may be admitted without obtaining an execution order under the judgment; see in re *Clagett's Estate* (5). [**26**] The Insolvency Court has no jurisdiction over the legal representative of the deceased debtor—*Ex parte Welchman* (6). As compared with that case the present is an *a fortiori* case, as the provision there discussed (Section 9 of the Act 5 & 6 Vic., c. 116) is not to be found in the Indian Act.

In my opinion the Administrator-General is entitled to take possession of and administer the moneys arising from the policy of insurance.

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18 M. 26.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

GURUVAYYA AND OTHERS (*Plaintiffs*), *Appellants* v. VUDAYAPPA (*Defendant No. 2*), *Respondent*.*
[1st May, 1894.]

Code of Civil Procedure—Act XIV of 1882, Sections 244 and 258—Payment to decree-holder out of Court—Whether an order having been made under Section 258, a separate suit on the subject matter thereof lies

An order under Section 258 of the Code of Civil Procedure is appealable under Section 244; no separate suit lies, since the question is *res judicata* between the parties

[**Rel.**, 4 Ind. Cas 818 (819)=U.B.R. 11, 11 Qr., 1909, C.P.C., p. 31; **R.**, 5 Ind. Cas. 814=16 P.R. 1910=18 P.W.R. 1910; **D.**, 20 M. 369 (371); 21 M. 409 (410).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, confirming the decree of O. V. Nanjunda Aiya, District Munsif of Masulipatam, in original suit No. 283 of 1891.

In this case first defendant held a decree against the plaintiff. In the execution proceedings of that decree the plaintiff put in a petition, pleading payment of Rs. 496, for which he held a receipt. The first defendant asserted that this receipt was fabricated. The District Munsif called for evidence and dismissed plaintiff's petition, because his witnesses were not in attendance. The plaintiff then filed a suit, upon his receipt, to recover Rs. 496 and Rs. 40 damages for first defendant's failure to certify the payment. The District Munsif held that the suit was barred by Section 244 of the Code of Civil Procedure. Against this decision [**27**] the plaintiff appealed, but the District Judge affirmed the decree of the District Munsif.

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* Second Appeal No. 1705 of 1893.

(1) Russ & Mylne, 241.
(2) 5 Mylne, & Craig. 299.
(3) 8 Sim. 176.
(4) L.R. 24 Ch. D. 672 at page 679.
(5) L.R. 20 Ch. D. 637, 640
(6) L.R. 11 Ch. D 48, 53

1894 May 1. — Appellate Civil — 18 M. 26.

The plaintiff preferred this appeal

Mahadeva Ayyar, for appellants.

Pattabhirama Ayyar, for respondent

JUDGMENT

In the Full Bench cases decided in this Court *Viraraghava* v *Subbakka* (1) and *Mallamma* v *Venkappa* (2) it does not appear that any question as to the satisfaction of the debt out of Court was raised in the execution proceedings So also in the case of *Sita Ram* v *Mahipal* (3) and *Shadi* v *Ganga Sahai* (4) The ground of decision in the Madras cases was that the question was not whether the decree had been satisfied and satisfaction should be recorded, but whether there had been a fraudulent breach of contract which had not formed the subject of inquiry in the suit or in the execution proceedings

Here, however, the question of payment out of Court did form the subject of inquiry in execution proceedings Though an order under Section 258 is not made appealable under Section 588, it is appealable under Section 244, being made on a question arising between the parties to the suit, and falling under the definition of ' decree ' The view taken in *Lingayya* v *Narasimha* (5) coincides with that taken in *Ghazidin* v *Fakir Bakhsh* (6), *Ranji Bhaiji* v *Harjivan* (7) and has been again followed in *Tamna Prasad* v *Mathura Prasad* (8) No separate suit will lie, since the question whether the payment has been made is *res judicata* between the parties

The decrees of the Courts below must be confirmed and this second appeal dismissed with costs.

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18 M. 28.

[28] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar

PERIAKARUPPAN (*Defendant*), *Petitioner* v PALANIYANDI (*Plaintiff*), *Respondent* * [18th July, 1894]

Provincial Small Cause Courts Act—Act IX of 1887, *Schedule II, Clause* 35 (1)—*Jurisdiction—Whether obstruction of a water course amounts to ' diversion' within the meaning of Clause* 35 (1)

If by obstruction the flow of water is diverted from a plaintiff's lands, such obstruction amounts to diversion within the meaning of Clause 35 (1) of Schedule II of Act IX of 1887

[F., 134 P R 1906=18 P L R 1907]

PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the decree of Venkata Rengaiyar, Subordinate Judge of Madura (East), in suit No 213 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Narayana Rao, for appellant

Desikachariar, for respondent

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* Civil Revision Petition No 101 of 1893.

(1) 5 M 397 (2) 8 M. 277. (3) 3 A 533 (4) 3 A 538
(5) 14 M 99 (6) 7 A 73 (7) 11 B. 57 (8) 16 A 129

1894
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APPEL-
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18 M. 28.

JUDGMENT.

This was a suit for compensation due for defendant having wrongfully obstructed the flow of water to plaintiff's cowle land, and the question raised for determination on revision is whether sub-clause (*i*) Clause 35 of the second schedule of the Provincial Small Causes Courts Act does not bar the jurisdiction of the Court of Small Causes from entertaining such suit. The contest is as to whether obstruction to the flow of water which is referred to by the Subordinate Judge in his judgment must be taken to imply necessarily a ' diversion ' of the water within the meaning of the provision of law cited above. It is contended on behalf of the petitioner that mere obstruction does not amount to diversion, and that the use by the Subordinate Judge of the words ' obstructed the flow of water ' was not felicitous. It appears from the record that plaintiff has certain cowle lands in Sivaganga, that a channel led off from the Puthur tank to those lands, and that petitioner's obstructions prevented the plaintiff [**29**] from taking water along it, that loss of crop was the damage which resulted, and that the water obstructed flowed into Ayan channels. This appears to me to be clearly a case falling under the clause of the Small Causes Act already cited. The contention that obstruction is not diversion seems to be absurd, since when the flow of water to the cowle lands along the channel was obstructed, it must be diverted in whole or part from the cowle lands, and since it is immaterial whether the diversion was into the tank itself or into Ayan or zamin channels or elsewhere. It is enough that if by the obstruction the flow of water to plaintiff's cowle lands is diverted from them so as to diminish the water-supply and to cause damage.

I set aside the decree of the Subordinate Judge as one passed without jurisdiction, and direct that the plaint be returned to plaintiff for presentation to a Court of competent jurisdiction.

Plaintiff will pay petitioner's costs throughout.

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18 M. 29.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MADRAS DEPOSIT AND BENEFIT SOCIETY, LIMITED (*Plaintiff*), *Appellant v.* OONNAMALAI AMMAL AND ANOTHER (*Defendants*), *Respondents.** [13th and 18th July, 1894.]

Transfer of Property Act—Act IV of 1882, Section 59—Instrument unsigned by any witness—Evidence Act—Act I of 1872, Section 68—Inadmissibility of the instrument in evidence to prove the debt.

A mortgage for more than Rs 100 which has been prepared and accepted, but which is not attested, is invalid, and it cannot be used in proof of a personal covenant to pay.

[**R.**, 30 M. 251 (252)=17 M.L.J. 213 =2 M.L.T. 175; 32 M. 410=1 Ind. Cas. 1=19 M.L.J. 584 (589); 53 P.W.R. 1907; **Not App.**, 30 M. 284 (288)=17 M.L.J. 167=1 M.L.T. 416; **D.**, 26 C. 222 (224).]

APPEAL from the decree of Davies, J., sitting on the original side of the High Court in original suit No. 280 of 1892.

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* Appeal No. 8 of 1894.

1894 JULY 18

APPELLATE CIVIL.

18 M. 29.

[30] The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Seshagiri Ayyar and *Parthasaradi Ayyangar*, for appellant

Ramanujachariar, for respondents.

JUDGMENT

It is urged that, though the document cannot be used or proved as a mortgage instrument, it may be proved as containing a personal covenant to pay, and we are referred to the decision in *Gomaji* v *Subbarayappa* (1) In that case, however, there was no statutory bar to receiving the document in evidence, though by reason of want of registration it could not affect the immoveable property comprised therein In the present case the document is itself excluded by the provisions of Section 68 of the Indian Evidence Act, since it purports to create a legal mortgage

Nor can the plaintiff company fall back upon the deposit of the title deeds. There was no antecedent debt to secure which the title deeds were deposited, and it is clear from the plaint itself that the intention from its inception was to effect a legal mortgage A legal mortgage was prepared and accepted, but owing to neglect to comply with the requirements of Section 59 of the Transfer of Property Act it is invalid

We must dismiss the appeal with costs

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18 M. 30.

APPELLATE CIVIL.

Before Sir Arthur J. H Collins, Kt , Chief Justice, and Mr. Justice Parker

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OLIVER (*Plaintiff*), *Appellant* v ANANTHARAMAYYAN (*Defendant*), *Respondent*.* [13th and 17th April, 1894]

Rent Recovery Act—Madras Act VIII of 1865, Section 39—Service by affixing notice of intention to sell on some conspicuous part of the tenant's land—Residence of tenant in foreign territory

The provision of Section 39 of the Rent Recovery Act that the notice of an intention to sell the land should be served 'at his usual place of abode' denotes some [31] place in the neighbourhood of the land in respect of which the patta was tendered, and does not apply when the tenant resides in foreign territory

SECOND appeal against the decree of H. H O'Farrell, Acting District Judge of Tanjore, in appeal suit No 919 of 1892, reversing the decision of F. H Hamnett, Sub-Collector of Tanjore, in summary suit No 74 of 1890

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Pattabhirama Ayyar, for appellant

Sundara Ayyar, for respondent

JUDGMENT

The District Judge has reversed the decision of the Sub-Collector and dismissed the suit on the ground that there was no proper tender of patta in the manner prescribed by law (Sections 7 and 39, Madras Act VIII of 1865)

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* Second Appeal No. 1601 of 1893

(1) 15 M. 253.

1894 April 17. — Appellate Civil. — 18 M. 30.

Defendant was a clerk in the District Court of Cochin at Trichoor and was not residing in the Tanjore district. One Ganapathi Subbier was looking after his cultivation for him in Tanjore, but had no power-of-attorney from him. Ganapathi Subbier denies that any patta was tendered to him, and though the kurnam deposed that there was, there is no finding by the Judge upon that point.

The patta tendered was stuck up on the land in the manner prescribed by Section 39, and the question is whether this mode of service was justifiable when the defendant was known to be living in foreign territory and had no authorized agent on the spot.

The procedure is only justifiable when service cannot be effected on the tenant himself or on some adult male member of his family at his usual place of abode, or on his authorized agent (Section 39). The section must be construed reasonably and the words 'at his usual place of abode' would seem to denote that it was contemplated that the notice would ordinarily be served upon the tenant himself, his relative or his authorized agent in the neighbourhood of the land in respect of which the patta was tendered. A tender through the post would not be effectual —see *Venkatachellam Chetti* v. *Kadumthusi* (1) and *Saminatha* v. *Viranna* (2). We do not think it could have been intended that a landlord should go himself or send an agent into foreign territory [32] to tender a patta, and we, therefore, hold that the service, contemplated in the first instance under Section 39 could not be effected, and hence that the service by affixing a copy on a conspicuous part of the land was under the circumstances a good and valid service. The decree of the District Judge must be reversed and the appeal remanded to be disposed of on the merits. Appellant is entitled to costs of this appeal, and the costs in the Lower Appellate Court will abide and follow the result.

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18 M. 32.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KAMMARAN NAMBIAR (*Plaintiff*), *Appellant v.* CHINDAN NAMBIAR AND OTHERS (*Defendants*), *Respondents.**
[27th April, 1894.]

Perpetual lease granted for consideration—Clause providing for forfeiture on rent being in arrears—Whether repayment of the consideration is a condition precedent to surrender of the lands

Consideration paid for a lease is exhausted by the grant of the lease, and a tenant's forfeiture of the lease cannot, in the absence of a provision to that effect, operate so as to convert the original consideration into a debt, which must be paid before the forfeiture can be enforced.

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 298 of 1892, confirming the decree of K. Ramanatha Iyer, District Munsif of Cannanore, in original suit No. 35 of 1892.

The defendants in this suit held lands on a perpetual lease (*Janmakozhu*), which provided that the lease should be forfeited if the defendants allowed the rent to fall into arrears. The rent fell into arrears, but since

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* Second Appeal No. 206 of 1893

(1) 4 M. 145. (2) 13 M. 42.

it appeared that the plaintiff's ancestor had received consideration for the lease, the District Munsif and the District Judge decreed that, although the defendants had forfeited the lease, the forfeiture thereof could not, by analogy to the ordinary kanom, be enforced, until the plaintiff had repaid the consideration.

1894 APRIL 27

APPELLATE CIVIL.

18 M. 32.

[33] The plaintiff preferred this appeal

Ryru Nambiar, for appellant

Respondents were not represented

JUDGMENT

We do not agree with the Judge that, if the clause for forfeiture of the perpetual lease is enforceable, plaintiff is only entitled to a decree on refund of the consideration paid by the tenant at the time of obtaining the lease. Exhibit A contains no provision for such repayment, and an obligation to refund cannot be inferred from the clause for forfeiture

In the case of a kanom referred to by the Judge, what is forfeited is the right to retain possession for the full period of twelve years, the liability to repay the debt being in no way affected Whereas in the case of a lease the consideration paid for it is exhausted by the grant of the lease, and the tenant's forfeiture of the lease cannot operate to convert the original consideration into a debt

This is the only point that has been argued for appellant, and respondents have not appeared

We, therefore, allow this appeal and setting aside the decrees of the Lower Courts so far as they disallow plaintiff's claim to possession of the land, we decree that defendants do surrender the land to plaintiff and pay his cost throughout

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18 M. 33=4 M L.J. 283

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Shephard

ALAGAPPA CHETTI (*Plaintiff*), *Appellant v* VELLIAN CHETTI AND ANOTHER (*Defendants*) *Respondents* *

[27th September and 2nd October, 1894]

Partnership—Suit by one member of an undivided Hindu family—Non-joinder of other persons interested in a family business

In 1887 the plaintiff appointed the defendant to serve for three years as manager of a business in Moulmein, which was the business of the undivided Hindu family to which the plaintiff belonged In 1893 the plaintiff, without joining the other members of his family, sued the defendant for damages for breach of the contract of service.

[34] *Held* (1) that the suit was not maintainable in the absence from the record of the other partners in the business,

(2) that under the circumstances, the name of the plaintiff in the cause-title could not be taken as designating his partners also,

(3) that by reason of the fact that the amendment might deprive the defendants of the defence of limitation and of the other circumstances in the case, the plaintiff should not be allowed on appeal to amend the plaint by bringing his partners on to the record

[F., 29 A 311 (316)=4 A L J 194=A.W N. (1907) 58, 23 M 190 (194), 6 Ind Cas. 288=7 M L.T 225; 6 Ind Cas 438=7 M L T 432, 17 M L J 25 (notes of recent cases) R., 25 A 378 (383); 34 A 549 (567)=9 A L J 819=15 Ind Cas

* Appeal No 65 of 1894

1894 Oct. 2.

APPELLATE CIVIL.

18 M. 33=4 M. L. J. 283.

126; 28 B. 11 (19); 32 M. 284=4 Ind. Cas. 38=19 M.L.J. 372 (382)=5 M. L.T 351; 35 M. 685 (689)=10 Ind. Cas. 874=21 M.L.J. 508=(1911) 1 M. W.N. 442; 7 Ind. Cas. 584 (586)=4 S.L.R. 2; 9 Ind. Cas. 760=9 M.L.T. 347=(1911) 1 M.W.N. 181; 10 Ind. Cas. 218 (219)=21 M.L.J. 475=9 M.L.T. 499; 2 N.L.R. 79 (80); 57 P.R. 1905=76 P.L.R. 1905; 69 P.R. 1906=118 P.L.R. 1906; **D.**, 33 A. 272 (278) **(P.C.)**=8 A.L.J. 256=13 Bom. L.R. 359=13 C.L.J. 345=15 C.W.N. 321=9 Ind. Cas. 739 =21 M.L.J. 378=9 M.L.T. 343=(1911) 2 M.W.N 395 (400); 127 P.R. 1906=58 P.L.R. 1907=10 P.W.R. 1907; 103 P.L.R. 1902.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 4 of 1893.

This was a suit brought by the plaintiff to recover from defendant No. 1 and his son the sum of Rs. 15,495 as damages sustained by reason of the first defendant's misconduct as agent for a business carried on at Moulmein under the name of Pana Ravana Mana Ana Alagappa Chettiar.

It appeared that the first defendant had been appointed by the plaintiff to the management of the business in question on 19th January 1887 and had then signed a document, designated in the plaint as a salary chit, by which he undertook to serve the business for a period of three years. The defendants pleaded, *inter alia*, that the plaintiff, being a member of the undivided Hindu family to which the business in question belonged, was not entitled to maintain the suit in his sole name. Preliminary issues were framed with reference to this plea, and it was found that the constitution of the firm was as alleged by the defendants, and the above plea was upheld. The suit having been thereupon dismissed, the plaintiff preferred this appeal.

Subramanya Ayyar, Ranga Ramanujachariar and *Desikacharir*, for appellant.

Mr. *R. F. Grant*, for respondent No. 1.

Sivasami Ayyar, for respondent No. 2.

JUDGMENT.

It appears from the plaint that the first defendant Vellian was, on the 19th January 1887, engaged by the plaintiff to carry on his business in Moulmein for a period of three years, and that, accordingly, he did act as the plaintiff's agent till the 17th December 1889, when he left moulmein. It is charged against the first defendant that during the period of his agency he acted in contravention of the plaintiff's orders, and that, on his return to this country, he refused to render proper accounts. The plaint was presented on the 14th January 1893.

On the 14th August 1893 the defendants put in separate [35] written statements, in both of which it is objected that the suit is bad for non-joinder of parties, because the plaintiff is only one of several members of a Hindu family carrying on business in partnership together. On the same day, the 14th August. certain preliminary issues were adjusted with reference to this objection. By the first of them the question of fact is raised whether "(as alleged in the plaint) the plaintiff is sole owner "of the firm P. R. M. A. in Moulmein or whether such firm has other "partners or belongs to a family which has other members." On the 2nd November certain persons describing themselves as members of the family of the plaintiff Alagappa put in petition stating that Alagappa was the manager of the family business, and that the first defendant was by him alone appointed agent, and asking that the plaintiff might be permitted to proceed against the defendants.

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On the 14th November the plaintiff himself filed a petition praying that, if the Court holds the other members of his undivided family should also be parties, they might " also be described as plaintiffs " On the same day the trial of the preliminary issues took place The plaintiff Alagappa was examined as a witness He at once admitted that he was not the sole owner of the firm, but that five persons in all named by him and members of his family were interested in it The witness proves the execution by the first defendant Vellian of the document (A) called a salary chit and explains that the letters P R. M A. appearing in that paper before his name Alagappa are not his own initials, but stand for the firm's name.

On the evidence the Judge held that the plaintiff was not competent to maintain the suit in his own name only He further, with reference to the petition presented on the same day but after he had expressed an opinion adverse to the plaintiff, refused to allow any addition of new parties The suit was accordingly dismissed The appeal was supported on alternative grounds It was argued that the plaintiff Alagappa was competent to maintain the suit in his own name, or in the alternative that the designation of the plaintiff in the cause-title was sufficient to denote all the persons interested in the firm There can be no doubt that as a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit brought in respect of transactions with the partnership It makes no difference that the persons, carrying on business together, were also members of a Hindu family—*Kalidas* [36] *Kevaldas* v. *Nathu Bhagvan* (1) and cases cited The proposition that the manager of a Hindu family can sue without joining those interested with him is one which cannot be supported and no authority was cited in support of it save a *dictum* in *Arunachala* v *Vythialinga* (2) There can be no doubt, in the present case, that the employment of Vellian as agent was an employment in the business of the firm and that the contract was made by Alagappa on behalf of the firm The appellant's vakil, however, endeavoured to convince us that Alagappa, though acting for the firm made the contract in his own name under such circumstances as to entitle him to sue alone The case of *Agacio* v *Forbes* (3), was cited, and it was urged that similarly here Alagappa was entitled to sue alone In *Agacio* v *Forbes* (3) it is true that the contract made in Honkong between the plaintiff and the defendant was made for the benefit of the plaintiff's firm, but the consideration for it, namely, the forbearance by the plaintiff from proceedings threatened against third parties, was a consideration moving from the plaintiff alone, for he alone was in Honkong representing his firm which carried on business in Valparaiso

If, instead of being a partner, Agacio had been a mere agent of a foreign principal, the case would have come within the principle recognized in Section 230 (1) of the Contract Act. And in considering the question of parties to an action, the case of partners and that of agent and principal stand on the same footing, the question in either case being with whom was the contract made in point of law, *Lindlay on Partnership*, 3rd edition, page 487 For these reasons we think that the authority cited is not applicable In the present case there is nothing to show that the right of suing on the contract was restricted to the plaintiff *Lucas* v *De la Cour* (4) On the contrary it appears on the face of the salary chit that the retainer is by the firm and not by Alagappa in his individual capacity It

(1) 7 B. 217 (2) 6 M 27. (3) 14 Moo P C 160 (4) 1 M & S. 249

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follows that the general rule above stated requiring the joinder of all the partners must apply, See *Lindley on Partnership,* 3rd edition pages 486 and 489.

This being so, we are asked to read the name of the plaintiff given in the cause-title as designating not Alagappa only but his [37] partners or coparceners. It seems to us impossible in the circumstances of the present case to say that there is a mere misdescription as was held to be the case in *Kasturchand Bahiravdas* v. *Sagarmal Shriram* (1). It is abundantly clear that the plaint was not read by the plaintiff's Vakil in the manner in which we are now asked to read it, for otherwise the Pleader would not have gone to trial on the issue raised by the Judge with regard to the question whether the plaintiff had other partners. It is contended that the Pleader misconstrued the plaint, but the mistake is by no means obvious, and we must assume that the party is duly represented by his Pleader.

We are clearly of opinion that the defect is one which only could be cured by the addition of the persons who along with Alagappa constitute the plaintiff's firm or family. It remains then to consider the question whether even at this stage those persons ought to be brought on the record. No formal application to that effect was made in the Court below nor is any such application made before us. On the respondent's behalf it is said that the required amendment ought not now to be made, because any claim against Vellian by the partners of Alagappa would be barred by the Statute of Limitation. Even on the 14th August when the informal application was made on behalf of those persons such suit would equally have been barred. On the other hand the plaintiff had elected to go to trial without offering to amend and therefore ought to be left to the consequence—*Dular Chand* v. *Balram Das* (2).

The case of *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (3) was cited in support of the contention that the possibility of the bar of limitation afforded a reason for allowing an amendment. That case is, however, plainly distinguishable from the present and from *Weldon* v. *Neal* (4). In *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (3) the mistake made consisted not in the non-joinder of parties or the omission of any statement of claim, but in the joinder of parties who ought not to have been joined. In the result the cause was remitted for trial on the issues touching the liability of the defendant Rutta Koer on the bond in respect of which [38] the suit had been brought. It is not necessary to consider what would be the consequence if the other partners were joined as to which point several cases were cited—*Kalidas Kevaldas* v. *Nathu Bhagvan* (5), *Narayana Chetti* v. *Sivaraman Chetti* (6).

In our opinion the amendment which, as has been observed, was never asked for in this Court or in the Court below ought not now to be made.

If by the amendment the defendants were deprived of the defence of limitation, then according to the view taken in *Weldon* v. *Neal* (4) and followed in this Court in *Mallikarjuna* v. *Pullayya* (7), the amendment ought not to be allowed. On the other hand if the amendment must, by the operation of Section 22 of the Limitation Act, lead to the dismissal of the suit, then it would clearly be useless.

The appeal is dismissed with costs.

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(1) 17 B. 413. (2) 1 A. 453. (3) 11 M.L.A. 468 (486).
(4) 19 Q.B.D. 394. (5) 7 B. 217.
(6) Appeal No. 31 of 1887, unreported. (7) 16 M. 319.

18 M 38.

1894 APRIL 18.

APPELLATE CIVIL.

18 M. 38.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

MOIDIN KUTTI AND OTHERS (*Plaintiffs*), *Appellants v* BEEVI KUTTI UMMAH AND OTHERS (*Defendants Nos* 1 *to* 41 *and* 43 *to* 45), *Respondents*.* [17th and 18th April, 1894]

Malabar law—Compromise of doubtful claims by adult members of a tarwad—Suit by junior members to rescind the compromise—Limitation Act—Act XV of 1877, Section 7

In 1878 the senior members of a Malabar tarwad, in *bona fide* compromise of certain doubtful claims, executed an instrument conveying away certain land of the tarwad In 1891 certain junior members of that tarwad, including several minors, sued to recover possession of the land in question Others of the junior members of the tarwad had attained majority more than three years before the suit and had not impugned the validity of the conveyance, these persons were joined as defendants None of the plaintiff's had attained majority in 1878

Held, that the suit was barred by limitation

[39] *Semble* that a compromise of a doubtful claim made by the adult members of a tarwad *bona fide* and in the interest of the tarwad is binding on the minor members

[**R.**, 6 Bom L.R 925 (930), 5 C L J 338=11 C W N 478 (483) (**P.C.**), 23 T L R 139, **D.**, 19 M 243 (247)]

APPEAL against the decree of C Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No 28 of 1891

Suit to recover possession of lands with mesne profits The plaintiffs were two adult and twenty-one infant members of the tarwad to which belonged also defendants, Nos 1 to 8 The remaining defendants (other than persons impleaded as tenants in possession merely) were members of a second tarwad to which certain property had been assigned in compromise of various disputed claims by defendants Nos 1 to 4, the senior members of the plaintiff's tarwad, under a karar (Exhibit BB), dated 30th May 1878 The lands sought to be recovered in this action were those comprised in the karar above referred to and the prayer of the plaint was in the following terms —" The karar, dated 18th Edvam 1053, " entered into by the first to fourth defendants and the ninth, tenth and " thirteenth to sixteenth defendants by which the properties described " below were transferred to the ninth to twenty-seventh defendants' " Muthalakam tarwad being invalid and not binding on the plaintiffs, it " is, therefore, prayed that a decree may be passed directing the ninth to " twenty-seventh defendants to surrender possession to us of the proper- " ties described in the schedules below with everything therein "

The Subordinate Judge held that the instrument was under the circumstances of the case binding upon the plaintiffs and also that the claim was barred by limitation. He accordingly dismissed the suit against which the plaintiffs preferred this appeal

Mr *Krishman Bhashyam Ayyangar* and *Seshachariar*, for appellants

Sankaran Nayar and *Ryru Nambiar*, for respondents

JUDGMENT

Two questions arise for determination in this appeal, *viz* , (i) whether the suit is time-barred, and (ii) whether the karar (BB) is binding on the plaintiffs

* Appeal No 21 of 1893.

1894 APRIL 18. — APPELLATE CIVIL. — 8 M. 38.

As to the first question, the suit was brought on the 6th October 1891 to set aside the karar, dated 30th May 1878, and to recover, for the benefit of the tarwad, possession with mesne profits of the properties, the subject of the karar.

The plaintiffs are members of the tarwad called Thayattum house and were minors at the date of BB, which purports to be a [40] compromise executed in favour of the ninth, tenth and thirteenth defendants by defendants, Nos. 1, 2 and 3, who are the mothers of the plaintiffs. Defendants 4 to 8 are also members of plaintiffs' tarwad; of them fourth defendant was a major at the date of BB and consented to it. Defendants 5 to 8, who were then minors, attained majority more than three years prior to the suit and never attempted to get the karar set aside. It is contended for the appellants that their right to bring this suit is in the nature of an individual right, and is saved by Section 7 of the Limitation Act for three years after attainment of majority. As pointed out in *Seshan* v. *Rajagopala* (1) and *Vigneswara* v. *Bapayya* (2), Section 7 cannot apply to a case in which there are also majors having a common right whose suit would be barred. The fact of the suit being brought by the minors alone does not affect the principle of the decision in the above cases. We think, therefore, the Subordinate Judge is right in holding the suit to be time-barred.

We also consider his decision to be right on the merits. The arguments of appellant's Counsel do not satisfy us that the Judge is in error in holding that a compromise of a doubtful claim made by the adult members of a tarwad *bona fide* and in the interest of the tarwad is binding on the minor members. There is evidence that the claim set up by ninth defendant to the karnavanship of the tarwad was not altogether devoid of foundation as shown by the Subordinate Judge in paras. 19 and 20 of his judgment.

The evidence discloses no trace of fraud or collusion between the parties to the compromise. Defendants 1, 2 and 3 are plaintiffs' own mothers and they were assisted by second plaintiff's father and also by a vakil of the family.

We dismiss the appeal with costs.

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18 M. 41=2 Weir 100.

[41] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

AGRA BANK, LIMITED (*Petitioner*) *v.* LEISHMAN (*Respondent*).*
[30th July, 31st August and 7th September, 1894.]

Criminal Procedure Code—Act X of 1882, *Sections* 145 *and* 146.

A Magistrate, in making an order under Criminal Procedure Code, Sections 145 and 146, must inquire into the question which party was in actual possession at the time of the institution of the proceedings and not at the time when the order is made. In making this enquiry the Magistrate may presume that when a vendor sells part of a property he retains all that he does not sell.

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*Criminal Revision Case No. 315 of 1894.

[N.B.—The gist of the decision in this case has been incorporated in Section 145 of Act V of 1898.—Ed.]

(1) 13 M. 236. (2) 16 M. 436.

1894 SEP. 7.

APPELLATE CRIMINAL.

18 M. 41=2 Weir 100.

[R., 25 A. 537 (539)=23 A W N 101, 24 B 527 (532), 2 Bom. Cr Cas. 96 (98)=15 Bom L.R 689]

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Subordinate Judge (First-class Magistrate of Nilgiris, Ootacamund), passed in miscellaneous case No. 1 of 1894.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Mr. *R. F. Grant*, for petitioner

Mr. *Johnstone*, for respondent.

JUDGMENT.

This is a petition by the Agra Bank to revise an order of the First-class Magistrate of Ootacamund under Sections 145 and 146, Criminal Procedure Code, attaching two plots of land as to which he was not able to decide whether the bank or the counter-petitioner, Mr Leishman, was in possession The admitted facts are that in 1885 the bank sold a portion of the Bella Vista property in Ootacamund to the Murree-Brewery Company Shortly afterwards, in 1885 or 1886, some sort of survey was made, and the Brewery Company put down demarcation stones to show the limits of their purchase and planted gum trees to mark the boundary Matters so continued till Mr Leishman agreed to purchase the Brewery Company at the end of 1892 He was put in possession of the machinery and buildings, but in 1893, after survey of the boundaries by a Mr De Lima, he [42] became of opinion that the boundaries as defined by the stones put down by the Brewery Company were not in accordance with their title deed, and that he was entitled to more land than was included within those boundaries In order to rectify these deficiencies Mr Leishman took upon himself to remove the boundary stones and to peg out a line and fence to show what his boundaries really were, and it is his action in this respect that led to the breach of the peace which caused the Magistrate to intervene

The Magistrate held (i) that he had to determine if either of the contending parties was in possession *at the time of his writing his order*, and (ii) that there was no presumption that the bank had retained plots 1 and 2 after 1885 In consequence of his holding upon this second point, the Magistrate held he had not to determine whether Mr Leishman had obtained *de facto* and physical possession and the language used by the Magistrate appears to intimate that had it not been for this opinion his decision might have been different

We are of opinion that on both these points the Magistrate was in error. There is a consensus of authority that the possession to be inquired into is the possession at the time of the institution of the proceedings—*Krishna Dhone Dutt* v. *Troilokia Nath Biswas* (1), *Bechu Sheikh* v *Deb Kumari Dasi* (2), *In the matter of the petition of Jai Lal* (3), and *In the matter of Huchapa and Shivagangava* (4) It is obvious that the words in Section 145, Criminal Procedure Code, "the fact of actual possession," must have reference to some fixed point of time It cannot, as pointed out in the Bombay case, have reference to some date long anterior to the date of the proceedings beng instituted, nor can it refer to a point of time subsequent to the commencement of the inquiry The time to be taken is obviously the date of the Magistrate being satisfied there is

(1) 12 C. 539. (2) 21 C 404
(3) 13 A 362. (4) 15 B 152

1894 SEP. 7.

APPELLATE CRIMINAL.

18 M. 41 = 2 Weir. 100.

ground for his intervention under Section 145, in other words the date of the institution of the proceedings.

Nor can we agree with the Magistrate in his opinion that there is no presumption that the Agra Bank retained possession of plots 1 and 2. There is a general presumption that when a vendor sells part of a property he retains all that he does not sell. In this case it is admitted that the two plots lie outside the boundary [43] stones put down by the Murree Brewery Company. This would of itself be sufficient to throw upon Mr. Leishman the onus of proving that he was in possession. There is, however, no room for any presumption at all about the matter, for in his evidence Mr. Leishman states:—" On " November 4th, 1893, I took possession of disputed block No. 2. Of " land on Muree Brewery side of fence in No. 1, I took possession on " 4th November 1893 and the portion of No. 1 on Bella Vesta side in " March 1894." There is thus a clear admission that up to these dates possession was with the Agra Bank, and the sole question for determination is whether there is evidence that the Bank has been dispossessed since those dates. . . . .

From this it appears that no effective possession was taken by Mr. Leishman in March as he claims and the Bank still remained in possession up to May notwithstanding the trespass.

On these grounds we must set aside the order of the Magistrate attaching plots 1 and 2, declare that the Agra Bank is entitled to retain possession till evicted in due course of law, and forbid all disturbance till such eviction.

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18 M. 43.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NAMASIVAYAM PILLAI (*Plaintiff*), *Appellant v.*
NELLAYAPPA PILLAI AND OTHERS (*Defendants Nos.* 1 *to* 3),
*Respondents.** [13th and 16th July, 1894.]

Specific Relief Act—Act I of 1877, *Section* 27—*Trusts Act—Act II of* 1882, *Section* 91—*Purchaser with notice of prior contract to sell.*

In a suit for land it appeared that the plaintiff had obtained a registered sale-deed comprising the property in question from defendants Nos. 1 and 2 who had already (to the plaintiff's knowledge) contracted to sell it to another and that the plaintiff had paid no consideration for the sale-deed, which in fact represented a collusive transaction entered into to defeat the prior contract.

Held, that the plaintiff was not entitled to recover:

[44] SECOND appeal against the decree of S. Gopalachari, Subordinate Judge of Tinnevelly, in appeal suit No. 101 of 1891, reversing the decree of H. Kistna Rau, District Munsif of Tinnevelly, in original suit No. 644 of 1888.

The plaintiff sued to recover possession of a house with mesne profits from the date of a registered sale-deed, comprising the house in question, executed to him by defendants Nos. 1 and 2 on 29th November 1888. Defendant No. 3 had previously, *viz.*, on 11th October 1888, agreed with the other defendants for the purchase of the house. The District Munsif

* Second Appeal No. 1669 of 1893.

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passed a decree in favour of plaintiff, which was reversed on appeal by the Subordinate Judge, whose findings are stated with sufficient fulness for the purposes of this report in the judgment of the High Court

Pattabhirama Ayyar, for appellant

Parthasaradhi Ayyangar, for respondent No 3

JUDGMENT

This was a suit brought by appellant as purchaser to recover possession of a house which was alleged to have been sold to him by first and second defendants for Rs 250 on the 23rd November 1888 Exhibit A is the sale-deed sued upon, and it was registered on the 7th December 1888 The appellant's case was that on the 6th October 1888, first and second defendants agreed to sell their house to him for Rs 250, and received Rs 12 in advance, that they received afterwards the balance of Rs 238 and executed and registered the sale-deed A The third defendant or respondent who resisted the claim contended that first and second defendants contracted to sell the house to him for Rs 300 on the 11th October, and, receiving Rs. 50 in advance, placed the house in his possession, and that the balance was paid by him on the 11th November 1888 He urged further that the contract set up by the appellant was made on 6th October was not true, that document D was spurious, and that first and second defendants colluded with the appellant and refused to execute a sale-deed to himself The Court of First Instance decreed the claim, but on appeal the Subordinate Judge dismissed the suit and directed appellant to pay third defendant's costs

The Lower Appellate Court found that no contract was made with the plaintiff on the 6th October 1888, and that there was no payment of Rs 12 or of Rs 238 as alleged by him It has also been found that first and second defendants agreed on the 11th October to sell the house to third defendant and placed him in [46] possession on receipt of Rs 50 in advance and subsequently received the balance of the purchase-money The Subordinate Judge has held further that the plaintiff got the sale-deed A with the knowledge of the prior contract with the third defendant, and that he was therefore not a *bona fide* purchaser for value without notice It is argued on second appeal that upon the facts found by the Lower Appellate Court, appellant is entitled to a decree But we are unable to accede to this suggestion From the fact of appellant having had at the date of his sale-deed, a knowledge of the prior contract of sale with the third defendant, it is clear that under Section 27 of the Specific Relief Act, his claim, as based on the registered sale-deed, cannot prevail against the third defendant's right to insist on the specific performance of the prior contract, though such right rests merely on an agreement to sell It is obvious from Section 91 of the Indian Trusts Act that, if appellant acquired any property in the house, he must be taken to have acquired it for the benefit of the third defendant to the extent necessary to give effect to his right to enforce specific performance It is then said that such right is now barred by limitation and that the property acquired under Exhibit A, though subject to third defendant's right to enforce specific performance at the date of its acquirement, has now become absolute To this objection, we are not prepared to attach any weight It is conceded that the right to insist on specific performance vesting by the prior contract in the third defendant was actionable both at the time when the sale-deed A was executed and when the third defendant's written statement was filed A legal right, which is made the subject of a suit or a plea if

1894 JULY 16. — APPELLATE CIVIL. — 18 M. 43.

actionable when the suit was commenced or the plea was set up, does not cease to be adjudicable by reason of the prescribed period of limitation having since elapsed at the date of decree. For instance, a bond which is not barred at the date of suit or a plea of set off which is not invalid from lapse of time when it is set up, cannot be held to be barred though, at the date of decree, the period of limitation may have expired.

Another fact found by the Subordinate Judge is that for the sale-deed A no value was paid, and that the intention with which it was collusively given and accepted was merely to thwart the third defendant on this point. The Subordinate Judge observes as follows:—" The truth is " the house in dipute is inconveniently situated so far as the plaintiff is " concerned, and he wants to buy [46] it, but is not willing to pay the price " demanded, and when a neighbour arranged to have it, with a view to " thwart him, induces defendants 1 and 2 to execute a registered sale-deed " to himself." In substance the finding is that Exhibit A was contrived as a means of defrauding the third defendant and has the semblance of a sale or legal transaction. The Subordinate Judge has, it must be remembered, discredited appellant's evidence that he paid value for the sale-deed and found collusion between appellant on the one part and first and second defendants on the other. No property passes or is presumably intended to pass when there is in substance no legal transaction, but a mere semblance of it collusively contrived as an instrument of fraud. This second appeal fails and is dismissed with costs.

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18 M. 46=1 Weir 919.

APPELLATE CRIMINAL.

Before Mr. Justice Best.

QUEEN-EMPRESS *v.* JAGANNAYAKULU AND OTHERS*
[2nd August, 1894.]

Towns Nuisanses Act (Madras)—Act III of 1889, *Section* 3—*Common gaming house—Vacant unenclosed site.*

The accused were found gaming on a vacant site, the property of the seventh accused. The seventh accused was convicted under Towns Nuisances Act (Madras), Sections 6 and 7, and the other accused under Section 7.

Held, that the site in question was not a common gaming house, and that the convictions were accordingly wrong.

CASE referred for the orders of the High Court under Section 438, Criminal Procedure Code, by H. T. Ross, Sessions Judge of Godaveri.

The case was stated as follows:—

" The accused were convicted by the Court of First Instance under Section 3, Clause (10) of Act III of 1889, for being found gaming in a vacant site belonging to the seventh accused. The Appellate Court, finding that such private site was not a public [47] street, road, thoroughfare or place of public resort, and that Section 3 of the Act could, therefore, not be applied to the case, altered the conviction to one under Sections 6 and 7 of the Act as regards the seventh accused, the owner of the site, and to one under Section 7 as regards the first accused, these being the only two who appealed out of the nine persons convicted by the Court of First Instance.

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* Criminal Revision Case No. 342 of 1894.

"These convictions under Sections 6 and 7 are, in my opinion, bad in law The essential point in both Sections is that the place used should be a 'common gaming house.' This is not defined in Act III of 1889; but even taking the definition in Act III of 1888, this vacant site of the seventh accused cannot, on the evidence, be brought within the definition There is no evidence that instruments of gaming are kept or used there for the profit of the owner, and the Appellate Court had no right to assume that such must be the case. It is in fact, simply a case, so far as the evidence goes, of a man and his friends playing a game of chance in his private place, just as one might play Loo in one's own house, and it is ridiculous to call the place a 'common gaming house' in the circumstances"

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APPELLATE CRIMINAL.

18 M. 46=1 Weir 919.

Parties were not represented.

JUDGMENT

The finding is that the "gaming" took place in a vacant site belonging to the seventh accused adjoning a public street

The Deputy Magistrate held that this did not constitute an offence punishable under Clause 10 of Section 3 of Act No III of 1889 (Madras), which makes punishable gambling or cock-fighting in any "public street, road, thoroughfare or place of public resort" In thus holding the Deputy Magistrate is no doubt right But he proceeded to find the first and seventh accused (the only appellants in the case), respectively, guilty of offences punishable under Sections 7 and 6 of the Act, the latter of which renders liable to punishment any person who "opens, keeps or uses or permits to be used any common gaming house," while the former makes punishable any person "found gaming or present for the purpose of gaming in a common gaming house" The Deputy Magistrate refers to the definition of "common gaming house" as contained in Madras Act III of 1888, and, as it contains the word "place" holds it wide enough to include any "vacant site" It is clear that the word "place" in the definition in question must be read with [48] the words immediately preceding, namely, "enclosure, room or place" It clearly means some "enclosed" place Even assuming, therefore, that the definition in Act III of 1888 can be used for the purposes of Act III of 1889, the site in question cannot be held to be a "common gaming house"

All the convictions in both the Courts are set aside and the fines levied will be refunded

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18 M. 48=4 M.L.J. 242=1 Weir 631=2 Weir 664

APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr. Justice Parker

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QUEEN-EMPRESS v PALAYATHAN * [8th and 28th August, 1894]

Abkari Act (Madras)—Act I of 1886, Section 43—Default by persons bailed to appear before the Abkari Inspector—Procedure of Magistrate

When an Abkari Inspector under Abkari Act, Section 43, forwards a bail bond to a Magistrate in order that payment may be compelled of the penalty mentioned therein, the Magistrate should call upon the person liable to appear and show cause against such order being made, and should otherwise observe the procedure prescribed in Criminal Procedure Code, Section 514

* Criminal Revision Case No 272 of 1894

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APPELLATE CRIMINAL.

18 M. 48 = 4 M. L. J. 242 = 1 Weir. 631 = 2 Weir 664.

CASE referred for the orders of the High Court under Section 438 of the Criminal Procedure Code, by J. Thomson, District Magistrate of Chingleput, in reference No. 239 of 1894.

The case was stated as follows:—

"One Para Palayathan stood surety for one Munuswami Gramani charged with an offence under Section 55 of the Abkari Act (I of 1886) and executed a bail bond before the police station-house officer in the sum of Rs. 25 for the appearance of the accused before the Inspector of Salt and Abkari Revenue, Conjeevaram Circle, whenever required. A summons issued by the Abkari Inspector for appearance on the 11th July 1893 was duly served on the accused, but was disobeyed. Three warrants were then issued for his arrest, but were returned unexecuted, the man having [49] absconded. The Inspector of Salt and Abkari Revenue thereupon sent the bail bond to the Stationary Sub-Magistrate, Tiruvallur, and requested him to proceed against the surety for the recovery of the penalty evidently under Section 43 of the Abkari Act. The Sub-Magistrate took a statement from the surety, in which he explained that he was present when the summons was served on the accused and that his responsibility ceased with that. The papers were then recorded by the Sub-Magistrate, and when reminded by the Abkari Inspector, he informed him that he accepted the explanation of the surety and excused him.

Leaving aside the question whether the Magistrate had rightly exercised his discretion in accepting such an explanation and in his final disposal of the matter by simply recording the papers and passing no distinct orders, the point on which orders are now solicited by me is whether the Sub-Magistrate has any discretion to remit or reduce the penalty mentioned in the bail bond. Section 43 of Act I of 1886 leaves it to the discretion of the Abkari Inspector to decide whether proceedings should be had to compel payment of the penalty, and when he so decides and applies to the Magistrate having jurisdiction for enforcing it, the question arises whether the latter has any option in the matter, or must simply recover the penalty in the manner provided by the Code of Criminal Procedure for similar default, *i.e.*, by the issue of a distress warrant by the attachment and sale of the moveable property of the person, &c. (*vide* Section 514, Criminal Procedure Code).

That is the literal view. The Sub-Magistrate's reasons for holding a different one are—

(1) bail bonds being often taken by station-house officers under Section 40 (2) of the Abkari Act, the amounts as fixed by them would become final, the Abkari Inspector having no power to reduce them if they are excessive;

(2) there could be no appeal to the District Magistrate under Section 515, Criminal Procedure Code, to reduce the amount or to set aside the order of a Sub-Magistrate ordering its payment.

Possibly, if an Abkari Inspector can decide whether a penalty is to be enforced or not, he has power also to reduce the amount and ask for only a portion being recovered. Under Section 515, Criminal Procedure Code, all orders passed by the Sub-Magistrate [50] under Section 514 are appealable to the District Magistrate, and the latter, I infer, could alter the amount levied if he thought that necessary."

The Government Pleader and Public Prosecutor (Mr. *Powell*), for the Crown.

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APPELLATE CRIMINAL.

18 M. 48=4 M. L. J. 242=1 Weir 631=2 Weir 664.

JUDGMENT

Section 43, Madras Act I of 1886, provides that when, by reason of default of appearance of a person bailed to appear before an Abkari Inspector, such officer is of opinion that proceedings should be had to compel payment of the penalty mentioned in the bond, he shall forward the bond to the Magistrate having jurisdiction to try the offence of which the person bailed was accused, and the Magistrate shall proceed to compel payment of the penalty in the manner provided by the Criminal Procedure Code, for the recovery of penalties in the like cases of default of appearance by a person bailed to appear before his own Court.

The procedure which the Magistrate has to follow is laid down in Section 514, Criminal Procedure Code. The question is whether the language of Section 43 of the Madras Abkari Act makes the Magistrate a mere executing officer and takes away from him the discretion which he would be at liberty to exercise if the defaulter had failed to appear before his own Court. If the Magistrate is merely an executing officer, the provisions of Section 514, Criminal Procedure Code, enabling him to call upon the defaulter to show cause why the penalty should not be enforced would become inapplicable, and the appeal to the District Magistrate given by Section 515, Criminal Procedure Code, would also be taken away, since there can be no ground for appeal or revision if the inferior Magistrate could not exercise any discretion, but was bound by law to pass one order only.

The Legislature has not provided for any revision of the orders of the Abkari Inspector, who is not bound even to call upon the defaulter to show cause why the penalty should not be enforced. If, therefore, the Magistrate has no such power, the amounts fixed by the station-house officer under Section 40, Clause 2 of the Abkari Act would become final, since no power is given to the Abkari Inspector to reduce the penalty.

We are of opinion that the Legislature could not have intended such a result, and that the intention was to make all the provisions of Section 514, Criminal Procedure Code, applicable to a Magistrate enforcing a penalty on the application of an Abkari Inspector [51] under Section 43, Madras Act I of 1886. From the fact that the Inspector is directed to send the bond to the Magistrate "having jurisdiction to try" the offence of which the person bailed is accused, the intention of the Legislature would appear to have been that the Magistrate should proceed in the same manner and with the same powers as if the default had been made by a person bailed to appear before his own Court. This inference is strengthened by the fact that where the Legislature intended as in Section 516, Criminal Procedure Code, that the Magistrate should have no discretion, but should merely execute the orders of superior authority, the direction to levy the amount may be addressed to "any" Magistrate.

Nor can we suppose that the Legislature intended to make the orders of the station-house officers and the Abkari Inspectors final, and to take away by implication the liberty to appeal under Section 515, Criminal Procedure Code.

For these reasons we are of opinion that the view taken by the Second-class Magistrate as to his legal powers was correct.

1894
SEP. 25.

APPEL-
LATE
CRIMI-
NAL.

18 M.
51=2
Weir
105.

18 M. 51=2 Weir, 105.

APPELLATE CRIMINAL.

Before Mr. Justice Best.

QUEEN-EMPRESS *v.* KUPPAYYAR AND ANOTHER.*
[25th September, 1894.]

Criminal Procedure Code, Act X of 1882, *Section* 145—*Parties bound by order.*

Orders passed under Criminal Procedure Code, Section 145, are binding only on the actual parties to the cases in which they are made.

CASE referred for the orders of the High Court under Section 438, Criminal Procedure Code, by G. Stokes, District Magistrate of Salem.

The case was stated as follows:—

"The facts are shortly that a dispute existed in regard to a piece of land in the Singapore village, and the Head Assistant [52] Magistrate passed an order under Section 145, Criminal Procedure Code, declaring that one Krishnayyar was entitled to retain possession of the land till ousted in due course of law. In this order but two persons are mentioned—Nanjunda Sastri and Krishnayyar. Subsequent to the date of this order, the accused in the present case, the village munsif and karnam of the village, entered on and disturbed Krishnayyar's possession and he charged them with mischief. They have been acquitted by the Second-class Magistrate on the ground that, as they were no parties to the proceedings in which the Head Assistant Magistrate's order was passed, they were not bound by these proceedings, and he finds that no criminal intent is proved against them.

"I find, on examining the proceedings in which the Head Assistant Magistrate's order was passed, that the village munsif and karnam were witnesses in these proceedings, and were examined in them by the police, and distinctly disputed then the complainant's right to the land then in dispute In fact the Head Assistant Magistrate finds that the village munsif was at the bottom of the whole dispute in that case.

"On the record, therefore, it seems to me that the finding of the Sub-Magistrate is opposed to fact, and that the accused were parties to these proceedings so as to be bound by the order. I am aware that it has been ruled (see *in re Gopal Burnawar* (1), also *in re Nobo Kishore Chuckerbutty* (2)), that in a dispute between A and B and his tenants, where A was by an order declared to be in possession, subsequently tenants of B could not be criminally punished for disobeying this order; but I think this a most mischievous and unnecessary ruling, and one which renders the maintenance of the peace needlessly more difficult. The Magistrate may forbid all disturbance of such possession until the party is evicted in due course of law The order under Section 145 seems much in the same category as an order addressed to the public under Section 144, and to be justified by exactly the same reasons. The ruling is a premium on what has been done in this case, *viz.*, to put forward only one disputant, and then another and so on, wasting the Magistrate's time to no purpose and perhaps keeping open a dangerous dispute.

"The Magistrate's proceedings seem further to be defective, [53] for there is nothing on the record to show that he has taken any

* Criminal Revision Case No 420 of 1894.

(1) 3 B.L.R. App. Cr. 13. (2) 7 C.L.R. 291.

steps to ascertain whether the land referred to in the Head Assistant Magistrate's order is the same as that to which mischief has been caused. The complainant asserts this; but the accused deny it "

Parties were not represented

SEP. 25

APPELLATE CRIMINAL.

18 M. 51=2 Weir 105.

JUDGMENT

I concur in the opinion expressed in re *Gopal Burnawar* (1) that an order passed under Section 145 of the Code of Criminal Procedure is binding only on the actual parties to the case in which it was passed

The mere fact of a person being examined as a witness in such a case does not make him a " party " bound by the order

The inconvenience pointed out by the District Magistrate can be avoided by care being taken to include as parties to proceedings under Section 145 all persons interested in, or claiming a right to, the property in dispute Cf *Ram Chundra Das* v *Monohur Roy* (2)

This case is not one calling for interference under Section 438 of the Code of Criminal Procedure

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18 M. 53=4 M L J. 237.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Shephard

GURULINGASWAMI (*Plaintiff*), *Appellant* v RAMALAKSHMAMMA AND ANOTHER (*Defendants Nos* 1 *and* 2), *Respondents* *

[31st August and 20th September, 1894]

Hindu law—An only son given in adoption by his widowed mother—Estoppel—Specific Relief Act—Act I of 1877, Section 42—Suit for declaration by a remote reversioner—Parties

The plaintiff, claiming a remote reversionary interest in the estates of a deceased Hindu, sued for a declaration of the invalidity of an adoption made by the widow It appeared that the nearer reversioners (who were in the first instance joined as defendants in the suit) refused to call in question the validity of the adoption and that the plaintiff himself had concurred in it at the time when it took place It appeared further that the alleged adopted son had been given in adoption by his widowed mother, and also that he was an only son

[54] *Held*, (1) that the plaintiff was entitled to bring the suit without proof of fraud on the part of the nearer reversioners,

(2) that the nearer reversioners were rightly impleaded in the suit,

(3) that the plaintiff was not estopped from impugning the adoption by reason of his conduct at the time when it took place,

(4) that the adoption was not invalid under Hindu law

Semble A Hindu widow can give her son in adoption without special authority from her husband

[**Affirmed**, 21 A 460 (**P.C.**)=22 M 398=1 Bom L R 226=3 C W N 427=26 I A 113=9 M L J 67=7 Sar P C J 330, **F.**, 28 M 57 (62)=14 M L J 209, **R**, 24 B 367 (380) (**F B**); 1 Bom L R 142 (152), (1913) M W N 383 (384)]

APPEAL against the decree of H T Ross, District Judge of Godavari, in original suit No 19 of 1892

The plaintiff sued for a declaration of the invalidity of the adoption of defendant No 2 by defendant No 1 who was the widow of the last male owner of certain estates in which the plaintiff claimed a reversionary

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* Appeal No 17 of 1894

(1) 3 B.L.R. App Cr 13

(2) 21 C 29

1894 Sep. 20.

APPELLATE CIVIL.

18 M. 53=4 M. L. J. 237.

interest. The reversioners, less remote than the plaintiff, were in the first instance joined as defendants, but the District Judge held that they were unnecessary parties and removed their names from the record. The plaintiff averred that these persons had either colluded with the first defendant in making the adoption or had otherwise precluded themselves from impugning its legality or had refused to do so. It appeared that the plaintiff, like the other reversioners, had himself concurred in the adoption, but it was alleged that he had done so in ignorance of the following circumstances, *viz.*, (1) that the consent of the *sapindas* to the adoption had not been given in good faith, (2) that the second defendant was an only son and (3) that he had been given in adoption by his mother who had not been expressly authorized to do so by her husband, deceased The District Judge held that the suit was not maintainable by the plaintiff in the absence of proof of fraud on the part of the nearer reversioners. He further held on the merits that the adoption was valid. An issue raised by the defendants as to whether the plaintiff was estopped from maintaining the suit by his concurrence in the adoption was not determined by the District Judge who. upon the foregoing findings, passed a decree dismissing the suit The plaintiff preferred this appeal.*

Mr. *J. G. Smith*, for appellants. The suit by the plaintiff is maintainable as the nearer reversioners refused, colluded or concluded themselves from suing. *Rani Anand Kunwar* v. *The Court* [55] *of Wards* (1). The plaintiff is not estopped as his consent if any was given in ignorance of the law *Vishnu* v. *Krishnan* (2), *Gopalayyan* v *Ragupatiayyan* (3) As to the validity of an adoption of an only son, the High Courts are at variance, whereas the Privy Council have treated such an adoption as undoubtedly invalid—*obiter dictum in Nilmadhub Doss* v. *Bishumber Doss* (4). As to the Indian decisions such an adoption was held to be invalid in *Waman Raghupati Bova* v *Krishnaji Kashiraj Bova* (5), *Raja Upendra Lal Roy* v *Srimati Rani Prasannamayi* (6), *Manik Chunder Dutt* v. *Bhuggobutty Dossee*, (7) *Nilmadhub Doss* v. *Bishumber Doss* (4). In Allahabad the latest Full Bench decision is in favour of such an adoption *Beni Prasad* v *Hardai Bibi* (8), following *Hanuman Tiwari* v. *Chirai* (9), which cases are in conflict with another Full Bench decision in *Tulshi Ram* v. *Behari Lal* (10), but the expression of opinion in the latter case appears to be *obiter* as the case went off on another point. In Madras such an adoption was held valid in *Chinna Goundan* v. *Kumara Goundan* (11) and in *Narayanasami v. Kuppusami* (12). In *Sri Ammi Devi* v. *Sri Vikrama Devu* (13), the question was treated as having been settled by the Privy Council, but the latter tribunal dissented from any such view.

In the Rajah of Tanjore's case the Government of India treated such an adoption as valid, Mayne, § 133 The doctrine of *factum valet* does not apply in such a case where there is an imperative interdiction. Broom's Legal Maxims, page 175, *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (14), *Ganga Sahai* v. *Lekhraj Singh* (15).

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* The parties to this suit are stated to be Sudras, but their caste is not mentioned in the record.—[*Reporter's Note*]

(1) 6 C. 764. (2) 7 M. 3 (3) 7 M.H.C R. 250
(4) 13 M.I.A. 85, 100 (5) 14 B 249 (6) 1 B.L.R.A.C. 221.
(7) 3 C. 443. (8) 14 A. 67. (9) 2 A. 164.
(10) 12 A. 328. (11) 1 M.H.C.R. 54. (12) 11 M. 43.
(13) 11 M. 486 (490). (14) 3 B 273. (15) 9 A. 253.

The Advocate-General (Hon Mr *Spring Branson*) abandoned the contention that the suit was not maintainable by reason of the remoteness of the plaintiff's interest, and argued that the adoption was not contrary to Hindu Law, at any rate according to the view adopted in this Presidency, and even if it were that *factum valet*. He pointed out that no suggestion had been made in the lower Courts as to the plaintiff having joined in the adoption in any ignorance of law and that this had not been proved.

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APPELLATE CIVIL.

18 M. 53 = 4 M. L. J. 237.

JUDGMENT.

[56] MUTTUSAMI AYYAR, J —There are two proprietary estates, called Kapileswarapuram and Kesanakuru in the district of Godavari Their last male owner was one Buchi Sarvarayudu He died without male issue, leaving him surviving a widow named Rama Lakshmamma On the 10th November 1888 she adopted the second defendant, Pattabhiramayya, and this suit was brought to have it declared that his adoption is invalid and inoperative

It is not alleged in the plaint that Buchi Sarvarayudu authorised Rama Lakshmamma to adopt, and it is the case of both parties that the adoption was made under the sanction or with the consent of his *sapindas* or *gnatis* The plaint alleged that their consent was given under corrupt inducement It is an undisputed fact that the second defendant was the only son of his father, and he was given in adoption by his mother after the death of his father On this point the plaintiff's case was that a Hindu widow in Southern India is incompetent to give as well as take a son in adoption, without express authority from her husband It was contended for the defence that no such authority was needed to validate the gift in adoption, and that second defendant's father had also given such authority prior to his death The adoption was impeached by the plaintiff on three grounds —

(i) the sanction or the consent of *sapindas* was not given *bona fide*;

(ii) the adopted was an only son, and

(iii) a widow was incompetent to give away her only son save under express authority from her husband

The plaint admits that plaintiff is one of the *sapindas* of Sarvarayudu who consented to, or concurred in, the adoption, and the pedigree filed in the case shows that defendants Nos 3, 5 and 7, whose names were struck out by the Judge, on the ground that they were not necessary parties to the suit are nearer in *sapinda* relationship than plaintiff

Two preliminary objections were taken to the suit, *viz* :—

(i) that as a remote reversioner the plaintiff could not maintain the suit, and

(ii) that by his concurrence in the adoption when it was made, he was estopped from impeaching its validity

These form the subject of the first and second issues, and the averments in regard to the invalidity of the adoption form the subject of the third issue

[57] There is a note made by the Judge during the examination of the plaintiff as his own tenth witness that his Vakil gave up his contention in reference to the first issue It is argued by his Counsel on appeal that there was misapprehension on the part of the Judge, and that what was really abandoned was not the first issue but the first part of the third issue. What contention the plaintiff's Vakil intended to give up in the

1894 Sep. 20. APPELLATE CIVIL. 18 M. 53=4 M. L. J. 237.

Court below is also a subsidiary question which has to be dealt with in appeal.

I shall first deal with this question, next with the two preliminary questions, and lastly with the three grounds on which the adoption is assailed by the appellant. As regards the contention which appellant's Vakil gave up in the Court below, there is reason to think that appellant's Counsel is probably right The Judge's note is in these terms:—" At "this point plaintiff's pleader, Mr Ward, intimates that he will confine " plaintiff's case to the question of law that the adoption is invalid by " reason of the second defendant being an only son. In reply to this " point Mr. Ward gives up the rest of the plaintiffs case." If Mr. Ward gave up his contention as to the first issue it would be inconsistent on his part to reserve his right to question the validity of the adoption, for in that case, he would have no *locus standi* at all. On the other hand, the suggestion of appellant's Counsel is reasonable because, as will presently appear, there was not even the shadow of a reason to give up the plaintiff's right to maintain the suit, whilst the evidence as to *sapindas* having sanctioned the adoption otherwise than *bona fide* was so contradictory or discrepant as to raise a presumption that Mr. Ward might not have desired to press it on the Court.

Passing on to the first issue, there can be no doubt that it must be decided in appellant's favour. The general rule, is, no doubt, that a suit of this nature should be brought by the presumptive reversionary heir; but it is a recognized exception to that rule that a more distant reversioner can maintain the suit if he can show that those reversioners who are nearer to the deceased in the line of succession are either in collusion with the widow, or have precluded themselves from interfering, or refused without sufficient cause to institute proceedings, or concurred in the act alleged to be wrongful. The law is enunciated to that effect by the Privy Council in *Rani Anund Koer* v. *The Court of Wards* (1). There is [58] proof in the case before us that defendants Nos. 3 and 5 who are nearer than plaintiff sanctioned or concurred in the adoption and the seventh defendant who is also a reversioner withdrew the suit he had instituted to set aside this adoption. In passing, I may also observe that the Judge is in error in striking out the names of nearer reversioners. They are legitimate parties to the suit and their Lordships of the Privy Council observe to that effect in the case cited above.

As regards the second preliminary question the decision must be in plaintiff's favour. No estoppel can arise from ignorance of law which both parties must be presumed to know. The adoption took place in 1888, whilst this suit was brought in 1892. There are not in this case equitable considerations consequent on the growth of a new family or rights of property under an invalid adoption concurred in for a considerable interval of time It must also be remembered that according to true Hindu theory, adoption is both a religious and a secular act, and estoppel cannot take the place of a religious act on which rests the conventional Hindu belief that a valid adoption generates filial relation and religious competency to make funeral and annual offerings with efficacy.

Passing on to the third issue, appellant's Counsel admits that the contention to which the first part of the third issue relates was given up by appellant's pleader and it is unnecessary for me to discuss the evidence regarding it.

(1) 8 I.A. 14=6 C. 764.

1894 Sep. 20.

Appellate Civil.

18 M. 53=4 M. L. J. 237.

Another contention with reference to the third issue is that a woman is not competent to give away an only son in adoption without express authority from her husband. The Judge observes that in fact the second defendant's mother who gave him in adoption had her husband's authority. There is the plaintiff's own admission to that effect in Exhibits V and VII* and there is also the evidence of the second defendant's maternal uncle Again, the question whether such authority is necessary to validate the gift in adoption in Southern India arose in *Narayanasami* v. *Kuppusami* (1) It was held in that case that a widow's power to *give* a son in adoption is co-extensive with that of her husband and that no special authority is needed from him The *Smritis* and commentaries which bear on the subject are cited in that decision and it is [59] shown that the conclusion arrived at by the author of Datta Chandrika is that in the absence of express prohibition from the husband, the widow has the same power to give that he has

This brings under our consideration the substantial question in this suit, *viz* , whether an only son can be given in adoption

There are several *Smritis* which forbid such adoption They are cited in the leading case on the subject, *viz* , *Chinna Gaundan* v *Kumara Gaundan* (2) Several of them state the reason of the prohibition is the desire to prevent the extinction of the natural family or the failure of funeral offerings to the deceased members of that family The texts are also referred to in *Narayanasami* v *Kuppusami* (1) where the question arose but was not pressed on the Court In 1862, the question was first considered by the High Court in *Chinna Gaundan* v *Kumara Gaundan* (2) It was decided in that case that if an only son were adopted, the adoption would be valid the ground of decision being that the *Smritis* which forbid it were only directory and not imperative, and that though the adoption was a sinful act, it was not invalid if it took place In that case prior decisions reaching back to the early part of this century are relied on in support of the decision The opinions of Sir Thomas Strange and Jagannatha are also mentioned I may refer to the opinion of Viswanath Narayana Mandlik on the subject It appears further from *Narayanasami* v. *Kuppusami* (1), that the decision in 1862 was followed in *Vikarama Devu* v *Neelamani Patta Mahadevi* (3) In 1886, the appellant's pleader did not press the point that such adoption was invalid in view of the course of decisions in the Presidency No case is cited in which such adoption was held in Southern India to be illegal In this state of authorities, I do not think that the question is *res integra* and I am of opinion that the Judge was right in following the course of decisions in this Presidency for the reasons stated by him The result is I would dismiss the appeal with costs.

SHEPHARD, J —This is an appeal against the decree of the District Judge dismissing the suit brought by the plaintiff for a declaration of the invalidity of the adoption of the defendant Pattabhiramayya by the defendant Ramalakshmamma, who is the childless widow of the last holder of certain estates in which the plaintiff claims a reversionary interest Although the judgment [60] against the plaintiff is professedly based on the Judge's opinion with regard to the question raised by the third issue, he expresses an opinion adverse to the plaintiff on the first issue,

* For Exhibit VII, in 4 M L J 239—we find "6"—ED

(1) 11 M 43. (2) 1 M H C R 54

(3) Appeal No 70 of 1882 unreported, but see note at end of this report.

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APPEL- LATE CIVIL.

18 M. 53=4 M. L. J. 237.

and arguments were addressed to us with regard to that issue as well as the second. The opinion expressed by the Judge is that the plaintiff not being the nearest reversioner cannot maintain the suit without showing collusion on the part of the intermediate reversioners. If it is meant that refusal on the part of those persons to question the adoption is not sufficient to justify the plaintiff in suing, I think that the Judge is wrong, for it is clear that under those circumstances and without proof of fraud a reversioner in the plaintiff's position may maintain a suit to protect his reversionary rights. The plaint makes the necessary allegations and there is evidence to support them. The Judge says that the plaintiff's pleader abandoned this part of the case—but I cannot help thinking he must have misunderstood the pleader. I can understand that the pleader resolved to confine his attack on the adoption to the one objection founded on the fact that the subject of the adoption was his father's only son, and that is recorded in the Judge's note. But as long as he persisted in that point he cannot reasonably be supposed to have given up all contest on the collateral question raised by the first issue.

On the second issue raising the question of estoppel, I think it is sufficient to say that in my opinion no estoppel arises as against the plaintiff by reason of the mere fact that he concurred in an adoption which was supposed by all parties concerned to be legal and valid.

The substantial question in the appeal is whether the adoption of an only son is valid according to Hindu Law.

As long ago as 1862 this question was held by this Court to be concluded by authority—*Chinna Gaundan* v. *Kumara Gaundan* (1). Since then the question has been raised again three times and received the same answer, *Sri Ammi Devi* v *Vikrama Devu* (2) and *Narayanasami* v. *Kuppusami* (3). The authority referred to includes the opinion of Sir Thomas Strange and Colebrooke and decisions in 1801 and 1817. It is not shown that the current of authority is broken by any single decision in this Presidency to the contrary.

[61] It is pointed out to us that some doubt seems to have been entertained by the learned Judges who took part in the decision of 1884.* The circumstance may perhaps be accounted for by the fact that the Chief Justice had previously, when a member of the Allahabad Court, expressed an opinion adverse to that entertained by this Court. (See *Hanuman Tiwari* v. *Chirai* (4)). The fact remains that the current of authority is for this Presidency unbroken. The present question is by no means the only question of Hindu Law on which the High Courts have maintained different views. On questions of this class it appears to me pre-eminently desirable not to disturb well settled rules of law. I would, therefore, decline to treat the question as an open one and would dismiss the appeal with costs. The point taken with regard to the pleader's fee was dealt with at the hearing. I would decline to interfere with the Judge's discretion.

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* The allusion here is to the unreported case above cited, *viz.*, *Vikrama Devu* v. *Neelamani Patta Mahadevi*, decided in 1884 by Turner, C J., and Muttusami Ayyar, J, That portion of their judgment in which the present subject was dealt with is given at I L.R. 11 Mad 489. in the report of the appeal in the Privy Council against the decree of the High Court--[*Reporter's Note*]

(1) 1 M H.C.R 54 (2) 11 M. 486 (489).
(3) 11 M. 43. (4) 2 A. 164 (169).

18 M. 61.

1894 APRIL 9. — APPELLATE CIVIL. — 18 M. 61.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

SANGU AYYAR (*Plaintiff*), *Appellant* v CUMARASAMI MUDALIAR AND OTHERS (*Defendants*), *Respondents* *

[4th and 9th April, 1894]

Transfer of Property Act—Act IV of 1882, Section 54—Execution of sale-deed without consideration—Subsequent transfer for value—Priorities

In a suit for land, it appeared that in 1887, A had executed in favour of B a registered conveyance of the land in question, which purported to be a sale-deed, but that no consideration was in fact paid, and that A who had retained possession sold and delivered it to C and D and that they then discharged a mortgage which was to have been paid off by B In the interval between the two transactions above referred to, the plaintiff had purchased the land from B and he now alleged [62] that the persons in possession had executed a rent agreement, in fact found to be a forgery, under the terms of which he claimed to eject them

Held, that the plaintiff's claim founded on the transaction of 1887 did not prevail against C and D

[R., 28 M 124 (126)=14 M L J 493, 3 O C 215 (224)]

SECOND appeal against the decree of O Chandu Menon, Subordinate Judge of Tinnevelly, in appeal suit No 198 of 1892, affirming the decree of C Subramania Ayyar, District Munsif of Tinnevelly, in original suit No 313 of 1891

Suit to recover land with mesne profits The plaintiff claimed title under a registered sale-deed (Exhibit D) for Rs. 300, dated 5th November 1888, and executed in his favour by defendant No 1, who had purchased the land under a registered sale-deed in 1887 (Exhibit A) from two persons named Sundara Nadan and Gurusami Nadan It was further alleged the defendants Nos 2, 4 and 6, who in 1888 were in possession as tenants of defendant No 1 under a lease (Exhibit B) had then been directed by him to attorn to the plaintiff and had in fact done so

Defendants Nos 3 and 5, who alone contested the suit, claimed title under a registered sale-deed executed in their favour by Gurusami Nadan in January 1890.

It appeared that a mortgage debt due by Sundara and Gurunada Nadan was to have been paid off by defendant No 1 in 1887, but was in fact subsisting till 1980 when it was discharged by defendants Nos 3 and 5.

The District Munsif dismissed the suit, finding that the alleged sale to defendant No 1 was supported by no consideration, and that Exhibit B, which was a document purporting to be signed by the alleged tenants, was a forgery His decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal

Sundara Ayyar, for appellant.

Krishnasami Ayyar, for respondents Nos. 3 and 5

JUDGMENT

It is contended that document A being registered, the property passed to the first defendant, though it is found that no consideration was paid as specified in A, and that, consequently, the subsequent sale to defendants

* Second Appeal No 1547 of 164, 1893.

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Nos. 3 and 5 is invalid on the ground that it was made by a person having no title to convey. In support of this contention reliance is placed on *Ram* [63] *Lakhan Rai* v. *Bandan Rai* (1), *Bishenmun Singh* v. *The Land Mortgage Bank of India* (2), *Umedmal Motiram* v. *Davu Bin Dhondiva* (3), and also on Section 54 of the Transfer of Property Act.

The present case is, however, distinguishable from the above. Here the first purchaser abstained from paying the purchase-money from 1887 to 1890, and allowed his vendor to retain possession, and then to sell the property to defendants 3 and 5, who, in consequence, paid off the mortgage that was to be discharged by the original purchaser.

The plaintiff purchased the same property from the first defendant in 1888, and lay by till 1890, and then, forging the lease B, brought this suit for possession of the property without offering to pay the consideration or accounting for it.

We are unable to say that his conduct discloses an intention to insist upon the original sale as a valid transaction

After thus lying by for several years, we do not think he should be permitted in equity to turn round on others who have paid valuable consideration and succeed with the aid of a forged document. To do so would be to permit the Registration Act to be turned into an instrument of fraud.

We dismiss the appeal with costs

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VOLKART BROTHERS (*Plaintiffs*), v RUTNAVELU CHETTI (*Defendant*).* [21st October, 1892 and 6th February, 1894.]

Contract Act—Act IX of 1872, Section 39—Shipment at monthly intervals

The defendant agreed to purchase from the plaintiffs 120 cases of condensed milk which were to be shipped in London and delivered in Madras. The agreement stipulated for shipment in six lots of twenty cases each at monthly intervals, but it contained a proviso, whereby the plaintiffs were excused from monthly shipments if space in ships sailing for Madras were not available The second shipment was [64] not made within one month from the date of the first shipment, thereupon the defendant repudiated the contract.

Held, (1) that the interval of time contemplated in the contract was one month more or less, regard being had to the time which it might be reasonable to allow to the plaintiffs for finding a steamer available for the required shipment;

(2) that the plaintiffs having failed to make the second shipment by a steamer of which they might have availed themselves the defendant was justified in rescinding the contract.

CASE stated by P. D. Shaw, Chief Judge of the Court of Small Causes, Madras, under Act XV of 1882, Section 69.

The case was stated as follows:—

" Suit for recovery of Rs. 583-9-1, the loss sustained by reason of the failure of defendant to pay for, and take delivery of, one hundred cases of condensed Swiss milk ordered by the defendant from plaintiffs at Madras

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* Referred Case No. 12 of 1892.

(1) 2 A. 711. (2) 11 C. 244. (3) 2 B. 547.

on 14th May 1890, and which were re-sold on defendant's account on or about 5th and 9th February 1891

The order or contract on which plaintiffs sue is Exhibit A, and was for one hundred and twenty cases each four dozens—1 lb round tins condensed milk, Milkmaid brand, at 15 per case, packing as usual with iron hoops.

'Shipment in six lots of twenty cases each at monthly intervals.' First shipment within 3—4 weeks from receipt of telegram or sooner if possible. Stock Mark $^{Cls}_{6}$C & R

Defendant admitted the contract, but pleaded that as to one hundred cases it was rescinded by him on 18th August 1890, that the milk imported by plaintiffs was not according to contract, and that even if liable for the milk he was not chargeable with the godown rent, interest and charges claimed

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It is well to state at once that defendant offered no evidence of the quality of the milk and practically abandoned this plea The defendant's case is that the milk was not shipped in due course according to the terms of the contract and that, in consequence he rescinded on 18th August 1890 the portion of the contract which remained to be carried out

The contention for plaintiffs is that the expression in Exhibit A 'shipment in six lots of twenty cases each at monthly intervals' means shipment month by month, that is to say, if as in this case the first shipment was made in June and others in the following consecutive five months the condition has been fulfilled, and I find, as a fact, that, with the exception of the month of [65] September in which two shipments were made, the other shipments were so made

The defendant's contention is that the expression 'monthly intervals' means that the shipments should be made at intervals of a month from each other In Exhibit A there is also a proviso, by which the plaintiffs are excused from the monthly shipments if space in ships sailing for Madras was not available, but upon this point no evidence was adduced by either side though on the plaintiffs' side it was shown that a ship left London on the 19th July and arrived here on the 21st August

As to the improbability of this contention of plaintiffs being the correct one, we have only to see what happened as to the second shipment it was made over five weeks from the first shipment, *viz*, on 27th July the first shipment having been on 18th June, and the defendant did not get notice of the arrival here of the second shipment till 6th September, thus leaving defendant during the whole month of August without any shipment The evidence of Thomas, Binny and Co's shipping clerk, shows that the *Golconda* by which the second shipment arrived, arrived here on 30th August If plaintiffs' contention is to be held good then it would be necessary to hold that a shipment at any time in the month subsequent to a previous shipment would fulfil the condition, and that although the agreement was for shipments at monthly *intervals* the interval to be allowed between them was not to be considered in carrying out the contract The defendant's contention seems to be more reasonable, for the importer in giving his order would naturally arrange that he should get his supplies at fixed periods and would not leave the dates of arrival uncertain, and the ordinary mode of doing this would seem to be by fixing the date of departure from the export country Further there is the evidence of the defendant's agent corroborated to a certain extent by Exhibits D, E, F and No 3 that this was the way the contract was

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understood by both parties originally. The defendant's agent says he received notice of the arrival of the first shipment in July 'and went to plaintiff's office and saw Mr. Schultzer and spoke to him through broker' Devaji Row, I said to him 'this first shipment has come late, in case the others arrive in thirty days regularly then only will I take them and if not I won't take them, he said all right. The second did not come in time within thirty days [66] from 20th July. So I wrote Exhibit D (18th August 1890).' In Exhibit D defendant stated he had up to date received no invoice of a further shipment and as there was again delay in the delivery he refused to further go on with the contract. In Exhibit E which is reply to Exhibit D, plaintiffs say 'it is quite impossible to ship goods in exactly one month's intervals as we must wait till a steamer is available to ship the same.' This I think shows clearly how the plaintiffs understood the expression *monthly intervals*, and that it meant at those intervals as nearly as possible; a pencil memorandum on Exhibit D, which was produced by plaintiffs, is to the same effect. This letter Exhibit E also to my mind reads as an excuse that no ship was available, but the witness Thomas proves that the '*Navarino*' left London on 19th July and as before remarked there is no evidence that there was no space available in her. Again on receiving advice of the arrival of the second shipment he repudiated his liability by Exhibit H and referred plaintiffs to Exhibit D. As to the interview between Mr. Schultzer and defendant's agent in July, Mr. Scholl, plaintiffs' witness and assistant, says he knew there had been a discussion between them and before the writing by plaintiffs of Exhibit 3, (11th September 1890) that Mr. Schultzer told him in July defendant had complained that the first shipment had not come within contract time as it had arrived in July instead of in June, and had agreed to accept it provided the other lots arrived in time, and that he Mr. Schultzer had promised that future deliveries should be made regularly every month. Mr. Scholl also stated originally that Exhibit D set out the complaint Mr. Schultzer had told him of and used the expression 'deliveries' should be made regularly every month, but changed to saying that the expression in Exhibit D 'future deliveries should be made regularly every month' had escaped his notice and when he used the expression 'delivery' he meant 'shipment.' With reference to the defendant's agent's evidence and Exhibits D, E, F and No. 3 it has been commented on by defendant's attorney that the plaintiffs have not examined Mr. Schultzer and the broker and it does seem extraordinary, for Exhibit D refers to the interview about the late shipment of the first lot and the alleged promises and Exhibit 3 refers to legal proceedings and the plaintiffs' ability to produce witnesses as to the agreement made.

[67] I am of opinion that the proper construction of the contract A is that contended for by the defendant, *viz.*, that the shipments were to be at monthly intervals from each other and it is proved that a ship left London for Madras on 19th July 1890, and there is no evidence that there was no room in it for defendant's goods. Plaintiffs further contend that, assuming the shipments were not in accordance with the terms of Exhibit A, the defendant was not entitled to rescind the remainder of the contract, the agreement being for deliveries at different periods and divisible. The points to consider in reference to this question are whether it was one entire contract or several, and whether the time of shipment was of the essence of it, and I am of opinion that it was one entire contract and time of shipment was the essence of it. Upon the question of entirety of the

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contract the cases of *Hoare* v *Rennie* (1), *Honck* v *Muller* (2), *Mersey Steel and Iron Co* v. *Naylor Benzon & Co* , (3) decide that where the agreement is for delivery of goods in monthly fixed portions, and that it is not carried out the contract is considered as a whole *Hoare* v *Rennie* (1) decided that where the quantity agreed to be delivered at a certain time was not so delivered to the vendee, it was an answer to a suit for non-acceptance *Honck* v *Muller* (2) decided that where the purchaser had not taken delivery of the first portion as agreed he could not insist on the vendor delivering the balance The *Mersey Steel and Iron Co.* v *Naylor Benzon & Co* (3) decided that where the vendors wrongfully refused to make a further delivery on account of an agreement for monthly deliveries, the vendee was entitled to claim the fulfilment of the contract as a whole In his judgment Lord Bramwell gave his opinion that *Hoare* v *Rennie* (1) had been rightly decided In this case if the proper construction of the contract is that monthly intervals means shipments at intervals of a month, there was no shipment within that period and thus it is within the principles of *Hoare* v *Rennie* (1)

The plaintiffs rely on *Simpson* v *Crippin* (4) as showing that partial failure as to one instalment or delivery does not entitle the promisor to refuse to complete the contract, and this it certainly does, but *Honck* v *Muller* (2) and *Mersey Steel and Iron Co* v *Naylor Benzon & Co* , (3) are later cases and were decided by the [68] Court of Appeal and the House of Lords From the remarks made in *Cutter* v *Powell* (5), I am led to the conclusion that these two latter cases are now considered to give the law on the point

As to time being the essence of the contract I have already remarked that at any rate it was so in the mind of the defendant, for he fixed a specific interval for the shipments to be made and defendant's agent's evidence and the Exhibits E and No 3 show that plaintiffs also considered that time of delivery was one of the essential ingredients of the contract Lord Cairns in *Bowes* v *Shand* (6) says ' therefore it may well be that a merchant making a number of rice contracts, ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times and at such intervals of time, as that it will be convenient for him to make the payments and it may well be that a merchant will consider that he has obtained that end if he provides for the shipment of the rice during a particular month or during particular months, and that he will know provided he had made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment,' and again at page 465, the non-fulfilment of any term in a contract is a means by which a purchaser is able to get rid of the contract when prices have dropped, but that is no reason why a term which is found in a contract should not be fulfilled

I am of opinion under the circumstances above set out that there was a breach of the contract by the plaintiffs in not shipping the second shipment within an interval of a month from the 18th June 1890, that it was one contract for the purchase of one hundred and twenty cases of tins of Swiss milk (see judgment of Lord Selborne in *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*, (3) and that time was the essence of the contract and defendant was entitled to rescind or cancel the remainder of the contract

(1) 5 H & N. 19.
(2) L.R 7 Q B D 92.
(3) L.R 9 App Cases, 434
(4) L R 8 Q B. 14
(5) Smiths Leading Cases, vol. ii. p 40
(6) L.R. 2 App Cases. 455

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(Section 55, Contract Act) and that defendant exercised his right by Exhibits D, F and H; and contingent upon the opinion of the High Court upon the two questions hereunder submitted, I give judgment for the defendant and dismiss the suit with costs.

The questions I beg to submit, are:—

[69] Whether upon the facts stated in the case the opinion I have formed as to the proper construction of agreement A is correct, *viz.*, that the expression in it shipment in six lots of twenty cases each at monthly intervals means that the shipments were to be at intervals of a month from each other and not month by month, that is to say, in consecutive months?

(2) Whether upon the facts stated in the case, the defendant was entitled to rescind the portion of the contract as to one hundred cases on the 18th August 1890, and did so by Exhibit D or at any time, and did so by Exhibits F (26th August 1890) and H (8th September 1890)?

Mr. *K. Anderson*, for plaintiff

Mr *R. F. Grant*, for defendant.

JUDGMENT.

The first question referred for our opinion is what is the proper construction of the agreement, Exhibit A? By that document the defendant agreed to purchase from the plaintiffs 120 cases of condensed milk which were to be shipped in London and delivered in Madras. The part of the agreement as to which there is a conflict is in these terms, " shipment in six lots of twenty cases each at monthly intervals."

On behalf of the plaintiffs it was contended that the expression " shipment at monthly intervals " means shipment in consecutive months or, as the learned Chief Judge puts it, shipment month by month, whereas the defendant contended that the expression meant that the shipment should be made at intervals of a month from each other.

It is not suggested on either side that the expression is used among merchants in any technical sense. Now the term " monthly " can only mean once a month or every month and the term " intervals " the time between two shipments. In the ordinary sense of the words therefore the expression " shipment at monthly intervals " means that there was to be an interval of one month between each shipment. As the learned Chief Judge observes, the importer wishing to arrange that his supplies should arrive at fixed periods would naturally stipulate that the date of shipment from the export country should be certain. He also refers to Exhibit E, the letter written by the plaintiffs' firm on the 26th August, as showing that the plaintiffs understood that the term " monthly intervals " meant at intervals of a month as nearly as possible. It is urged by plaintiffs' Counsel that it would be [70] unreasonable to hold that the plaintiffs contracted to ship the twenty cases at exact intervals of one month as they would have to wait till a steamer was available or charter a special steamer for the conveyance of the twenty cases. There can be no doubt that in determining what is the construction to be put upon the term " shipment at monthly intervals," regard should be had to the possibility of finding a steamer available for shipment on or about the monthly interval as well as to the necessity for defendant getting his supplies at regular intervals.

The reasonable construction, therefore, is that the interval contemplated by the parties to the document was not precisely thirty days or one month, but one month more or less, regard being had to the time which

it may be reasonable to allow to the plaintiffs for finding a steamer available for the required shipment

This is in accordance with the rule mentioned by Cresswell, J. in *Wilson* v. *Bevan* (1) which he stated in these words:—"When the intention of the parties to a contract is sufficiently apparent, effect must be given to it in that sense, though some violence be thereby done to the words Where the intention is doubtful the safest course is to take the words in their ordinary sense" In applying the rule it must also be observed that the hardship to either party is not an element to be considered unless it amounts to a degree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties *Prebble* v *Boghurst* (2)

With reference to the second question referred to us whether the defendant was entitled to rescind the contract, we observe that its decision depends upon a further question, which contract was it which defendant claimed to be entitled to rescind? It appears that the first shipment was made on the 18th June and arrived at Madras on 22nd July Defendant complained that the consignment had arrived late, and at an interview, plaintiffs' agent consented to accept delivery only on the assurance that future shipments or deliveries were regular In their letter of the 11th September plaintiffs refer to his agreement as an agreement for a "shipment in due course" The second shipment was made on the 27th July and arrived in Madras on the 6th September Meanwhile on the 18th August defendant had written to plaintiffs (Exhi- [71] bit D) in these terms —"The first twenty cases should have been "*delivered* in the month of June, instead of which you delivered them "in July, when you promised that future deliveries would be made every "month" It will be observed that the defendant treated the original agreement (A) as one for "deliveries at monthly intervals" and that he regarded the agreement of July as an agreement for "deliveries regularly every month" The original contract was one for "shipment at monthly intervals" and the learned Cheif Judge appears to hold that as the second shipment was not within one month from the date of the first shipment, defendant was entitled to repudiate the contract That would depend upon the question whether the interval between the 18th June and 27th July was under the circumstances reasonable, regard being had to the time ordinarily necessary for finding a steamer available for the shipment

If it was the agreement of July which defendant claimed to repudiate, there must be a finding what the terms of that agreement were, and whether with reference to the construction we put upon the term "monthly intervals" defendant was entitled to repudiate it

We will ask the learned Chief Judge to return a finding upon these questions.

In compliance with the above order, Mr N Subrahmanyam, the Acting Chief Judge of the Court of Small Causes, submitted his finding as follows:—

FINDING

My finding on the first question is that defendant claims to repudiate the original contract of 14th May 1890 under Exhibit A It will be seen by the statements filed by the Attorneys of both the parties that it is not the case of either pary that there was any new agreement on 21st July 1891 Exhibits F, H, J and III also confirm their view; what really

(1) 7 C.B 673. (2) 1 Swanston 329.

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took place on that date was that plaintiff having made a default in the first shipment, defendant complained on this score and at the interview on 21st July 1890 all that happened was that defendant agreed to waive his right to rescind the whole contract and accept the delivery of the first shipment on plaintiffs' promising that future shipment should be regular as stipulated in the original contract A of 14th May. What happened, therefore, was an agreement to [72] stand by the original contract. The defendant makes plaintiffs understand more clearly if possible, than before that time was of the essence of the contract.

It becomes unnecessary to give a finding on the second question.

Taking the third question to be whether the defendant was entitled to repudiate such new contract, it becomes unnecessary to give a finding on it. If the question is whether, with reference to the construction put by the High Court, on the term monthly intervals, the defendant was entitled to repudiate, I agree with Mr. Shaw for the reasons given by him that defendant was entitled to repudiate the contract as the plaintiffs might have had the second shipment made by the steamer which left London on 19th July and he failed to do so.

This case came on for final disposal when the Court delivered judgment as follows:—

Branson & Branson, Attorneys for defendant.

The first question was already answered in the affirmative.

As to the second question also the answer must be in the affirmative on the findings now submitted.

Wilson & King:—Attorneys for plaintiffs.

JUDGMENT (FINAL).

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18 M. 73=4 M.L.J. 212.

[73] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

In Appeal No. 7 of 1892.

KRISHNASAMI AYYANGAR (*Defendant No.* 5), *Appellant v.* RAJAGOPALA AYYANGAR AND OTHERS (*Plaintiff and Defendants Nos.* 1 *to* 4 *and* 6 *to* 9), *Respondents.**

In Appeal No. 50 of 1892.

RANGASAMI AYYANGAR AND OTHERS (*Defendants Nos.* 2, 3 *and* 4), *Appellants v.* RANGAGOPALA AYYANGAR AND OTHERS (*Plaintiff and Defendant No.* 1 *and Defendants Nos.* 5 *to* 9), *Respondents.**

In Appeal No. 51 of 1892.

KRISHNASAMI AYYANGAR (*Defendant No.* 1), *Appellant v.* RAJAGOPALA AYYANGAR AND OTHERS (*Plaintiff and Defendants Nos.* 2 *to* 6), *Respondents.** [3rd, 4th, 5th, 10th, 11th October, and 21st December, 1893 and 30th April, 1894.]

Hindu law—Sale of a co-parcener's share—Claim of co-parceners on proceeds—Remuneration for management—Evidence Act—Act I of 1872, Section 35—Judgments and private documents—Civil Procedure Code—Act XIV of 1882, Sections 2, 215, 540—Provisiona. decree—Admission made arguendo.

In a suit for partition of family property it became necessary for the plaintiff to prove that his grandfather had been adopted by A, and he tendered in

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* Appeals Nos. 7. 50 and 51 of 1892.

evidence judgments from which it appeared that A's brother, who was the grandfather of defendant No 1 had sued to recover moneys due to A, alleging that the adopted son was an infant living under his protection An adoption of the father of the defendant No 1 by D was also put in issue, and to prove it defendant No 1 tendered in evidence decrees in which the alleged adopted son was so described and also other documents (to which neither defendant No 5 who denied the adoption nor his father was a party) where the same description was used. It appeared that one of the deceased co-parceners had sold to a stranger his undivided share in almost all the immoveable property of the family, and with part of the proceeds had discharged some debts and with the rest had purchased certain lands, now claimed [74] by his widow as his separate property One of the defendants claimed to be credited with a sum payable to him as the managing co-parcener under a deed of management to which the plaintiff was not a party A decree was passed declaring the share to which the plaintiff and some of the defendants were entitled in the family property, but reserving all other questions involved in the suit

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Held, (1) that the decree was a provisional decree and was subject to appeal, but that it was irregular in form in that it should have contained declarations as to all the rights and liabilities which had been adjudicated on and directions as to the accounts and enquiries remaining to be taken and made,

(2) that the documents tendered in evidence of the two adoptions above mentioned respectively were admissible in evidence,

(3) that the proceeds of the sale of the co-parcener's share so far as they were in excess of the requirements of his creditor's equity were not divested of the character of co-parcenery property, and the lands purchased therewith were consequently property subject to partition and not separate property as contended by his widow,

(4) that the claim under the deed of management was not valid against the plaintiff.

Per cur The opinion exprssed by a vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client

[R., 24 B 591 (599), 3 C L J 521 (529), 3 M L T 293, 5 M L T 213]

APPEAL against the decree of C Vencobachariar, Subordinate Judge of Tanjore, in original suit No 27 of 1890

The plaintiff sued for partition of the property of the undivided family consisting of himself and defendants Nos 1 to 5, of which he claimed to be entitled to a half share The seventh defendant was the widow of a deceased member of the family who, as was averred in the plaint, had in 1884 effected a partition with defendants Nos 1 and 5 in fraud of the rights of the plaintiff With regard to defendant No 6 the plaint alleged that he had obtained from the late husband of defendant No 7 a conveyance of his undivided one-third share of a moiety of the family property. It appeared from the conveyance that the transfer comprised only the executant's share of the immoveable property of the joint family excluding therefrom a certain house The consideration for the conveyance was made up of a previous debt and a sum of Rs 21,150 then paid With this money the transferor purchased certain land through his father-in-law who was joined in this suit as defendant No 8 and who managed the property by his agent, defendant No 9

There was a contest, with regard to the share of the plaintiff which turned upon the question whether or not his grandfather Varadayyangar was the adopted son of Ammalayyangar as alleged by the plaintiff In order to prove this adoption the [75] plaintiff tendered in evidence certain judgments from which it appeared that the grandfather of defendant No 1 had brought suits to recover moneys due to the alleged adopted father, then deceased, stating that he sued because Varadayyangar, the adopted son of Ammalayyangar, was an infant living under his protection Another, alleged adoption came in question

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in this suit, *viz.*, that of the first defendant's father by his uncle Dorasami. In order to prove this adoption there were put in evidence two decrees in which the alleged adopted son (then the defendant) was so described and also various other documents (a sale-deed, a lease, a money-bond executed to him and a claim petition filed in a Munsif's Court by third parties) to which neither the fifth defendant who denied the adoption nor his father was a party, where the same description appeared.

Of some of the properties comprised in the plaint, defendant No. 7 alleged that they were self-acquired properties of her deceased husband and claimed to be entitled to them in preference to his co-parceners. These were the properties purchased with the money paid by defendant No. 6, *viz.*, Rs. 21,150 as mentioned above. At the hearing in the Subordinate Court the plaintiff's vakil stated that the claim in respect of this property, which had been made the subject of the ninth, tenth and sixteenth issues, was made "unwarrantably," and the Subordinate Judge accordingly dismissed the plaintiff's claim on this head without determining the issues relating that. It appeared further that the seventh defendant's late husband had in 1888 handed over certain title-deeds relating to family property to defendant No. 6 by way of guarantee without the consent of his co-parceners.

Defendant No. 1 claimed to be credited with a sum of Rs. 8,000 payable to him under a document referred to as a deed of management which provided for the payment to him of this sum as a remuneration for the management of the family property. The plaintiff was not a party to this deed which was executed by defendants Nos. 1 and 5 and the late husband of defendant No 7, and the Subordinate Judge held that he was not bound by it.

In the result the Subordinate Judge passed a decree as follows:—
"This Court doth order and decree that plaintiff, as the grandson of "Varadayyangar, who was adopted by Ammalayyangar, be, and is hereby "declared entitled to a half share and defendants Nos, 1, 5 and 6 as well "as the third defendant [76] (who was adopted by Sindu Ayyangar, "adopted son of Dorasami Ayyangar) to one-eighth share each in the plaint "properties, save those detailed in Schedule A, and that the other ques-"tions involved in the suit be reserved."

Issues raised as to the amount of outstanding debts due to the family and of sums expended by the defendants for family purposes and as to mesne profits payable to the plaintiff, &c., were reserved for determination at a later stage.

The present appeals were filed by defendants No. 1 to 5 against this decree, and it was objected that no appeal lay because the decree was incomplete and not a final adjudication.

In Appeal No. 7 of 1892—

The Advocate-General (Honourable Mr. *Spring Branson*) and *Sankaran Nayar*, for appellant.

Subramania Ayyar, *Bhashyam Ayyangar*, *Pattabhirama Ayyar*, *Shadagopachariar*, *Tiruvenkatachariar* and *Krishnasami Ayyangar*, for respondents.

In Appeal No. 50 of 1892—

Pattabhirama Ayyar, for appellants.

Bhashyam Ayyangar, *Sankaran Nayar*, *Shadagopachariar*, *Tiruvenkatachariar* and *Krishnasami Ayyangar*, for respondents.

In Appeal No. 51 of 1892—

Mahadeva Ayyar, for appellant.

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Pattabhirama Ayyar, Subramania Ayyar, Govinda Menon and *Krishnasami Ayyangar*, for respondents.

JUDGMENT

These three appeals are all from the same decree (Appeal No 7 being by the fifth defendant, Appeal No 50 by defendants Nos 2 to 4 and Appeal No 51 by the first defendant) in a suit brought by plaintiff for partition of family property and recovery of a moiety as the share to which he is entitled

The relationship of the parties will be seen from the following genealogical table —

Kuppanayyangar
- Ammalayyangar (died 1833)
- Krishnayyangar (died 1858)
  - Doraisami (died 1856-57)
  - Varadayyangar
    - Srinivasayyangar (died 1883)
      - Plaintiff
  - Rangasami (died 1880-81)
    - Sindu alias Srinivasan died
    - 1st deft
      - Defts, 2, 3, and 4
  - Periasami
    - Krishnasami, deceased husband of 7th deft
  - Chinnasami.
    - 5th deft.

[77] Plaintiff's case is that his grandfather Varadayyangar, the second son of Krishnayyangar, was adopted by the latter's brother Ammalayyangar, and that plaintiff is consequently entitled to a moiety of the property as representative of Ammalayyangar, the other moiety going to defendants Nos 1 to 5 representing Krishnayyangar's branch to which also belonged the late husband of the seventh defendant

The adoption of plaintiff's grandfather by Ammalayyangar was denied by all the present appellants as defendants in the Lower Court, and the denial is persisted in by them all as appellants in this Court

The first question for determination now is, therefore, whether or not Varadayyangar was adopted by his uncle Ammalayyangar

This was the first issue recorded in the Court below, and the finding of the Subordinate Judge is in the affirmative—see paragraph 32 of his judgment, in which he expresses his finding to the above effect, after discussing the evidence at length in paragraphs 14 to 31 We do not think it necessary to do more than notice the documents, which afford unambiguous evidence of the adoption These are Exhibits L Series, O Series, A and XIV, C and E

From Exhibits L, L1, L2, L3 and L5 it is seen that the adoption of Varadayyangar by Ammalayyangar was stated by the latter's brother Krishnayyangar in suits brought by him in 1838, 1841 and 1843 to recover moneys due to Ammalayangar (then deceased) He explained that the suits were brought by him as Varadayyangar, the adopted son of Ammalayyangar, was under his protection It has been objected on behalf of appellants that these copies of judgments are inadmissible as evidence, and in support of this objection we were referred to *Subramanyan* v *Paramaswaran* (1) Copies of judgments and decrees were there

(1) 11 M. 116

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held to be inadmissible with reference to the decision of the majority of Judges of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (1). As pointed out by this Court *Byathamma* v. *Avulla* (2), the sole object for which it was sought to use the former judgment in *Gujju Lall* v. *Fatteh Lall* (1) was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right; and [78] it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case is clearly different where the previous judgment is produced not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used; *cf. Parbutty Dassi* v. *Purno Chunder Singh* (3) and *Thama* v. *Kondan* (4). Such is the case here and we have no doubt that the judgments in question are relevant under Section 35 of the Evidence Act But even were it otherwise, a copy of the plaint in the suit of which L3 is the judgment is filed as fifth defendant's Exhibit LXVIII and affords the same evidence as Exhibits L series. See also fifth defendant's Exhibit LXVIII*a*; also the N series of exhibits. These latter are no doubt signed by Varadayyangar himself as vakil of Krishnayyangar, but O and O1 to 8 show that Varadayyangar was appointed as his vakil by Krishnayyangar, who describes him in all these documents as his natural (Janaka) son, which description would not be used unless there had been an adoption. This description of plaintiff also occurs in the documents P series and others of the years 1841 to 1843. It has been contended for appellants that the O series of documents are forgeries, but the Subordinate Judge has held otherwise and there is no reason for thinking that he is wrong.

The next document to be considered is Exhibit A. From it it is seen that in 1858 Chellathammal, widow of Varadayyangar, brought a suit for maintenance against Krishnayyangar, which suit was continued on the latter's death against his sons (i) Rangasami Ayyangar, the father of the first defendant and grandfather of defendants Nos. 2 and 4 and (ii) Periasami Ayyangar, the father of the seventh defendant's late husband and (iii) Chinnasami Ayyangar, father of the fifth defendant, describing Varadayyangar as the adopted son of Ammalayyangar, to which description no objection appears to have been taken.

The statements made by the first defendant in Exhibits C, E and XIV in 1882, also support the adoption alleged by plaintiff, as pointed out in paragraph 28 of the Subordinate Judge's judgment.

It is further contended on behalf of appellants that Varaday-[79] yangar's adoption by Ammalayangar (even if it is a fact) is invalid in consequence of Varadayyangar being previously married, as appears from the evidence of his widow Chellathammal, who has been examined as eleventh witness for the plaintiff. Considering that the precise date of Varadayyangar's adoption is not known and that no living member of the family has any personal knowledge of it, even assuming that he had a daughter born about 1831 (as would appear from the evidence of the eleventh witness) this circumstance is not sufficient to justify the finding that his first marriage took place prior to his adoption. When we find it recognized in 1838, 1840 and 1841 in the suits to which L, L1, L2, L3, L5, LXVIII and LXVIII*a* relate, and not denied in 1858 in the suit brought by his widow for maintenance (Exhibit A), the presumption is in

(1) 6 C 171. (2) 15 M. 19 (23). (3) 9 C. 586. (4) 15 M. 378.

favour of its validity and such presumption must be rebutted by more positive evidence than has been adduced in this suit

We see no reason, therefore, to doubt the correctness of the Lower Court's finding either as to the *factum* or validity of the adoption of Varadayyangar by Ammalayyangar, and the adoption being found to be a fact and valid, plaintiff is clearly entitled to a moiety of the property as representative of Ammalayyangar's branch

The next point for consideration merely affects the shares to which defendants Nos 1 to 5 are entitled *inter se* out of the moiety belonging to their branch as representatives of Krishnayyangar On reference to the genealogical table given at the beginning of this judgment, it is seen that Krishnayyangar had five sons, the second of whom Varadayyangar (the grandfather of the plaintiff) was, as found above, adopted by Ammalayyangar, the fourth son Periasami had a son Krishnasami who died in 1889, leaving a widow (seventh defendant) and no male issue (his father predeceased him), fifth defendant is the son of Krishnayyangar's youngest son Chinnasami Rangasami, the third son of Krishnayyangar (died in 1880-81), had two sons, first defendant and one Sindu *alias* Srinivasan Defendants Nos 2, 3 and 4 are the sons of the first defendant

The eldest son Doraisami had no issue The case of defendants Nos 1 to 4 is that Doraisami adopted the first defendant's younger brother Sindu, and that this latter adopted the third defendant If such be the fact, Krishnayyangar's moiety of the [80] property is divisible into three shares, one of which belongs to the third defendant, another to defendants Nos. 1, 2 and 4, and the third to the fifth defendant The fifth defendant however denies the alleged adoption (1) of Sindu by Doraisami and (2) of the third defendant by Sindu, and claims that he, as representing Chinnasami's branch, is entitled to a share equal to that of defendants Nos 1 to 4 jointly as representatives of Rangasami's branch The questions for decision with reference to this contention are consequently two, namely, (1) was Sindu adopted by Doraisami? and (2) was the third defendant adopted by Sindu? The Subordinate Judge has found in the affirmative with regard to both these adoptions The evidence is considered in paragraphs 33 to 35 of his judgment

The evidence of witnesses who speak to the adoption of Sindu by Doraisami is supported by Exhibit IV, an inam statement prepared in 1862, in which Sreenivasa Ayyangar is entered as the adopted son of Komalavalle, the widow of Doraisami Ayyangar The third defendant's second witness, by whom the statement was prepared, swears, that it was prepared on information given by the father of defendant's Nos 1 and 5 and their brother Periasami, the father of the seventh defendant's husband Exhibits II and III are decrees in two suits of 1869 in which Sindu Ayyangar was defendant and described as adopted son of Doraisami There are also a number of other documents produced in which Sindu is described as Doraisami's son Cf XIII, XVII, XX, XXIV, &c It is true that the fifth defendant was not a party to these last-mentioned documents but, nevertheless, they are admissible as corroborating the oral evidence of both plaintiff's and the third defendant's witesses

As to the third defendant's adoption by Sindu Ayyangar, there is the evidence of defendants' sixth and seventh witnesses and also of plaintiff's eighth witness, all of whom say they were present when the adoption took

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place, while other witnesses speak to the performance by the third defendant of the exequial rites and sradhas of Sindu and of Doraisami's widow Komalavallee.

The finding of the Subordinate Judge as to these two adoptions is thus supported by evidence which we see no reason for holding to have been misappreciated; nor do we see reason to differ from the finding of the Subordinate Judge on the fourth, fifth and sixth issues. We also agree with him in finding that the seventh [81] defendant's late husband was an undivided co-parcener at the date of his death.

The next question is as to the validity of the transfer evidenced by Exhibit LVIII executed by the seventh defendant's late husband to the sixth defendant. It was the subject of the eighth issue recorded by the Subordinate Judge. The Subordinate Judge has found that though the seventh defendant's late husband could not convey any definite portion of the undivided family property, he could convey his undefined interest and share in the same and that to this extent the conveyance under LVIII is valid; and the sixth defendants stated his readiness to accept his vendor's share whatever it comes to. As pointed out by the Subordinate Judge, the consideration for the conveyance is Rs. 40,000, of which Rs. 8,000 and odd were paid to one Sadagopachari under Exhibit XXXIII, Rs. 11,000 and odd to N Saminathayyar by whom were granted the receipts XXXII series (which are admitted by him as a witness examined on commission, and the remaining Rs. 21,000 were to be paid to the eighth defendant, the father of the seventh defendant, for the purpose of liquidating other debts of the executant of LVIII. The evidence on the point is stated in paragraph 40 of the Subordinate Judge's judgment. There is no reason for holding that this sale to the sixth defendant was not for valuable consideration or that the sixth defendant purchased *benamee* for the plaintiff. According to the law administered in this presidency a sale by a co-parcener of his undivided interest in family property is clearly valid and gives the vendee a right to claim the share of his vendor though not any specific property It is clear, however, from Exhibit LVIII that what was sold thereby to the sixth defendant is the seventh defendant's late husband's share in the immoveable property only of the joint family excluding therefrom the "old, tiled, full-built dwelling house," situate in the northern row of Mela Valattur. The decree of the Lower Court must be amended accordingly by excluding from the portion to be awarded to the sixth defendant the above house and Krishnasami Ayyangar's share in the moveable property.

The next question is as to the properties specified in Schedule H which consist of 34 items. It is contended for the seventh defendant that items 4 to 28 were acquired by her deceased husband, that she had yet realized nothing from the policy of insurance on his life, that item 32 which was also her husband's self-acquisition [82] was conveyed by him for the purpose of conducting a charity to one Tatu Desikachariar of Triplicane who was not made a party to this suit, and that under Hindu Law she was entitled to take her husband's self-acquisition in preference to his co-parceners and that no other items of Schedule H were in her possession.

As regards items 29, 30 and 31, it was urged on behalf of the eighth defendant, father of the seventh defendant, that he acquired the first two items by purchase and that they did not belong to the joint family and that item 31 was bought by him on the 19th July 1888 at a Court sale. As for items 29, 30, 31, 33 and 34, he alleged that even supposing that they

all belonged to his son-in-law Krishnasami Ayyangar, the latter ceased to be a co-parcener in consequence of the sale of his undivided share to the sixth defendant, and that the seventh defendant was the lawful heir entitled to succeed to it upon her husband's death With reference to items 1 to 3 in Schedule H, the ninth defendant's case was that they belonged exclusively to the seventh defendant's husband, and he purchased them at a revenue sale for arrears of revenue due to the Government by Krishnasami Ayyangar As regards all the above items, the plaintiff averred in paragraphs 5 and 6 of his plaint, that out of the sale amount, *viz*, Rs 40,000 due by the sixth defendant to the seventh defendant's husband the latter paid his father-in-law, the eighth defendant, Rs 21,500 which was the surplus that remained after payment of his debts, in order that the father-in-law might purchase land for him, that the items in dispute were so purchased, and that the co-parceners of the seventh defendant's husband were entitled to recover them from defendants Nos 6 to 8 As to this sum of Rs 21,500, the eighth defendant contended that it was paid to him out of the purchase-money, not to be invested as alleged in the purchase of land for the benefit of the seventh defendant's husband, but in payment of debts due by him to the eighth defendant of moneys lent at his intercession and of debts which he was requested to liquidate The eighth defendant stated also that the sixth defendant executed a promissory note in his favour for Rs 21,150 at the date of the sale to him and that he obtained a decree upon the promissory note against the purchaser and recovered from him after decree Rs 7,410 He alleged further that the plaintiff's case that Rs 9,000 remained with him as unexpended balance of the sale amount, *viz*, Rs 40,000 was false

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[83] These contentions formed the subject of the ninth, tenth and sixteenth issues and the Subordinate Judge decided them all against the plaintiff on the ground mentioned in paragraph 41 of his judgment, *viz.*, that the plaintiff's vakil who argued the case said that the properties in Schedule H were claimed very unwarrantably The contention in appeal is that this is not a proper or sufficient disposal and we think that it is entitled to weight The opinion expressed by a vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client when it is not in accordance with the law applicable to the case, and it is clearly not binding on the other contending defendants

The question arising on these contentions is whether when a co-parcener sells his undivided share and when a surplus is left after paying his debts from the sale-proceeds, that surplus is co-parcenary property subject to the right of survivorship vesting in other co-parceners or his self-acquired property devolving upon his demise on his childless widow The Subordinate Judge apparently considers it to be the deceased co-parcener's separate estate, but we are unable to concur in this opinion It has been held by this Court that a co-parcener can only alienate his undivided share for value and that he cannot alienate it by will or gift

The law on this subject, as administered in this Presidency was explained by the Privy Council in *Suraj Bunsi Koer* v *Sheo Proshad Singh* (1) Their Lordships say that "since the decision of the cases in "*Virasvami Gramini* v *Ayyasvami Gramini* (2), *Peddamuthulaty* v *N* "*Timma Reddy* (3), *Palaniveelappa Kaundan* v *Mannaru Naikan* (4) and "*Rayacharlu* v. *Venkataramaniah* (5), it has been settled law in the

(1) 6 I A. 88 (101, 102). (2) 1 M.H C R 471 (3) 2 M.H C R. 270
(4) 2 M.H.C.R. 416. (5) 4 M.H C.R. 60.

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"Presidency of Madras that one co-parcener may dispose of ancestral "undivided estate, even by contract and conveyance, to the extent of his "own share; and *a fortiori* that such share may be seized and sold in "execution for his debt." It is also pointed out that the law obtaining in the Presidency of Bombay differs from that administered in this Presidency of this extent, *viz.*, that in the former the alienation must be for value, whilst in the latter an alienation by gift was recognized. The Judicial Committee proceeded to observe that there [84] "can be little "doubt that all such alienations are inconsistent with the strict theory of "a joint and undivided family, and the law as established in Madras and "Bombay has been one of gradual growth, founded on the equity which "a purchaser for value has to be allowed to stand in his vendor's shoes "and to work out his rights by means of a partition."

In paragraphs 331 to 334 of Mayne's Hindu Law the learned writer gives the history of Hindu Law on the alienability of an undivided share by a co-parcener as administered in this Presidency. The decisions passed subsequent to the date of the decision of the Privy Council, *Baba* v. *Timma* (1) and *Ponnusami* v. *Thatha* (2), show that a co-parcener is not at liberty to alienate his undivided interest by gift except when he is expressly authorized to do so by a text of Hindu Law, because the equity which exists in favour of a purchaser for value does not arise in favour of a donee who is a mere volunteer. In the former case the question was fully discussed by a Full Bench of this Court, and the conclusion arrived at is that a co-parcener has no power to alienate his undivided interest by gift, unless such gift is sanctioned by an express text of Hindu Law. As regards devises by will, it was held that at the moment of death, the right by survivorship arises, and as it is in conflict with the right by devise, the former prevails as the prior right against the latter. The law applicable to alienations of an undivided share may thus be summarised. It may be alienated for value but not otherwise except where a gift is expressly sanctioned by Hindu Law, and the equity of the creditor or the purchaser is the foundation on which the power to alienate for value rests.

If a co-parcener then sells his undivided interest for Rs. 40,000, of which a part only is applied to payment of his debts and the rest is either retained by him, or by some one else in trust for him, or laid out in the acquisition of other property, the right of survivorship attaches to the surplus so retained or to the property in which it has been invested. For the sale, so far as it produces the surplus, was in excess of the requirements of the creditor's equity and amounts to a mere conversion of the co-parcenery interest into money or other property, which when warranted neither by Hindu Law nor by the equity engrafted upon it, [85] cannot operate to remove it from the domain of survivorship or to divest the surplus of its character of co-parcenary property. Suppose that a co-parcener alienates his undivided share only in part of the joint property and that it is sufficient to satisfy the equity of the creditor; it cannot be pretended that his share in the rest of the joint property, is thereby changed into his separate property, and we consider that the same principle ought to govern the unexpended surplus which it is not necessary to raise or the property in which it happens to be invested. Although the sale may be upheld, because the purchaser has the equity to stand in the place of the vendor and to work out his rights by partition as he has paid value for his purchase,—the purchase-money, except so far as it is applied to payment

(1) 7 M. 357. (2) 9 M. 273.

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of debts, continues to be co-parcenary property There are no doubt decisions to the effect that when a co-parcener's share is alienated, the alienor ceases to be a co-parcener *quoad* the property so alienated, and the co-parcenary is thereby determined *pro tanto* inasmuch as the purchaser, who is a stranger to the joint family, cannot be a co-parcener But they do not establish the proposition that the sale-proceeds, when they are not paid to a creditor in whole or part, but retained by the co-parcener, cease likewise to be co-parcenary property

The Subordinate Judge must be requested to come to fresh findings on the contention of the plaintiff and the other co-parceners and defendants Nos 7 and 9 in regard to the several items of property mentioned in Schedule H including Rs 9,000 and pass a final decree with reference to those findings and the foregoing observations on the law applicable to the case.

There are several minor points as to which the Subordinate Judge has come to no finding though it was desirable to do so before passing a provisional decree

It is first urged that the Subordinate Judge has recorded no findings on issues 21 to 24 As to issues 23 and 24 the Subordinate Judge has expressed, as his opinion, in paragraph 40 of his judgment, that the sale to the sixth defendant was not *benami* for the plaintiff as alleged by him and in this opinion we concur The question of fraud suggested by the twenty-third issue must also be negatived, for, we are referred to no evidence in its support, whilst it is clear that the sixth defendant paid full value for his purchase No distinct findings are, however, recorded [86] on the twentieth and twenty-second issues, and we think they must be included among those which remain to be adjudicated upon before a final decree is passed

Another matter urged upon us is that the seventh defendant's husband acknowledged in Exhibit LXII that he collected moneys due on some of the bonds belonging to the joint family, and that the Subordinate Judge has not expressed his opinion as to the amounts collected by him and as to whether he has duly accounted for them The Subordinate Judge must be requested to come to a distinct finding on the matters mentioned above as he probably intended to do whilst deciding the eleventh and twelfth issues which he has reserved for adjudication before final decree

As regards the sum of Rs. 8,000 claimed under the deed of management, the Subordinate Judge observes, and we think correctly, that plaintiff who was not a party to Exhibit LXXVIII is not bound by it In the absence of a valid special agreement, the managing co-parcener of a joint Hindu family is clearly entitled to no special remuneration as the property which he manages is one of which he is a joint owner

Another contention urged in appeal is that 89 documents which admittedly relate to family properties were handed over to the sixth defendant under Exhibit LXXV by way of guarantee and that the Subordinate Judge has not noticed the objection raised to the guarantee As an individual co-parcener, the seventh defendant's husband was not entitled to charge joint property (as he did) by way of indemnity without the consent of the other co-parceners The sixth defendant admits as the seventeenth witness for defence that those documents are with him, and we think that the indemnity should be set aside and that provision should be made in the final decree for the return of those documents.

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As regards the nineteenth issue* the Subordinate Judge states that there is no evidence in regard to it and we adopt his finding so far as it relates to plaintiff and we leave it, so far as it relates to seventh defendant, to abide the result of the further enquiry which we have ordered.

It only remains for us to notice the preliminary objection taken on behalf of the eighth defendant that the decree passed by [87] the Subordinate Judge is incomplete and that no appeal lies until there is a complete and final decree. We are of opinion that this objection cannot be supported. A decree is defined by Section 2 of the Code of Civil Procedure, and it implies that an order directing accounts to be taken is separable from the rest of the decree adjudicating on the rights claimed or the defences set up in the suit. A provisional decree is clearly appealable and the decree before us appears to us to be in the nature of a provisional decree. The decision of the Privy Council, *Chidambaram Chettiar* v. *Gauri Nachiar* (1), and Section 540 of the Civil Procedure Code which allows an appeal from part of a decree support that view. A provisional decree is permitted to be passed by Section 215 in a suit for dissolution of partnership and a partition suit which has for its object the determination of the co-parcenary is similar to it. The decree before us is however somewhat defective in form. A provisional decree ought to declare the several rights and liabilities which have been adjudicated on and embody an order similar to the one contemplated by Section 215 and Section 215-A. The decree passed by the Subordinate Judge will be so amended as to declare all the rights and liabilities which have already been adjudicated on and to contain directions as to what remains to be done, *viz.*, that an account be taken in respect of the matters mentioned in issues 11, 12, 13, 15, 20 and 22 and that further enquiry be made as to the properties mentioned in Schedule H as herein directed and that the result of such enquiry be embodied in the final decree.

The costs in the original Court will be reserved for adjudication when the final decree is passed. The costs of this appeal will follow the result and be provided for in the decree to be passed by the Subordinate Judge.

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[88] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

DAMODARA MUDALIAR AND ANOTHER (*Defendants*), *Appellants* v. SECRETARY OF STATE FOR INDIA (*Plaintiff*), *Respondent*.†

[21st March and 18th October, 1894.]

Contract Act—Act IX of 1872, Section 70—Repairs by Government to a tank in which zemindar is interested—Suit against zemindars for share of cost

The Government repaired a certain tank from which were irrigated lands in the zemindari of the defendants and also raiyatwari villages held under Government which had been severed from the zemindari. It was found that the defendants knew that the repairs, which were necessary for the preservation of the tank, were being carried out and did not wish to execute them them-

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* "Are plaintiff and seventh defendant in possession of any moveable or immoveable properties liable to be brought to partition, and if so, what are they?"

† Appeal No. 38 of 1893.

(1) 2 M. 83.

selves except as contractors and that they had enjoyed the benefit of the work done, and further that Government had carried out the repairs not intending to do them gratuitously for the defendants It was not found that there was any request, either express or implied, on the part of the defendants to the Government to execute the repairs In a suit by the Secretary of State to recover from the defendants their share of the cost incurred:

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Held, that the plaintiff was entitled under Contract Act, Section 70, to recover part of the cost incurred, estimated with reference to the irrigable area of the villages owned by the plaintiff and defendants, respectively

[**F.**, 16 Ind Cas 692 (693)=1912 M W N 956, 10 Ind Cas 694=7 N L R 11 (12), 21 T L R 142, **Appr.**, 38 C. 1 (12)=12 C L J 566=14 C W N 945=6 Ind Cas 810, **Appl.**, 32 C 374 (377), 2 C L J 311, 12 C P L R 4 (7), **R**, 32 A. 25 (28)=6 A L J 947=4 Ind Cas 706 33 M 15 (22)=3 Ind Cas 110=19 M L J 489=6 M L T 162, 33 M 189 (195)=5 Ind Cas 318=7 M L T 249, 5 Ind Cas 742=20 M L J 722 (725)=7 M L T 74, 14 C W N 699=6 Ind Cas 341 (342), 11 Ind Cas 155 (159), 15 Ind Cas 55 (56) 7 O C 146 (151)]

APPEAL against the decree of S Russell, District Judge of Chingleput, in original suit No 10 of 1892

Suit by the Secretary of State to recover from two zemindars their respective shares of the cost of repairing a certain tank by which were irrigated certain lands of the defendants as well as raiyatwari lands held under Government The District Judge passed a decree for a portion of the plaintiff's claim against which the present appeal was preferred by the defendants

Sankara Menon and *Masilamani Pillai,* for appellants

Mr *K Brown,* for respondent

JUDGMENT

The question raised by this appeal is whether the defendants being the proprietors of certain villages irrigated by the Parayankulattur tank, can be made liable for the costs of repairs of that tank incurred by the Government Inasmuch as other villages held under Government are irrigated by the same tank [**89**] the Government were under an obligation to make the repairs, and it is found as a fact, and not disputed, that the repairs were necessary for the preservation of the tank There are no definite findings by the District Judge, and the evidence is not clear as to the circumstances under which the repairs were undertaken by Government But it seems clear from the defendants' own statements that they were aware that the repairs were being executed (see BB) The averment to that effect made in the plaint is not denied in the written statement, and it is not the defendants' case that they were themselves anxious to execute the repairs except in the capacity of contractors, or that the act of the Government in undertaking the work was in any way wrongful or improper The contention on the defendants' part is that the Government were bound to do the repairs at their own expense and not entitled to charge the zemindar A further point of minor importance is also taken, *viz* , that the District Judge has not made a fair apportionment of the cost of the work, having regard to the interests of the Government villages and zemindars' villages in the irrigation secured by the tank

On the part of the defendants it was argued that, as there was no contract between them and the Government and no joint liability such as could give rise to an action for contribution, the present

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action could not be maintained; and the case of *Leigh* v. *Dickeson* (1) was relied on. In that case the parties were tenants-in-common of a house, and the claim made was in respect of money expended on substantial and proper repairs. In this view of the facts the present case may be distinguished, and another ground of distinction is that in the present case the remedy of partition is not available. In his judgment, Pollock, B., expressly distinguished the case from those in which "it has been held that, where an outlay is in the nature of "salvage, all interested in the thing saved are bound to contribute."—*Leigh* v. *Dickeson* (2). But in the Court of Appeal where the judgment of Pollock, B., adverse to the claim was affirmed, the decision was put upon grounds which cover cases in which an outlay necessary for the preservation of the thing in which the parties are interested, has been made. Indeed, Cotton, L. J., starts by assuming "that the house was in a bad "state of repair" and that the repairs executed by the defendant were [90] necessary. —*Leigh* v. *Dickeson* (1). His decision amounts to this, that, in the absence of a request and in the absence of a common obligation to repair, no action for contribution will lie at the suit of one tenant in common against another, and that was the judgment of the Court of Appeal. No reference is made by any of the Lords Justices to the doctrine of salvage. In a later case where the question related to a policy of life insurance and the claim was made in respect of a premium paid by the mortgager, the Court of Appeal distinctly held that the doctrine of salvage, as understood with reference to maritime cases, had no application, and Bowen, L. J., states as the general principle that work and labour done or money expended by one man to preserve the property of another do not, according to English Law, create any obligation to repay the expenditure. In the course of the argument (page 239) he observes that the law is laid down too widely in the notes to *Lampleigh* v. *Brathwait* (3). It follows also from these decisions, which after all only re-affirm what has been said in earlier cases, that the statement of law made by Chancellor Kent and cited in *Leigh* v. *Dickeson* (2) cannot be accepted as correct according to English authorities (see Kent's Commentaries). As a general rule, a man cannot be made liable for good services rendered under circumstances giving him no option of declining or accepting.

In the present case it is clear that the facts do not bring it within either of the two exceptions above mentioned. There was no common obligation to repair the tank, the zemindar and the Government are liable to their tenants, respectively, and the tenants of the one could not, it is conceived, make the other responsible for mere neglect to maintain the tank. The exception which covers the case of joint debtors, one of whom pays the whole debt, cannot apply, and it is at least doubtful whether on any principle of contribution or indemnity the plaintiff could recover—*Leigh* v. *Dickeson* (1), *Dering* v. *The Earl of Winchelsea* (4), *Moule* v. *Garrett* (5). Again, there was no request on the part of the zemindars, and though it is possible that if the facts were properly ascertained, a request might have been implied, the District Judge has not found that such implication ought to be made. According to [91] the English authorities it would seem, therefore, that the action must fail.

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(1) L.R. 15 Q.B.D. 60
(2) L.R. 12 Q.B.D. 194
(3) 1 Smith's Leading Cases, 160.
(4) 2 B. & P. 270.
(5) L.R. 7 Ex. 101.

But the plaintiff's Counsel relies on Section 70 of the Contract Act and invites us to hold that a rule of law, differing from that found in the English cases has been there laid down By that section three conditions are required to establish a right of action at the suit of a person who does anything for another The thing must be done lawfully, it must be done by a person not intending to act gratuitously, and the person for whom the act is done must enjoy the benefit of it There can be little doubt that the statement of the law is derived from the notes to *Lampleigh* v *Brathwait*, and perhaps indirectly from the Roman law (see Stokes' Introduction to Contract Act) The learned authors of Smith's Leading Cases, when enumerating the instances in which the request necessary to constitute a cause of action in the case of an executed consideration may be implied—gives as the second instance " where the defendant has adopted and enjoyed the benefit of the consideration "—*Lampleigh* v *Brathwait* (1). That is the very statement of law which, according to Bowen, L J , is too wide—nevertheless it is the law we have to apply and we ought not to be deterred from doing so, because the rule is not in harmony with English decisions (see Lord Herschell's observations— *Bank of England* v *Vagliano Brothers* (2) or because the application of it may be difficult.

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Certainly there may be difficulties in applying a rule stated in such wide terms as is that expressed in Section 70 According to the section it is not essential that the Act shall have been necessary in the sense that it has been done under circumstances of pressing emergency, or even that it shall have been an act necessary to be done at some time for the preservation of property. It may therefore be extended to cases into which no question of salvage enters It is not limited to persons standing in particular relations to one another, and except in the requirement that the Act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done

In the present instance the relations of the parties are peculiar Formerly as it appears all the eleven villages irrigated by the tank were zemindari villages Seven of them have been severed [92] from the zemindari and become ordinary raiaytwari villages As a consequence of the severance the duty to maintain the tank has, so far as concerns these latter villages, devolved on Government As has already been observed the remedy which is open to tenants-in-common who cannot agree about the enjoyment of property is not available to persons situated as are the parties in the present case In their relation to the tank their position may be compared to that of the owners of two houses supported by a party wall (see Story's Eq , Juris), in respect of which, if partition is legally possible, it is at any rate in fact, impracticable See *Watson* v *Gray* (3), Bell's Commentaries (1085)

Now taking the terms of Section 70, we have to see first whether an act was done by the plaintiff for the defendants not intending to do so gratuitously Here are two questions of fact involved First, were the repairs executed for the defendants? In a case where the plaintiff has himself no interest in the matter as in the case put in the illustration of A saving B's property from fire, there can hardly be any doubt as to the answer to be given to the question The case is that to which in the first

(1) 1 Smith's Leading Cases, 160
(2) (1891) App. Cas 145.
(3) L R 14 Ch. D 192

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instance the rule of Roman law giving a right of action to the *negotiorum gestor* was applicable.

The fact that the plaintiff had an interest in the matter may show that he was acting on his own account only. *England* v. *Marsden* (1) affords an illustration. But it is obvious that a person doing an act in which he is himself interested may, at the same time, intend to act for another. Section 69 and the cases on which it is founded (see *Moule* v. *Garrett* (2), make it clear that a payment made by a party interested may be recovered and it would be inconsistent to hold that services done would not equally give a right of action. Having mentioned Section 69, we ought to add that the plaintiff cannot rely directly upon it, because the interest of the plaintiff and the duty of the defendants related to the doing of work and not to the payment of money.

The question whether the act was done for the defendants is one which must be determined according to the circumstances of the case, for one of two persons having a common interest in property may or may not intend to act for the other in the execution of [93] work upon the property. The fact that the latter was benefited by the work does not necessarily show that it was done for him. We think there must be a finding upon this question There must also be a finding on the question of intention whether or not the intention of Government was to do the repairs at their own cost without making any charge on the zemindar.

Then comes the question whether in executing the repairs the Government acted lawfully. It is clear that actual consent or request on the part of the defendants need not be proved. It is because the party interested is absent and had given no mandate that the right of action on the part of the *negotiorum gestor* accrues—Justinian Institutes Lib. III, Tit XXVII.* On the other hand, if the Roman law is to be followed it must be shown that the act done is one to which the party to be charged would have assented had he been consulted and the doing of which he had not forbidden. (See Colquhoun Roman Civil Law, § 1766, &c.).

It is plain that the section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered.

In the present case there can be no doubt that the Government acted lawfully in repairing the tank. The act was lawful whether done with a view of benefiting all the villages under the tank or the Government villages only, and whether or not done with the intention of charging the zemindars. Having regard to the fact that the zemindars knew of the intention to execute the repairs and did not disapprove, we think that if the repairs were done for the zemindars, they were done lawfully for them.

The final condition required by the section is that the person charged should have enjoyed the benefit of the act done. On this question an issue was raised, but the finding on it is not satisfactory. Indeed the District Judge does not purport to deal with it exactly. Seen that the greater number of the villages irrigated by the tank are raiyatwari villages, *prima facie*, we should suppose that the benefit derived by the zemindars from the repairs was less than that derived by Government.

* [p. 386—ED]

(1) L.R. 1 C.P 529.

(2) L.R. 5 Ex, 132 on appeal, L.R, 7 Ex. 101

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Regard must be had to the irrigable area of the villages owned by Government and the zemindars respectively The fact that kist is paid by the zemindars has nothing to do with the matter If the cultivated area belonging to the Government villages and [94] watered by the tank is larger than that of the zemindar's villages the Government has in the same proportion been the greater gainer by the preservation of the tank There must be a distinct finding on the fifth issue

The finding is to be submitted within one month from the date of the re-opening of the Court after the recess, and seven days will be allowed for filing objections after the finding has been posted up in this Court

In compliance with the above order, the District Judge submitted the finding in the following terms

I find that the plaintiff did not intend to do this work gratuitously for the defendants

There can be no doubt defendants have enjoyed the benefit of the work

This appeal came on for final disposal, and the Court delivered the following

JUDGMENT (FINAL)

The finding on the first issue is not questioned

As to the second issue there is some evidence that the plaintiff did not intend to do the work gratuitously, and there is certainly no evidence to the contrary

We must accept the finding and dismiss the appeal with costs

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APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard

SRINIVASACHARIAR (*Plaintiff*), *Appellant* v RANGAMMAL AND OTHERS (*Defendants Nos* 1, 2 *and* 3), *Respondents* *
[10th September and 15th November, 1894]

Civil Procedure Code—Act XIV of 1882, *Sections* 171, 568 *and* 582*—Remand—Direction by Appellate Court for the taking of further evidence*

In a suit on a hypothecation bond the plaintiff relied in bar of limitation on endorsements of part-payments appearing on the bond The Court of First Instance held that the endorsements were genuine The Court of First Appeal remanded the suit for further evidence to be taken with regard to the endorsements and [95] directed the Court to record an opinion on the question of the handwriting of the endorsements, and held upon the return of the evidence that the endorsements were forgeries and dismissed the suit

Held, that the evidence taken on the remand was legally admitted

SECOND appeal against the decree of W Dumergue, District Judge of Trichinopoly, in appeal suit No 1 of 1891, reversing the decree of P Dorasami Ayyar, District Munsif of Trichinopoly, in original suit No 210 of 1889

Suit to recover principal and interest upon a hypothecation bond, dated 8th September 1886 In bar of limitation reliance was placed on endorsements of part-payments appearing on the instrument sued upon, which were alleged by the defendants to be forgeries The District

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* Second Appeal No 1575 of 1893

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Munsif held that the endorsements were proved and passed a decree for the plaintiff. On appeal the then District Judge of Trichinopoly directed that further evidence be taken by the District Munsif as to the handwriting of the endorsements in question.

The then District Munsif, recorded further evidence as directed, and found that the endorsements had been forged. This finding was adopted on appeal by the District Judge of Trichinopoly, who accordingly reversed the decree and dismissed the suit.

The plaintiff preferred this second appeal.

Mr. *Wedderburn* and *Rangachariyar*, for appellant.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—It is conceded that but for the endorsements on the hypothecation bond A, the suit would be barred by limitation. The District Judge concurs in the finding of the District Munsif on remand that the endorsements are not genuine. It is contended on behalf of the appellant that the finding is illegal, as it rests upon evidence improperly admitted on appeal. It is urged that the District Judge was in error in remanding the case for further evidence and that the remand is illegal. The third issue recorded in this suit was whether the claim was barred by limitation; and upon the evidence originally adduced by the parties with reference to that issue, the District Munsif came to the conclusion that the endorsements were genuine and that the suit was not barred by limitation. On appeal, however, defendants objected to the finding. Thereupon, the District Judge considered it desirable that further evidence should be taken [96] as to the handwriting of the two endorsements of payments and that there was a large number of disinterested witnesses well acquainted with the handwriting of the deceased Tirumala Thatha Chariar, who made the endorsements. On this view, he remanded the suit for further evidence being taken, and this procedure on the part of the District Judge is impugned as illegal. Though the order purports to remand the suit, there was no remand within the meaning of Section 562 of the Civil Procedure Code. In substance, it was only an order that further evidence be taken on the third issue and that such evidence be returned to the District Court with the opinion of the District Munsif as to its effect on the question of the handwriting in which the endorsements are made. Our decision must, therefore, depend on the construction we put upon Section 568, Civil Procedure Code, and its scope. The first principle to be remembered in connection with that section is that the production of additional evidence in appeal is not a matter of right and the section accordingly confers a discretionary power on the Appellate Court. The general rule is that the Appellate Court ought to decide the appeal on those materials only which the parties think proper to furnish in the Court of First Instance and not on substantially new evidence introduced on appeal to mend the case of either party.

The first exception mentioned in Section 568 is where the Court of First Instance refuses to admit evidence which ought to have been admitted. This is founded on the principle that neither party shoud be improperly precluded from putting before the Court such materials as he desires to furnish for decision, provided that they are proper materials.

The second exception mentioned in Section 568 is when the Appellate Court requires any document produced or any witness examined to enable it to pronounce judgment or for any other substantial cause. This

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is a discretionary power conferred upon the Appellate Courts in the interests of justice With reference to it Lord Westbury observes that the power to take fresh evidence is a power which may be very wholesome, but adds that the reasons for exercising the power should always be recorded. This is necessary to see whether the discretionary power is carefully exercised and new evidence is not lightly introduced into the record Lord Westbury further remarks that the power should be very sparingly exercised, because when it is not done at the [97] instance of the parties but at the suggestion of the Court itself, witnesses may be called who are not the witnesses the parties themselves would have thought fit to call, and it is possible, that the new original enquiry by the Court may be itself imperfect and not sufficiently extensive to answer the purposes of justice Whilst pointing out this danger likely to arise from the Appellate Court lightly introducing new evidence, the Judicial Committee say that no general rule can be laid down, whilst Lord Westbury considers that it is a very wholesome power if exercised cautiously and within proper limits, *Gunga Gobind Mundul* v *The Collector of the Twenty-four Pergunnahs* (1) As regards the second case mentioned in Section 568, it was held with reference to Section 355 of Act VIII of 1859 that the Appellate Court might take fresh evidence where the evidence has been taken so imperfectly by the Court of First Instance that the lower appellate Court cannot pass a satisfactory judgment, *Joog Maya Debia* v *Ramchunder Chatterjee* (2), *Mohesh Chunder Doss* v *Madhub Chunder Sirdar* (3) In the case before us the new evidence taken was, in my opinion, taken in the proper exercise of the discretion vested in the Appellate Court The enquiry as to the genuineness of the endorsements was so imperfect and incomplete that the Judge found it difficult to proceed to judgment without the evidence of several disinterested persons who were acquainted with the handwriting of the person, who was alleged to have made the endorsements The result was that in the light of the new evidence, both Courts came to the conclusion that the endorsements were forged The new evidence ordered to be taken was ordered to cure a defect in the enquiry made by the Court of First Instance, and to enable the Court to value the existing evidence in the light of disinterested evidence There is nothing to show that it was one-sided or not sufficiently extensive for purposes of justice

Again, as for the appellant's contention that Exhibits III to XI are not proved, it must be observed that the District Munsif refers to the evidence in detail and names the witnesses who prove them This second appeal fails and I would dismiss it with costs

SHEPHARD, J —On the first hearing of the appeal the District Judge, by order, dated 2nd December 1891, remanded the case to the District Munsif for further evidence with a direction to the [98] District Munsif to return such evidence together with his opinion on the question of the handwriting of the endorsements The reason given by him for taking this course was that, in his opinion, there must be in existence papers signed by the alleged writer of the endorsements and witnesses who would be able to speak to his writing

It is quite clear that the case was not one in which a remand, as that term is used in the Code, was legally possible—nor in fact did the Judge purport to remand the case in the manner prescribed by Section 562 Again, it is clear that Section 566 cannot be called in aid, for there was no

(1) 11 M I A. 345 (2) 10 W R 378 (3) 13 W R 85

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omission on the part of the District Munsif to determine any question of fact or frame or try any issue. The only provision of this part of the Code which can be indicated as justifying the order of the Judge is that contained in Section 568, and that section does not authorize the Appellate Court to call for an opinion on the new evidence. It was contended that the circumstances were not such as to justify the application of that section at all and that, at any rate, the District Judge who ultimately disposed of the appeal ought not to have treated the District Munsif's opinion given in pursuance of the order of the Judge as a legal finding or judgment. On the respondents' behalf reliance was placed on Clause (*b*) of Section 568, and it was said that if the examination of further witnesses was not required to enable the Appellate Court to pronounce judgment, there was at any rate 'other substantial cause' justifying the order of the Judge. We were also referred to the provisions of Chapter XIV and especially Section 171 which enables the Court, if at any time it thinks necessary, to cause any person to be examined as a witness, and to the provisions of Section 582 giving the Appellate Court the same powers and imposing upon it the same duties as are conferred and imposed by the Code on Courts of original jurisdiction. Seeing that by Section 568 special provision is made for particular cases in which Appellate Courts may require additional evidence, I think it is impossible to hold that an Appellate Court should in such cases exercise the general powers given by Section 171. The two sections must be read together and the conditions imposed by the latter section must not be disregarded. I have felt great doubt on the question whether, in the circumstances of the present case, the act of the Judge in permitting fresh evidence to be taken could be justified. According, however, to the cases [99] decided on this Section 568 and the corresponding section of the Code of 1859, it must be taken that the law does allow a discretion to the Appellate Court and that it cannot be said to be illegal to admit evidence as was done in the present case. It cannot be said that the Judge gave no reasons for this order. I agree with the conclusion at which SIR T MUTTUSAMI AYYAR has arrived.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VEERAMMA (*Defendant No.* 1), *Appellant* v. ABBIAH AND ANOTHER (*Defendant No.* 2 *and Plaintiff*), *Respondents.**
[3rd and 24th March, and 23rd and 24th November, 1893 and 30th April and 18th October, 1894.]

Limitation Act—Act XV of 1877, *Section* 7*—Registration Act—Act III of* 1877, *Section* 77*—Suit by infant to enforce registration—Special rule of limitation.*

The Registration Act, 1877, being a special Act complete in itself, the provisions of Limitation Act, Section 7, do not apply to suits instituted under Section 77 for a decree directing a document to be registered:

Held accordingly, that a suit by an infant to enforce the registration of a conveyance having been instituted more than thirty days after refusal on the part of a registrar to register it is barred by limitation.

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* Second Appeal No. 1125 of 1892.

[N.F., 30 B 275 (288)=7 Bom L R 697. F., 24 A 402 (418), 30 C 532 (535); 20 M 249 (250), 22 M 179 (181)=8 M L J 265 (266), 34 M 505 (509)=5 Ind Cas 884=20 M L J 283=7 M L.T 132, R., 34 A 496=10 A L J 3=16 Ind. Cas 149 (152), 20 B 543 (547), 18 M 484 (486), 20 M 476 (478, 80), 23 M 389 (397), 12 Bom L R 27 (31), 16 C W N. 721 (723), 4 O C 182 (186)]

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SECOND appeal against the decree of G T Mackenzie, District Judge of Kistna, in appeal suit No 515 of 1891, modifying the decree of D Raghavendra Rau, District Munsif of Karempudi, in original suit No 63 of 1890

The plaintiff was an infant and he sued by his next friend to enforce registration of a conveyance, dated 30th August 1889, and executed by one Yegamma, deceased, in his favour

It appeared that the conveyance was presented for registration to the Sub-Registrar of Narasaraopet, who refused to register it on 15th October 1889, and that by an order, dated 14th January 1890, the District Registrar declined to interfere and direct its [100] registration and that the plaint in this suit was presented on 14th February 1890

The District Munsif passed a decree for the plaintiff without costs and on appeal the District Judge modified the decree by directing that the defendant should pay the costs of the plaintiff

The defendant preferred this second appeal

Sriramulu Sastri, for appellant

Narayana Rau, for respondent

The second appeal came on for hearing before Collins, C J , and Shephard, J , and their Lordships made the following order of reference to Full Bench

ORDER OF REFERENCE TO FULL BENCH

The question is whether this suit, being instituted after the thirty days allowed by Section 77 of the Registration Act, is nevertheless maintainable by reason of the plaintiff's infancy The Courts below have given judgment in his favour holding that the provisions of Section 7 of the Limitation Act are applicable to, and govern, a suit for which special provision is made by the abovementioned section of the Registration Act

The respondent's vakil in support of this judgment, while admitting that there are decisions to the contrary in the other High Courts, relies on the judgment of this Court in *Kullayappa* v *Lakshmipathi* (1), where it is said that it has been several times decided that the general sections of the Limitation Act are applicable to suits for which periods of limitation are prescribed other than those prescribed in the second schedule to the Act In that particular case it was held that the plaintiff in a suit to which Section 78 of the Rent Recovery Act applied was entitled to the benefit of Section 14 of the Limitation Act It was unnecessary to decide the point which arises in the present case In this and in the earlier case, *Reference under Forest Act of* 1882 (2) it seems to have been considered that the language of Section 6 justified the inference that the general provisions of the Act were applicable to cases provided for by special rules of limitation so long as the period prescribed by such rules was not altered or affected As a general rule, a statute prescribing rules for special and exceptional cases is not controlled by subsequent legislation of a general character, *Abergavenny* v. *Brace* (3) Accordingly, in a case where

(1) 12 M 467 (471) (2) 10 M 210. (3) L R 7 Ex 170

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a claim [101] was made under Act IX of 1859 to recover confiscated property, and the suit was brought more than a year after the seizure of the property, it was held by the Judicial Committee that the disability of the plaintiff could not save him from the operation of the section limiting the time to one year. The following language is used by the Judicial Committee:—" It was said that the clauses in the General Statute, Act XIV of " 1859, relating to disabilities might be imported into this Act, but this cannot properly be done Act XIV is a Code of Limitation of general application. This Act is of a special kind and does not admit of those enactments " being annexed to it." *Mohummud Buhadoor Khan* v. *The Collector of Bareilly* (1). See *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (2). In a recent case decided in Calcutta with reference to Section 7 of the Limitation Act and to the Bengal Act VIII of 1869, the Court for other reasons arrives at the same conclusion. *Girija Nath Roy Bahadur* v. *Patani Bibee* (3). It is noted in that case that the language of Section 7 of the Limitation Act referring to " the same period after the disability has ceased " as would otherwise have been allowed from the time prescribed therefor " in the third column of the second schedule hereto annexed " is not applicable to suits for which a special period is prescribed by another Act and which therefore cannot be governed by any of the articles in the second schedule. This is a consideration which makes the present case further distinguishable from the Madras case decided with regard to Section 14 of the Limitation Act. Since the decision in *Girija Nath Roy Bahadur* v. *Patani Bibee* (3), the question " whether the provisions " of Section 14 of the Limitation Act are applicable to a suit for arrears " of rent under Act X of 1859 " came before a Full Bench, and the question was answered in the negative. The *ratio decidendi* seems to be that the Act X of 1859, where it is in force, is a Code complete in itself unaffected by the general law of Limitation *Nagendro Nath Mullick* v *Mathura Mohun Parhi* (4). This decision can hardly be reconciled with the decision in *Golap Chand Nowluckha* v. *Kristo Chunder Das Biswas* (5), also a case where the rent law was in question, or with the reasoning founded on that case in *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (6),—which latter is one of the authorities relied on in *Kullayappa* v. [102] *Lakshmipathi* (7), and also in *Reference under Forest Act of* 1882 (8). The cases in *Nijabutoola* v. *Wazir Ali* (9) and *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (6), are both cases of suits under the Registration Act. The decision in *Guracharya* v. *The President of the Belgaum Town Municipalities* (10) which follows that in *Golap Chand Nowluckha* v. *Krishto Chunder Das Biswars* (5), and *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (6) is open to the same observation, *viz.*, that the authorities on which it is founded, are shaken by the Full Bench decision in *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (4).

In this state of things and considering the general importance of the question it seems to us best to refer to a Full Bench the question whether a minor plaintiff suing under Section 77 of the Registration Act for a decree directing a document to be registered and presenting his plaint more than thirty days after refusal on the part of the Registrar to register such document is barred by limitation?

This case then came on for hearing before the Full Bench.

(1) 1 I.A. 176. (2) 1 C. 226 (242). (3) 17 C. 263.
(4) 18 C. 368. (5) 5 C 314 (6) 10 C 265 (267).
(7) 12 M. 467 (471). (8) 10 M. 210. (9) 8 C. 910.
(10) 8 B. 529.

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Sriramulu Sastri, for appellant
Narayana Rau, for respondent No 1

JUDGMENT OF THE FULL BENCH

COLLINS, C J —The question referred to a Full Bench is whether the provisions of Section 7 of the Limitation Act are applicable to, and govern, a suit for which special provision is made by Section 77 of the Registration Act

Act III of 1877 appears to be a Special Act complete in itself, and according to a well-established rule for the construction of statutes it should be presumed that the legislature did not intend by a general enactment to interfere with it Lord Hatherly, when Vice-Chancellor, in *Fitzgerald* v *Champneys* (1) at page 782, thus states the proposition of law —" The reason is that the legislature having had its attention " directed to a special subject and observed all the circumstances of the " case and provided for them, does not intend by a general enactment " afterwards to derogate from its own act when it makes no special " mention of its intention to do so "

Section 77 of Act III of 1877 enacts that, when the Registrar [**103**] refuses to order the document to be registered under Section 72 or 76, any person claiming under such document or his representative, assign or agent may within thirty days after the making of the order of refusal institute in the Civil Court a suit for a decree directing the document to be registered

It appears to me that it was the intention of the legislature that questions affecting the registration of deeds should be as soon as possible decided, and to allow a number of years to elapse, as in the case of a minor, would be to defeat the intention of the Act.

A Full Bench of the Calcutta Court in *Nagendro Nath Mullick* v *Mathura Mohun Parhi* (2) have decided that the provisions of Section 14 of Act XV of 1877 are not applicable for arrears of rent under Act X of 1859 on the ground that Act X of 1859 is a Code complete in itself

I am, therefore, of opinion that Act III of 1877 being a Special Act complete in itself, the provisions of Section 7 of the Limitation Act do not apply

MUTTUSAMI AYYAR, J.—The question referred for the opinion of the Full Bench is whether Section 7 of the General Act of Limitation governs a suit instituted under Section 77 of the Indian Registration Act The latter enactment refers specially to the subject of Registration and Section 77 provides that, when the Registrar refuses to order a document to be registered under Section 72 or Section 76, any person claiming under such document or his representative, assign or agent may, within thirty days after the making of the order of refusal, institute a suit for a decree directing the document to be registered in such office, if it be duly presented for registration within thirty days after the passing of such decree Section 7 of the General Act of Limitations enacts that if a person entitled to institute a suit be, at the time from which the period of limitation is to be reckoned, a minor or insane or an idiot, he may institute the suit within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor, by the third column of the second schedule thereto annexed The question for determination is whether a suit under Section 77 of Act III of 1877 may be instituted within the time prescribed therefor after

(1) 50 L.J (Ch) 777 (2) 18 C 368.

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the cessation of the disability. Our decision must depend on the [104] construction to be put on Section 6 of the Limitation Act and on the nature of Act III of 1877 as a Code complete in itself on the subject of limitation.

The general rule is no doubt that laid down in *Abergavenny* v. *Brace* (1), *viz.*, that a statute prescribing rules for special subjects is not controlled by subsequent legislation of a general character. But the operation of this rule may be precluded in regard to particular enactments either by express legislation or by the inference which may be drawn from the character of a special enactment as a complete Code or otherwise The question must resolve itself ultimately into one of intention of the legislature either express or implied.

I may here refer to two decisions of the Privy Council which illustrate and explain the principles that ought to guide our decision as to implied intention. The case of *Mohummud Buhadoor Khan* v. *The Collector of Bareilly* (2) is an authority for the proposition that Act IX of 1859 is a special enactment complete in itself and that its provisions are such as do not permit of Section 6 of the General Limitation Act being imported into them without incongruity. Their Lordships of the Privy Council observe in that case as follows —" That Act was passed for the special " purpose of providing a Court for the adjudication of claims of innocent " persons upon the property of rebels which had been forfeited to the " Government. It established a special Court consisting of three Commis- " sioners and suspended the action of all other Courts in respect of such " claims. Special modes of proceeding are established and various clauses " in the Act refer to that special course of procedure. There are also " provisions in the Act which relate not merely to the Court so established " and the procedure under it, but are of a general character and apply " to the property forfeited in whatever Court claims may be made regard- " ing it. Section 20 provided that no suits brought by any party in " respect to such property shall be entertained unless it be instituted with- " in the period of one year from the date of the attachment or seizure of " the property to which the suit relates. It was said that the clauses in " the General Statute Act XIV of 1859 relating to disabilities might be " imported into the Act, but this cannot be properly done. Act XIV is a " Code of Limitation [105] of general application, while this Act is of a " special kind and does not admit of those enactments being annexed to " it."

Again, in *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (3), the question arose whether a suit brought under Section 246 of Act VIII of 1859 is governed by Sections 11 and 12 of Act XIV of 1859. The Judicial Committee then held that the appellant in that case was under disability within the meaning of those sections, and that the suit having been brought during disability, though after the expiration of one year, was brought in time. Their Lordships explained the grounds of decision in these terms:—" The two statutes (Acts VIII and XIV of 1859) were " passed in the same year. The object of the first was to enact a general " Code of Procedure for the Courts of Civil Judicature not established by " Royal Charter. The object of the second was to establish a general law " of limitation in supersession both of the regulations which had governed " those Courts and of the English statutes which had regulated the prac- " tice of the Courts established by Royal Charter. Looking to the fifth

(1) L.R 7 Ex. 170. (2) 1 I.A. 167. (3) 3 I.A. 7.

"sub-Section of the 1st Section and the 3rd and 11th Sections of Act XIV "of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from Section 246 of Act "VIII of 1859 should in the case of a minor be modified by the operation "of the 11th Section of Act XIV and that this construction has obtained "in the Courts in India appears from the case cited, *Huro Soondurec* "*Chowdhrain* v *Anundnath Roy Chowdhry* (1)"

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Adverting to the previous decision they say —"That case is distinguishable from the present It arose upon a very special statute and upon "that ground the judgment rests"

These cases were decided with reference to Act XIV of 1859, Section 3 of which is substantially the same as Section 6 of the present Limitation Act, and they are authorities for the proposition that, when the Act to be modified by Section 6 is of a very special kind, complete in itself, and it does not admit of the several provisions of the Limitation Act being imported into it without incongruity and without defeating the intention of the legislature, it is not controlled by the general provisions of the Limitation Act

[**106**] As regards Section 6 of the Limitation Act, it is in these terms — "When, by any special or local law now or hereafter in force in British "India, a period of limitation is specially prescribed for any suit, nothing "herein contained shall affect or alter the period so prescribed" The language of the corresponding section in Act IX of 1871 was to the effect, that nothing therein contained shall affect *that law*, Act XIV of 1859, Section 3, provided that when by any law now or hereafter to be in force, a shorter period of limitation is prescribed, such shorter limitation shall be applied, notwithstanding this Act The question is how and whether the alteration of the language of Section 6 of Act IX of 1871 is material or significant It is contended that the present Act only explains Act IX of 1871, but I am unable to accede to this contention It appears to be significant, when regard is had to the course of legislation on the question of limitation Prior to 1859 there were different systems of limitation laws, not only in different Presidencies but also in different Courts in the same presidency In 1842, the Indian Law Commissioners framed a bill embodying a uniform law of limitation for all the Courts in British India With some amendments suggested by Sir James Colville and Sir Barnes Peacock, Act XIV of 1859 was framed on that bill But the Privy Council since remarked that it was an inartistically drawn statute, and Act IX of 1871 was then framed on a scientific plan, Act XV of 1877 reproducing it with certain important amendments The scheme of the present Act consists in dividing the limitation law into four parts and in collecting the preliminary rules into the first part, certain rules of general application and rules relating to computation of the period of limitation into the second and third parts and in appending to them a tricolumnar schedule, specifying the several descriptions of suits, the period of limitation in regard to each, and the time from which the period begins to run The scientific arrangement according to which rules of limitation are classified and distributed gives a significance to the substitution of the words 'affect or alter the period prescribed' for the words 'affect or alter that law' The course of legislation also discloses an intention to limit the operation of special or local laws, as a general rule, to the periods mentioned therein unless they are Codes complete in themselves, and to restore Act XIV of 1859 which

(1) 3 W R C R, 8

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confined their operation to the short periods [107] prescribed and to repeal Act IX of 1871 which excluded all provisions of the general law of limitations.

There is another standpoint from which the alteration of language appears to be material. There are various Local and Special Acts now in force, and all of them are not so framed as to be complete and independent Codes so far as they relate to limitation, and this probably created the necessity for embodying in Section 6, a general direction applicable to those Special or Local Acts which are not from their frame complete Codes. There is considerable authority in support of this view. I may first refer to the two decisions of the Privy Council already cited which were passed when Act XIV of 1859 was in force. I shall next refer to three cases decided by the High Court at Calcutta. In *Golap Chand Nawluckha* v. *Kristo Chunder Dass Biswas* (1), it was held that Section 5 of the Limitation Act applied to suits instituted under Section 30 of Bengal Act VIII of 1859, and the ground of decision was that the language of Section 6 of the present Act of Limitations as compared with that of Section 6 of Act IX of 1871 suggests that it was the intention of the legislature to give to persons suing under the Special Act, the benefit of the general provisions of the General Limitation Act. The next case is that of *Nijabutoola* v. *Wazir Ali* (2). In that case Section 5 of the General Limitation Act was applied to a suit brought under Section 77 of the Registration Act, the *ratio decidendi* being, that the proper interpretation to be put on Section 5 considered together with Section 6, is that except as defined in Section 6, the general provisions of the Limitation Act are applicable to cases for which short periods of limitation are specially provided by Local or Special Laws. The third case is that of *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (3) decided by Sir R. Garth, C.J., and Mr. Justice O'Kinealy, which approved of the interpretation placed on Section 6 in *Golap Chand Nowluckha* v. *Kristo Chunder Dass Biswas* (1) and *Nijabutoola* v. *Wazir Ali* (2), and applied Section 14 of Act XV of 1877 to a suit instituted under Section 77 of the Registration Act.

In *Garacharya* v. *The President of the Belgaum Town Municipalities* (4), the Bombay High Court approved of the decision in *Golap Chand Nowluckha* v. *Kristo Chunder Dass Biswas* (1) and [108] applied Section 14 of the General Limitation Act to the suit before them. In the reference made under the Forest Act, the High Court at Madras followed the Calcutta decision and applied Secion 5 of the general provisions to an appeal preferred under Section 14 of the Forest Act. This decision was again followed in the case of *Kullayappa* v. *Lakshmipathi* (5), wherein it was held that Section 14 of the Limitation Act applied to a suit brought under Section 78 of the Rent Recovery Act and in the decision *Mahadevi* v. *Vikrama* (6). It is true that the decision of a Divisional Bench of the High Court at Calcutta in *Girija Nath Roy Bahadur* v. *Patani Bibee* (7) and the decision of the Full Bench in *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (8) are in conflict with the previous decisions, but the conflict is rather apparent than real. In the former, the special law under which the suit was brought was Bengal Act VIII of 1859. The Court observed that that Act not only prescribed a special period of limitation for suits to recover arrears of rent, but also prescribed rules relating to other matters. The learned Judges also laid stress on the language of Section 7 in particular

(1) 5 C 314. (2) 8 C 910. (3) 10 C. 265 (267).
(4) 8 B. 529 (5) 12 M 467. (6) 14 M. 365 (369).
(7) 17 C. 264. (8) 18 C. 368 (371).

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on the words " in the third column of second schedule hereto annexed " as being words of reference to the General Limitation Act only The suit referred to in *Nagendro Nath Mullick* v *Mathura Mohun Parhi* (1) was brought under Act X of 1859 and the learned Judges observed that Act X of 1859 had always been considered to be a Code complete in itself and unaffected by the General Laws of Limitation Relying therefore on the principles laid down by the Privy Council in *Mohummud Buhadoor Khan* v *the Collector of Bareilly* (2) and *Mussumat Phoolban Koonwur* v *Lalla Jogeshur Sahoy* (3) the conclusion I come to, both on the construction of Section 6 of Act XV of 1877 and on authority, is that the general provisions of the last mentioned Act modifying the operation of Special or Local Acts, unless they are complete Codes in themselves, are not on that ground affected by the General Act of Limitations

The next question which arises for decision is whether Act III of 1877 is a Code complete in itself, so as to render it incongruous to import into the general provisions of the Limitation Act I have already referred to the language of Section 77 and certainly [109] it discloses an intention to fix a short period of limitation not only for instituting a suit under that section, but also for the enforcement of the decree mentioned therein

Again, Section 77 pre-supposes an order by the Registrar refusing registration under Section 72, and Section 71 directs him to state his reasons for such refusal By Section 23 a Registrar is bound to refuse to register an instrument unless it is presented for registration within four months from the date of its execution By Sections 24 and 25 the time prescribed for presentation of the document for registration is extended by four months more subject to certain conditions Take for instance, the case of a refusal by the Registrar on the ground that the document was not presented within the prescribed time,—and I do not think that the Civil Courts can set aside an order of refusal which is based on those sections which disclose an intention to enforce presentation for registration within a determinate period.

Again, Section 32 provides that every document must be presented for registration by some person executing or claiming under the instrument or by the representative or assign of such person or by the agent of such person This section does not apparently contemplate the case of disability, and makes a special provision in regard to it and the probable inference is that when a document is executed in favour of a minor, his legal guardian is taken to represent him for the purpose of registering it It must also be remembered that the right to register a document is a right created by the Act and when it prescribes a remedy for its exercise and limits the time for such exercise the remedy must ordinarily be taken to be what is provided therein.

Further, the object of the Registration Act in prescribing compulsory registration within a determinate and short period is to prevent fabrication of documents and that object will be defeated if the time for registration is indefinitely prolonged during the continuance of disabilities

Thus, there are detailed rules in the Registration Act showing that the intention is to prescribe a determinate time for registration as of the essence of the Act and that indefinite extension is likely to defeat the object of registration. I am of opinion that it would be incongruous to import into it the general provisions of the Limitation Act, and on this ground I hold that the Registration Act is of a special

(1) 18 C. 368 (371) (2) 1 I. A. 167 (3) 3 I.A 7.

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kind, in that it discloses an intention to [110] prescribe a specific and determinate period for registration, and that it contains rules of limitation complete in themselves. I therefore answer the question in the negative.

SHEPHARD, J.—The question is whether the provisions of the Limitation Act with regard to disabilities are applicable to a suit brought under Section 77 of the Registration Act. Section 77 is the last of a series of sections directing the course to be adopted on the refusal of the Sub-Registrar or Registrar to register a document. By Section 72 provision is made for an appeal against the order of the Sub-Registrar not being made on the ground of denial of execution. The section requires the appeal to be presented within thirty days from the date of the order. In the case of the Sub-Registrar refusing to register on the ground of denial of execution, Section 73 provides that the party aggrieved may apply to the Registrar in order to establish his right to have the document registered. That section also requires the application to be made within thirty days of the date of the order. In the enquiry which the Registrar holds on such application the Registrar exercises judicial functions and has the ordinary powers of a civil Court. In the event of the Registrar refusing to register a document whether in the first instance presented to himself or to the Sub-Registrar, Section 77 provides for a remedy by a suit in the civil Court. Again, the section requires the suit to be brought within thirty days from the date of the order of refusal. It seems clear that the intention of the legislature was in all these cases alike to reduce to the shortest limits the time in which parties aggrieved by a Sub-Registrar's or Registrar's orders might take action. As is the case with other statutes limiting specially the time in which the acts of public officials may be impugned, no provision is made for the case of disabilities or for the other cases in which according to the Limitation Act time does not run against the plaintiff or some deduction is made in computing the period of limitation. The exception in favour of infants is not one which is necessarily implied in statutes of limitation. " When the words in their ordinary and " common signification are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature, manifested by "other parts of the law, from the general purpose and design of the law, " and from the subject-matter of it."—*Beckford* v. *Wade* (1).

[111] I cannot find any manifestation of such intention in the Registration Act, nor do I think it can be said that there is any hardship in requiring an aggrieved person to take action within a month although he may happen to be under a disability. In the transaction which has led up to the execution of a document, the person interested as purchaser, if himself incapable of action, must have had some representative or agent to act for him, and Section 77 provides that the representative or agent of any person claiming under the document may institute the suit in case of refusal to register.

It was argued for the plaintiff that an intention on the part of the legislature to engraft exceptions on the general words of the Act has been manifested in the Limitation Act, 1877.

According to the Limitation Act in force when the Registration Act was passed, it is quite clear that no allowance could be made for the disability of the plaintiff not provided for by any special Act, for Section 6 of the Act of 1871 expressly saves any law by which a period of limitation differing from that prescribed by the Act is specially prescribed. In the

(1) 17 Ves. 87, (92).

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later Act of 1877, Section 6 appears in a different form, more nearly resembling the language of Section 3 of the Act of 1859 In the new Section 6 it is provided that nothing therein contained shall affect or alter the period specially prescribed by any special law It is contended that, although in the absence of any such provision a special rule of limitation should be treated as complete in itself and unaffected by the general law of limitation, the effect of this section is to make the general law of limitation applicable to special cases in all matters save the length of the period prescribed Thus, in a suit under the Registration Act, the plaintiff could, it is argued, take advantage of any of the sections, 5th or 7th or 8th, 14th, 18th or 19th of the Act of Limitation I cannot believe that this was the intention of the Legislature, nor do I think that Section 6 will bear this construction It appears to me that the period fixed by a special law is *affected* if not altered, when by virtue of the general law of limitation the starting point is altered and the period is made to begin on the cessation of the plaintiff's disability According to this contention the plaintiff is entitled to thirty days computed from the last-mentioned date instead of thirty days computed from the date of the order as provided in the Registration Act I am unable to accept the construction put upon the section in some of the cases [**112**] *Behari Loll Mookerjee* v *Mungolanath Mookerjee* (1), *Reference under Forest Act of* 1882 (2) and am clearly of opinion that the language of the section does not evince any intention to qualify the operation of the Registration Act in respect of the provision contained in Section 77

With regard to the authorities I find a great fluctuation of opinion The most important and recent decision is that of the Full Bench of Calcutta with reference to a case under the Act X of 1859 Being of opinion that that enactment was a Code complete in itself, the Court held that the provisions of Section 14 of the Limitation Act were not applicable to a suit brought under it *Nagendro Nath Mullick* v *Mathura Mohun Parhi* (3) In an earlier case the same Court arrived at a like conclusion with reference to Section 7 of the Limitation Act and some stress was laid on the language of this section *Girija Nath Roy Bahadur* v *Patani Bibee* (4) The Full Bench decision is in accordance with the principle laid down by the Privy Council in a case relating to a claim to recover confiscated property for which special provision was made by Act IX 1859 See *Kery Kolitany* v. *Moneeram Kolita* (5), *Mohummud Buhadoor Khan* v *The Collector of Bareilly* (6), *Phoolbas Koonwur* v *Lalla Jogeshur Sahoy* (7), *Poulson* v *Madhusudan Pal Chowdhry* (8) The present case is, I think, within the principle of these decisions On the other hand, there are certainly several decisions in the other sense including decisions of the Bengal High Court and of this Court In two of them a suit under the Registration Act was in question, *Nijabutoolla* v *Wazir Ali* (9), *Khetter Mohun Chuckerbutty* v *Dinabashy Shaha* (10) Here there have been similar decisions with reference to the Forest Act and the Rent Act *Reference under Forest Act of* 1882 (2) and *Kullayappa* v *Lakshmipathi* (11), see however, *In re Syed Mohidin Hussen Saheb* (12) and *Thir Singh* v *Venkataramier* (13) Except the case in *Girija Nath Roy Bahadur* v. *Patani Bibee* (4), no decision with reference to the provision for

(1) 5 C 110 (2) 10 M 210 (3) 18 C 368
(4) 17 C 263 (267) (5) 13 B.L.R 60 (6) 1 I A 167 (176).
(7) 1 C. 226 (242) (8) B L R Sup Vol 101 (9) 8 C 910
(10) 10 C 265. (11) 12 M 467 (471) (12) 8 M H C R. 44
(13) 3 M 92

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disabilities was cited. I am unable to find any similar English case and this want of authority is, I think, significant, as there are several statutes [113] relating to public bodies and official acts prescribing special rules of limitation and not providing for disabilities (see *Darby and Bosanquet's Treatise on Limitation* in page 669).

In my opinion the question submitted to us must be answered in the negative.

This second appeal then came on for final disposal before Collins, C.J., and Shephard, J., and the Court delivered the following

JUDGMENT (FINAL).

The decree must be reversed and the suit dismissed with costs throughout.

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18 M. 113.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

Ramasami Chetti (*Plaintiff*), *Appellant v.* Mangaikarasu Nachiar and others (*Defendants*), *Respondents.**
[20th, 21st August and 26th September, 1894.]

Hindu law—Mortgage of zamindari lands by zamindar's widow to secure her husband's debts—Appropriation of the assets of deceased towards payment of his debts

In a suit on a mortgage of lands forming part of a zamindari, it appeared that the zamindar died without issue, being indebted to the plaintiff, and that his widow subsequently borrowed money from the plaintiff for her own purposes, including litigation successfully prosecuted by her to make good her claim to the estate The widow being pressed for payment executed the mortgage sued on and afterwards paid to the plaintiff two sums, being the proceeds of the sale of her husband's jewels and of the execution of a decree in his favour realized after his death. These sums were appropriated to the payment of the widow's debt by the mortgagee who, after her death, brought the present suit against the deceased zamindar's mother then come into possession of the estate, his undivided half-brothers being joined also as defendants:

Held (1) that the widow was entitled to mortgage the estate for the payment of her husband's debts, and was not bound to discharge them out of income;

(2) that the two payments by the widow of money belonging to the estate of the deceased zamindar should have been applied in liquidation of his debt.

[R., 34 M. 188 (195)=8 Ind Cas 1072=21 M.L.J 320=9 M.L.T. 235=(1910) M.W.N. 790; (1913) M.W.N. 275 (276).]

Appeal by the plaintiff against the decree of Venkataranga Ayyar, Subordinate Judge of Madura (East), in original suit No. 36 of [114] 1890, and a memorandum of objections by the defendants against the same decree.

Suit to recover principal and interest due upon a hypothecation bond, dated 5th July 1888, and executed in favour of the plaintiff by one Thanga Nachiar, the widow of the late Zamindar of Pandalkudi, who had died without issue on 29th November 1887. It was stipulated in the bond that the obligor should pay the principal sum on the 4th July 1889 together with interest at 12 per cent. per annum, and that in default of payment on the specified date compound interest should be paid.

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* Appeal No. 151 of 1893.

The consideration of the instrument sued upon was made up of the principal and interest of debts contracted by the late zamindar, and the property subject to the charge formed part of his estate Thanga Nachiar had died before the institution of the present suit which was in the first instance brought against the mother of the late zamindar as sole defendant, it being averred that she was entitled to be and in fact was in possession of his properties Subsequently his two divided step-brothers were brought on to the record as defendants by the orders of the Court

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APPELLATE CIVIL

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The following were the issues framed in the suit —

(1) Whether the items of consideration set forth in the hypothecation bond of 5th July 1888 were genuine debts due by the late Seemaichami Taver or not?

(2) Whether assuming they were so, Thanga Nachiar was under any legal necessity to execute the hypothecation bond and whether it is a *bona fide* transaction and is binding on the defendants?

(3) Whether the sum of Rs 46,405-15-7 or any other and what sum was received by the plaintiff from the estate of the late Seemaichami Taver during the life time of Thanga Nachiar, and whether the plaintiff was bound in the first instance to have given credit for such sum towards the debt, if any, due by Seemaichami Taver as pleaded by the defendant?

(4) Whether the provision in the hypothecation bond regarding compound interest is binding on the defendant?

(5) Whether the plaintiff's claim is in any view barred by limitation?

(6) What decree, if any, is plaintiff entitled to?

The first and second issues were determined in favour of the plaintiff as also was the fourth, with regard to which the Subordinate [116] Judge quoted *Chhab Nath* v *Kamta Prasad* (1), and also referred to evidence which showed that the deceased zamindar used to pay to the plaintiff compound interest on the sums from time to time borrowed by him

The third issue was dealt with in paragraphs 22 to 27 of the Subordinate Judge's judgment It appeared that two payments aggregating Rs. 16,200-11-6 were made to the plaintiff after the death of the late zamindar and out of his estate These sums had been applied by the plaintiff towards the discharge of a debt due to him from Thanga Nachiar and not of that of the late zamindar, these debts, theretofore treated in his accounts as one entire demand, being split into two with the object of effecting this appropriation. It was sought to be proved by the plaintiff that it was agreed between him and Thanga Nachiar or her agent that the payments should be appropriated in the above manner The Subordinate Judge held that such an agreement if it were made in fact was opposed to the principles of the Hindu law and would have the effect of defrauding the reversionary heirs, and accordingly held that the payments should be treated as made in discharge of the husband's debt

In the result the Subordinate Judge passed a decree for the plaintiff that the defendants do pay him Rs 19,106-1-4, within six months and in default that the property in question be sold

Against this decree the plaintiff and defendants respectively preferred an appeal and took objection under Civil Procedure Code, Section 561, on grounds which appear sufficiently for the purposes of this report from the judgment of the High Court.

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(1) 7 A 333.

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Subramanya Ayyar, Bhashyam Ayyangar and *Desikachariar*, for appellant.

Parthasaradhi Ayyangar, Srirangachariar, Bhashiachariar and *Thiruvenkatachariar*, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.— This is an appeal from the decree of the Subordinate Judge's Court of Madura (East), in so far as it disallows appellant's claim upon the hypothecation bond Z, dated the 8th July 1888. Respondents object to the decree so far as it allows his claim under Section 561 of the Code of Civil Procedure. The plaint claimed Rs. 39,013-3-5, as principal and interest, simple and compound, due under Exhibit Z, but the decree awarded Rs. [116] 19,106-1-4 only. The contention on appeal is that the difference, *viz.*, Rs. 19,900 and odd, has been improperly disallowed and the objection taken by respondents is that the bond Z is not binding on the estate.

The five issues upon which the parties proceeded to trial are set forth in paragraph 5 of the original judgment, and the Subordinate Judge decided the first, second, fourth, and fifth in appellant's favour, but on the third issue he upheld respondent's contention and credited to the debts sued for two sums of money, *viz.*, Rs. 3,905-3-6 and Rs. 12,295-8-0 Whether the Subordinate Judge was right in doing so is what we have to determine in this appeal

Appellant is a money-lender in the District of Madura. The first respondent is the mother of the last male owner of the hypothecated property, and she succeeded to it on the death of his widow, Thanga Nachiar. The second and third respondents are the half-brothers and the reversionary heirs of the late male owner Seemaichami *alias* Sivagyanaswami Taver.

Sivagyana Taver, commonly called the Pandalkudi Zamindar, borrowed from the appellant from time to time various sums of money. He borrowed first Rs. 6,761,-5-0 on a promissory note dated the 21st October 1884. On diverse occasions he since obtained loans from the appellant on 48 letters (F-1 to F-48) which, on a settlement of accounts made on the 27th April 1887, resulted in a balance in his favour to the extent of Rs. 17,542-14-7. The Subordinate Judge has found that on the last mentioned date the debtor consolidated the two debts, executed the promissory note C and took back the prior promissory note and the 48 letters. Subsequently, Mangalasami Taver, his agent, borrowed Rs. 1,800 upon the authority conveyed by Sivagyana Taver by yadasts S to S-6. On the 29th November 1887 the debtor died leaving him surviving a widow named Thanga Nachiar, the first respondent, his mother, and the second and third respondents, his divided step-brothers, Kottaisami Taver and Pandi Dorai. Thanga Nachiar desired, on her husband's death, to enter into possession of his estate, but her attempt was resisted by the other members of the family who wished the Court of Wards to take up its management on plea of the widow's youth and sex. Their opposition, however, failed and the Court of Wards declined to supersede the widow who assumed management in March 1888. During this quarrel she had occasion to borrow from time to time and the appellant accommodated her with loans and [117] as is alleged, probably took her side. She also borrowed monies for other purposes, and her own debts were considerable. On the 5th July 1888, she executed the hypothecation bond Z in favour of the appellant for Rs. 30,740-7-10 which was made up of Rs. 24,304-3-7

due under Exhibit C, of Rs 1,800 borrowed under yadasts (S series) and of Rs 4,686-4-3 interest due thereon The hypothecation bond provided for interest on the consolidated amount at 12 per cent per annum, and in default of payment, for consolidating the interest and the principal at the end of each year It is in evidence that Sivagyana Taver's estate yielded Rs 30,000 or Rs. 32,000 a year, that the peishcush, cesses and poruppu amounted to about 14,000, that the cost of establishment was about Rs 5,000, that the cost of repair and contingent charges amounted to Rs 1,000, that the amount paid to the first defendant on account of her maintenance was Rs 1,800 a year, and that the widow's net income was about Rs 10,000 a year She had to incur an expenditure of Rs 6,000 or Rs 7,000 in connection with the dispute about her management It is also in evidence that she made payments to a large extent on account of her personal debts and placed part of the collection of her estate in view to their discharge under the direct and immediate control of the creditor

Among the sums of money so paid to and appropriated by the appellant there are admittedly two payments, *viz* , (1) 12,295-8-0, (2) Rs 3,905-3-6, which require to be noticed The first item of payment represents the sale-proceeds of Sivagyana's jewels and the second item represents the produce of a decree in favour of Sivagyanam realized after his death by his widow It was conceded by the appellant's pleader that at the date of appropriation the appellant was aware that the first item was made up of the sale-proceeds of Sivagyana's jewels There is also reason to think that, in the circumstances of the case, the creditor had means of knowledge as regards the nature of the second item Upon these facts the Subordinate Judge has held that the two items formed part of the *corpus* of Sivagyana's estate and that they ought to have been appropriated by the appellant to the debt due by the estate on the hypothecation bond He discusses the question in paragraphs 22 to 27 of original judgment, and I agree in the conclusion at which he has arrived The hypothecation debt was a charge on the estate, whilst it is not proved for the appellant that monies borrowed by Thanga Nachiar were mostly other than her personal debts This being so, [**118**] what was recovered on account of the estate and what was realized by the sale of part of it ought to have been applied in its reduction, as the reversioners would otherwise be defrauded

In the case before us the creditor knew that the monies formed part of the estate, and the Subordinate Judge finds, and properly, I think, that the appropriation was the result of collusion between the widow's agent and the creditor The splitting of the debts referred to by the Subordinate Judge in paragraph 25 of his judgment lends material support to this view of the facts Moreover, the decision of the Subordinate Judge is in accordance with the principle laid down by the Privy Council in *Hurro Nath Rai Chowdhri* v *Randhir Singh* (1) I disallow the first contention in appeal

Another contention in appeal is that the Subordinate Judge ought to have awarded interest on the amount decreed from the date of plaint to date of realization, and I am of opinion that it must be upheld Appellant is entitled to interest on the amount decreed at the contract rate from the date of plaint to that of the decree, and at 6 per cent. per annum from the date of decree to that of realization The decree appealed against

(1) 18 C 311=18 I A 1.

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must be modified as indicated above with reference to interest and confirmed in other respects. The costs will be proportionately assessed.

As regards the memorandum of objections, respondents object to the whole decree.

The first ground of objection is as to the correctness of the Subordinate Judge's finding on the first issue and he deals with it and the second and fourth issues in paragraphs 6 to 21 of his judgment. I agree in the conclusions at which he has arrived. During the argument, respondents' pleader pressed on us four objections to the finding, *viz.*, (i) that there was a considerable interval of time between the date on which document C was drawn up and the date on which it was signed by Sivagyana; (ii) that the evidence of plaintiff's second witness Somasundaram so far as it explains the delay is contradictory (iii) that several others who might have been called as witnesses have not been called; and (iv) that a sum of Rs. 1,800 was twice included in the amount of debt entered in document Z. As to the first objection the evidence of Somasundaram affords satisfactory explanation. Although he made two conflicting statements, he made the second [**119**] statement of his own accord and corrected the first, and there is no sufficient reason to think that the discrepancy is not due to defective memory consequent on lapse of time. There is further the evidence of plaintiff's fourteenth witness as to the execution of C and it corroborates that of the second witness. It is true that certain persons who might have been called as witnesses have not been called But taking the evidence as a whole it is so cogent and varied that it is not possible to come to any other finding than that to which the Subordinate Judge has come. The objection as to Rs. 1,807 being included twice over has no foundation in fact, and the appellant's pleader has shown by reference to the accounts that it is founded on a misconception of certain entries in Exhibit OOO. As regards the contention that there was no necessity for the execution of the mortgage, there is evidence that the creditor insisted on the payment of Sivagyana's debts due on the estate. Under Hindu law, a widow is at liberty to sell a portion of the estate to pay those debts, as the heritage she or any heir is entitled to consists of Sivagyana's property less his debts, or is the aggregate of his property and his debts which are in the first instance payable out of it. A mortgage therefore in lieu of the sale of part of the estate is an act ordinarily beneficial to the reversioners unless special circumstances show that the intention was otherwise. The rate of interest provided by the mortgage is 12 per cent. per annum, and the provision for annual rests is what her husband had entered into in some of instruments executed by him. As Thanga Nachiar was a young widow, she might have hoped to live long and to pay the interest every year as soon as her own debts were paid off. It must be remembered that she died in October 1889 while the document Z was executed in July 1888.

It is next contended that she was bound to apply the income of her husband's estate first in discharge of his debts instead of executing the mortgage. The net income is, under Hindu law, as administered in this Presidency, her own exclusive property as widow, and she is not bound either to save or apply it for the benefit of the reversioners. She is no doubt bound to pay her husband's debts from it, because she had taken charge of the whole property left by him whilst her right of inheritance extends only to the property as diminished or affected by his debts. As between her and the reversioners she is entitled to say, " I will " pay my husband's debts by the sale of his property and take the residue,

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" [120] and I desire to keep the net income derived from it and to spend " or invest it as I please." I do not, however, desire to be understood as holding that she is entitled to ignore the charges which are legally payable out of the gross income such as the peishcush and maintenance due to other members of the family and thereby add to the debt left by the husband so as to prejudice the reversion Applying these principles to the case before us, I am of opinion that the gross income less the charges she is legally bound to pay from it is her exclusive property as between her and the reversioners Another objection taken to the decree is that a personal decree has been passed against the first defendant This is founded on a misconstruction of the decree which only purports to give her the option of paying the decree amount within six months if she desires to prevent the creditor from bringing the property to sale

I would dismiss the memorandum of objections with costs The decree should, however, be so varied as to grant the six months from the date of the appeal instead of the original decree

SHEPHARD, J —By the decree in this case there is made payable to the plaintiff the sum due on the footing of the bond executed by the widow on whose death the defendants came into possession less the sum of Rs. 16,200-11-6 which is found to have been received by the plaintiff The plaintiff appeals against the decree on the ground that this deduction ought not to have been made and also on the ground that interest up to the date of realization is not provided for The defendants object to the whole decree on several grounds They contend that the whole basis of the suit is false, that the widow was under no necessity to execute the bond, that the bond comprises sums not really due and that interest at the contract rate ought not to have been allowed The contention of the defendants which goes to the root of the whole decree forms the subject of the first and second issues The debt secured by the widow's bond was made up of two sums, one a sum claimed in respect of a promissory note alleged to have been made by her late husband Sivagyanam, the other consisting of monies advanced to the widow herself As to the former there is a mass of evidence, oral and documentary, brought before the Subordinate Judge to prove the promissory note was made by the late Sivagyanasamy under the circumstances described That evidence was accepted by the Judge, and there really was no attempt to meet it by counter-evidence The evidence as to the handwriting of [121] Sivagyanasamy stands uncontradicted I see no reason to think that the Judge was wrong in his finding on the first issue with regard to the promissory note It was not denied that the other sums which make up the consideration for the bond were advanced to the widow, but it was said that they had been paid off on a settlement of accounts between her and the plaintiff This contention founded on a misconception of the evidence was sufficiently disposed of during the argument The more substantial contention was that the widow was under no necessity to hypothecate the property in which she enjoyed only a limited interest Sivagyanasamy died on the 29th November 1887. The bond was executed on the 5th July 1888 At the former date the treasury of Sivagyanasamy was empty On the 30th June 1888 there is evidence to show that about Rs 21,000 remained in hand including the mohathala account It also appears from the evidence that the gross income of the estate was between 32 and 39 thousand rupees. The particular income for the year succeeding Sivagyana's death is not stated. Assuming that it was about Rs. 35,000 gross, the net

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available income for the widow would seem to have been about Rs. 11,000. With this income the widow had to face the debt due under the promissory note exceeding Rs. 24,000 in amount. There is evidence which the Judge believes that the plaintiff pressed for the payment of this debt as well as the small advances made by him to the widow. Under these circumstances it seems to me the finding that the hypothecation was made in good faith and under pressure of necessity is fully justified. Nor do I think that the Judge was wrong under the circumstances mentioned by him (paragraph 20) in allowing compound interest. These observations dispose of the defendants' objections. I think they should be dismissed with costs.

The plaintiff's appeal relates firstly to the sum allowed to the defendants on account of monies belonging to the estate of Sivagyanasamy which are found to have come into the hands of the plaintiff. The Judge has proceeded on the authority of the decision in *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (1). There can be no doubt that the plaintiff was well aware that the monies received by the sale of the jewels as well as those realized by the decree were part of the estate which the widow took from her [122] husband. His object clearly was, as the Judge finds, to secure himself with regard to the sums he had advanced to the widow personally, and to throw the whole burden of the other debts on the estate. It was argued here that the former debts were also binding on the reversioners, but that was not the contention in the Court below. Then it was said that the appropriation was the result of an arrangement between the widow and the plaintiff. It appears to me that the Judge was right in holding that the plaintiff ought to have applied the two sums, which came to his hands, to the liquidation of the husband's debt.

No reason was given for refusing interest from the date of the suit till the date of decree and thereafter till realization. The decree should be modified by allowing the agreed rate till date of decree and further interest at 6 per cent. till realization. In other respects I would dismiss the appeal with proportionate costs.

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18 M. 122.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NARASIMHA CHARYULU AND OTHERS (*Defendants*), *Appellants v.* APPA RAU (*Plaintiff*), *Respondent.**
[21st September, 1894.]

Stamp Act—Act I of 1879, Section 51 (a)—Allowance for spoiled stamps—Whether applicable to ordinary use in which a mistake has been made

Section 51 (*a*) of the Stamp Act, which permits an allowance being made for spoiled stamps, applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases of the use of the paper in an ordinary way, in which a mistake has been made.

APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in original suit No. 28 of 1892.

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* Appeal No. 58 of 1894.
(1) 18 C. 311=18 I.A. 1.

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The defendants in this suit executed a mortgage deed in favour of the plaintiff's father, since deceased, conveying certain immoveable property to him as a security for a loan of Rs 12,000, it being provided that "the "sum of Rs 12,000 should be repaid in twenty-four annual instalments, "commencing with the 30th [123] June 1888, and that each instalment "of Rs 500 should be accompanied by the interest thereon at Re 1 per "cent per mensem from date of bond to date of instalment"

The deed further contained the following clause —

"According to these instalments in case of default in payment of "the amount due on the date of any instalment, the total amount due for "that instalment, both on account of principal and interest, we will pay "with additional interest thereon at Rs 2 per cent per mensem without "any objection and will have it endorsed on the back of the bond Of the "amount of this bond in paying the amounts of the principal and interest "according to instalments in case of default of payment of instalments "1, 2 and 3, without reference to future instalments, we shall pay the "whole (amount) at once and take this document"

The defendants paid the first two instalments, but made default in payment of three succeeding instalments The plaintiff thereupon brought this suit to recover the whole sum remaining due, i e, some Rs 18,000 Subsequent, however, to the drawing of the plaint on stamped paper, the defendants paid to the plaintiff the sum of Rs 2,771

The defendants contended that the instalments 1, 2 and 3 specified in the deed had reference only to the first three instalments, but not to any subsequent ones, and further that the plaintiff might have recovered Rs 75, or at least some part of the value of the stamped paper used for the plaint, under Section 51 of the Stamp Act

The Subordinate Judge decreed in favour of the plaintiff and gave him costs calculated on the amount originally claimed in the plaint, notwithstanding the defendants' payment of Rs 2,771 made before the plaint was filed

The defendants preferred this appeal

Seshagiri Ayyar and *Gopalasami Ayyangar*, for appellants

Krishnasami Ayyar, for respondent

JUDGMENT.

We agree with the construction placed by the Subordinate Judge on the clause relating to default in payment of three instalments The suggestion that the clause provides only for the case of the first two instalments not being paid on the due dates is an unreasonable one and it is not supported by the language of the instrument

We also think the Judge was right in charging the defendant [124] with the full amount of the costs calculated on the amount originally claimed in the plaint, notwithstanding that Rs 2,771 was paid before the plaint was filed It is said that the plaintiff might have recovered Rs 75 or at least some part of the value of the stamped papers used for the plaint, and we are referred to Section 51 (a) of the Stamped Act and Section 54

In our opinion, Clause (a) of Section 51 applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases in which a person has used the paper in the ordinary way, but has made a mistake in using it Section 54 clearly has no application.

1894 Sep. 21. — Appellate Civil. — 18 M. 122.

The next point argued is that raised by the fifth ground of appeal. There is clearly nothing in the nature of a penalty, for it is from date of default only that the higher rate is made payable.

Another contention is that the Subordinate Judge was in error in awarding 2 per cent. interest on all the overdue instalments. On the true construction of the document we are of opinion that interest is payable at the enhanced rate only on the three instalments due at the date of the suit, and not on the whole balance which fell due under the clause relating to the defaults of those instalments.

The decree awards further interest at 24 per cent. while the plaint asked for such interest at the rate of 12 per cent. only. No relief can be awarded in excess of what is asked for. We must therefore modify the decree by giving 12 per cent. up to date of decree and 6 per cent. from that date till payment

The substantial question argued is whether there was a tender of the fifth instalment as alleged and consequently the suit was premature. The defendants' case is that on 3rd June 1892 he tendered Rs. 755-10-8 for acceptance in satisfaction of the fifth instalment, and that the manager refused to accept it. He attempted to show that the sum was tendered on that day thrice over, at 5 P.M. again at 7 P.M. and lastly about 11 P.M. The first tender was made by the second defendant, and the other two by the first. There is no doubt evidence (Defence witnesses 1, 2, 3, 4, and plaintiff, witness 4) in proof of first tender The Subordinate Judge, however, characterises the evidence as false. The second defendant does not refer to the presence of the first witness. There does not seem to have been any necessity for the defendant to refer to the shroff to introduce him to the manager, [126] and it seems strange that he went to the shroff without an irsanamah. The most suspicious feature is that the alleged tender is not mentioned in the letter said to have been written by the other defendant on the same evening. The manager, supported by the duffadar, says that the second defendant never came at all on the 30th. Moreover, it is extremely doubtful whether the defendant had on that day the sum required. Even if there was such a tender, as is spoken to it, it was insufficient as it fell short of the amount due for the fifth instalment We are unable to say that the Judge was wrong in disbelieving the evidence as to the tender As to the second tender there is evidence of the two defendants and the clerk. The evidence of the latter does not impress us favourably Admittedly, he had nothing to do with the business. The other witnesses are interested and their story as to funds is open to grave suspicion, and wholly uncorroborated. Boyi Shetti, who is said to have lent them Rs. 400, is not called, and no accounts are produced either as to this sum or as to the sum realized by sale of grain. It is true that the manager admits that the first defendant came to him and had a conversation, and was told that the money could not be accepted unless the prior instalments were paid. In this respect the manager was mistaken, for it was for the defendants to determine to what instalment the payment should be applied, and he had good reason for wishing to have the fifth instalment paid first, as otherwise the whole balance would become due. We cannot, however, infer from the evidence that the manager refused absolutely to accept a tender which the first defendant promised to make. All that the manager admits is that the first defendant said he would arrange for the payment, not that he was ready and willing to make the payment then and there. We are inclined to believe that the defendant had

not really sufficient money with him It is in evidence that on the same evening after 7 P M the defendant borrowed Rs 200 This strongly supports the opinion of the Subordinate Judge 1894 SEP. 21.

As to the last tender it was really no tender as the manager had left the office The evidence of the defendants is extremely unsatisfactory APPELLATE CIVIL

We see no reason to disturb the findings of the Judge on the fourth, fifth and sixth issues

The decree will be modified in two respects as above observed Otherwise the appeal is dismissed Proportionate costs 18 M. 122.

18 M. 126.

[126] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

SUBBA RAU (*Plaintiff*), *Appellant* v DEVU SHETTI (*Defendant*), *Respondent*.* [21st March and 27th September, 1894]

Mortgage—Part breach of contract by mortgagee—Contract Act—Act IX of 1872, Section 39—Rescission—Acquiescence—Suit by mortgagee for interest due under the mortgage as regards the part fulfilled

A mortgaged certain land to B for Rs 800 Under the terms of the mortgage deed B was to pay Rs 500 of the advance to C in discharge of a previous mortgage executed by A in favour of C Of the balance of Rs 300, B was to retain Rs 200 in payment of a previous debt of A due to him, and the balance of Rs 100 was to be paid to A B paid the said Rs 100, retained the Rs 200, but neglected to pay the said Rs 500 to C, who sued A and recovered the debt by attachment and sale of A's moveable property After eight years from the date of the mortgage B brought a suit to recover the interest due under the mortgage on Rs. 300 only

Held, that under Section 39 of the Contract Act, A was entitled to cancel the contract of mortgage owing to B's conduct, but that he was bound to give up the benefit he had received, *viz*, Rs 300 and pay interest thereon up to the date of cancellation B was not entitled to treat the original mortgage as a mortgage in force with all its stipulations for Rs 300 instead of Rs. 800, and on that view to sue for interest alone.

[R., 34 A. 273 (280)=9 A L J 198=13 Ind Cas 573, 35 M 114 (118)=9 Ind Cas 289=21 M L J 169=9 M L T 286=(1911) 1 M W N 113, 10 Ind Cas 258 (259)=9 M L T 479=(1911) 1 M W N 265, 14 Ind Cas 399 (400)=8 N L R 7, 24 M L J 479 (480)=13 M L T 327=(1913) M W N 335, 10 O C 69 (74), D., 10 C W N 932 (933)]

SECOND appeal against the decree of O Chandu Menon, Subordinate Judge of South Canara, in appeal suit No. 373 of 1892, confirming the decree of U Babu Rau, District Munsif of Udipi, in original suit No. 103 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgments of the High Court

Pattabhirama Ayyar and *Madhava Rau*, for appellant

Narayana Rau, for respondent.

JUDGMENT.

BEST, J.—The mortgage bond executed by defendant in favour of plaintiff was for a sum of Rs 800, of which Rs 500 were left with plaintiff to pay off a prior mortgage debt and of the balance Rs 200 are stated in A to

* Second Appeal No 1634 of 1893.

1894 Sep. 27.

APPELLATE CIVIL.

18 M. 126.

be the amount previously borrowed from plaintiff and the remaining Rs. 100 as received on the date of A.

It appears that plaintiff did not pay off the prior mortgage, [127] who therefore sued the defendant, and recovered his debt by attachment and sale of defendant's moveables.

Plaintiff's present suit is to recover the proportionate interest due on the Rs. 300 only for a period of eight years.

I am unable to agree with the Lower Courts in holding that he is not entitled to this proportionate interest, *cf. Chinnayya Rawutan* v. *Chidambaram Chetti* (1); but I think the suit as brought has been rightly dismissed.

Under the circumstances, the plaintiff must wait till he can sue for the principal amount also, when the defendant will be able to set off the amount claimed by him as damages for plaintiff's failure to pay off the prior mortgagee.

I would dismiss this appeal with costs.

MUTTUSAMI AYYAR, J.—The facts found in this case are (1) that by the instrument of mortgage the plaintiff was bound to pay Rs. 800, (2) that he paid the mortgagor only Rs 300, (3) that he never paid Rs 500 to a prior mortgagee as stipulated in the instrument, (4) that by reason of his default the prior mortgagee sued the mortgagor, obtained a decree against him and recovered the sum from him. The Subordinate Judge considered that, owing to appellant's failure to perform his part of the contract in regard to Rs 500, and of the respondent being compelled by his default to satisfy the prior mortgagee, the latter was not bound to perform his part of the contract to pay interest on Rs. 300 at the rate stipulated in the instrument of mortgage. Under Section 39 of the Contract Act, the mortgagor was entitled to cancel the contract of mortgage on the ground that the mortgagee by acting in contravention of his agreement incapacitated himself for performing it in its entirety. Though no less than eight years passed subsequent to the payment of the prior mortgage by respondent, the appellant never attempted to tender Rs. 500 to respondent to keep the prior mortgage in force. Upon the facts found the Subordinate Judge obviously considered the original mortgage as lawfully cancelled, and held that the stipulation therein as to interest as not being since in force. I am of opinion that he was right in treating the original contract as at an end. In putting an end to it, however, respondent was bound to give up the benefit he had received and to pay back Rs 300 with interest up to date of cancellation. Appellant might [128] have sued respondent to enforce this obligation and to recover Rs. 300 and interest as damages on the security of the property. He was clearly not entitled to treat the contract of mortgage for Rs. 800 as still subsisting after acquiescing in its cancellation by respondent for eight years and then bringing this suit to recover only the interest due on Rs. 300 as due under the original contract. The only obligation which he can now enforce is the obligation to repay Rs. 300 with interest, which respondent was bound to pay when he put an end to the mortgage as regards Rs. 500. He was not entitled to treat the original mortgage as a mortgage in force with all its stipulations for Rs. 300 instead of Rs. 800, and on that view to sue for interest alone. I would also dismiss this appeal with costs.

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(1) 2 M. 212.

18 M. 128

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr. Justice Shephard

1894 Sep 26.

APPELLATE CIVIL

18 M. 128.

SEETA PATTA MAHADEVI (*Defendant*), *Appellant* v SURYUDAMMA AND ANOTHER (*Plaintiffs*), *Respondents* * [22nd August and 26th September, 1894]

Costs—Whether an unsuccessful plaintiff is liable for costs unnecessarily incurred by the defendant owing to his vakil's negligence

The costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party in the defence of the suit Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided

APPEAL against the decree of N Swaminadha Ayyar, Subordinate Judge of Vizagapatam, in original suit No 51 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgments of the High Court

Pattabhirama Ayyar, for appellant

Respondents were not represented

JUDGMENT

SHEPHARD, J —This appeal relates to the costs which the Subordinate Judge refused to allow to the defendant when dismissing [129] the plaintiff's suit So far as regards the vakil's fee, the appeal must, I think, be allowed for the defendant's vakil is at least entitled to the sum for which he has certified, that sum not exceeding a moiety of the full *ad valorem* fee. With regard to the other costs incurred in connection with witnesses summoned by the defendant, there is more room for doubt It is said that, as issues had been settled on all the questions of law and fact supposed to arise on the pleadings, the defendant was bound to have his witnesses ready, and that, if anybody was to blame, it was not the defendant's vakil but the Judge, who ought to have discovered that on the face of the plaint the suit as framed would not lie This contention appears to me wholly unreasonable The costs which a defeated plaintiff should be required to pay should be only the costs necessarily incurred by the successful party in the defence of the suit Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided

In the present case it was open to the defendant's pleader to have the plaint rejected under the provisions of Sections 53 and 54 of the Civil Procedure Code That is the course which he ought to have adopted Instead of doing this he filed a written statement raising a variety of defences but not raising the very point which has ultimately caused the shipwreck of the suit, and when the time came for settling the issues he again let slip the opportunity of pressing the matter on the attention of the Court It is said that it is the business of the Judge to peruse the plaint and to frame the requisite issues That is perfectly true, but it does not follow that the vakils on either side have no duty to perform It is, I apprehend, the clear duty of a party's vakil to bring to the Judge's notice any allegation on which he relies and to ask for the requisite issue If he overlooks the allegation and does not ask for the issue, and costs are

* Appeal No 176 of 1893.

1894 Sep. 26. — Appellate Civil. — 18 M. 128.

occasioned by the omission, it is his client and not the other party who ought to be saddled with them. In the present case it may be said that at the outset the fault lay with the plaintiffs; they launched a suit which, on the face of the plaint could not be maintained. I do not think we ought to assume that they acted in bad faith any more than we should assume that anything worse than negligence was imputable to the defendant's vakil. Let it be assumed that on both sides there was a lack of skill and due care. The defendant is entitled to the costs so far as [130] they were occasioned by the plaintiff's fault, but, as he is not by reason of that fault absolved from the duty of himself taking due care, he ought to bear the loss which by dint of such care he might have avoided. To hold otherwise would be to make the plaintiffs answerable for the mistake of their adversary's vakil.

For these reasons I would decline to interfere with the Judge's ruling as to the costs of witnesses, and dismiss the appeal.

Muttusami Ayyar, J.—I am also of the same opinion

As regards the vakil's fee, the amount certified should have been allowed. It is less than the *ad valorem* fee, and the sum awarded by the Court below, *viz.*, Rs. 25, is certainly inadequate. I would award the fee certified as received.

I doubted if the Subordinate Judge was not also in error in refusing defendant's costs incurred by taking out summons for his witnesses. It is true that it was necessary to take out these summonses when regard is had to the ground upon which the suit was ultimately decided. But the objection to the suit which eventually prevailed was not noticed either by the defendant's vakil or by the Subordinate Judge when issues were framed. Though the vakil was certainly negligent in not pressing the preliminary objection at the first hearing and in not insisting upon its prior determination, yet as the Subordinate Judge also overlooked the defect and as the issues framed by him constituted the proximate cause for defendant's taking out summons for witnesses with reference to those issues, I first doubted whether the party concerned should be mulcted in costs which he incurred *bona fide* to be ready to prove the recorded issues. As the defendant's vakil contributed to the error on the part of the Subordinate Judge, I think on further consideration that I cannot say that the ground upon which the Subordinate Judge exercised his discretion in refusing costs was illegal. On taking time to consider the matter, I do not think that the Subordinate Judge's order on this point should be disturbed, as the Code leaves the adjudication of costs to the discretion of the Subordinate Judge.

I concur in the decision proposed by my learned colleague.

18 M. 131.

[131] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar

1894 Nov. 12.

APPELLATE CIVIL.

18 M. 131

TIRTHASAMI (*Counter-petitioner No* 3), *Appellant v* ANNAPPAYYA (*Petitioner*), *Respondents* * [8th and 12th November, 1894]

Code of Civil Procedure—Act XIV of 1882, *Section* 158—*Act VI of* 1892, *Section* 4—*Proceedings in execution—Dismissal of petition for default*

The dismissal of a petition for execution for default does not bar a fresh application, Section 158 of the Code of Civil Procedure being inapplicable, since by reason of Section 4 of Act VI of 1892, it does not apply to proceedings in execution *Dhonkal Singh* v *Phakkar Singh* (15 A 84), *Hajrat Akramnissa Begam* v *Valiulnissa Begam* (18 B 429) and *Delhi and London Bank* v *Orchard* (4 I A 127) followed

[R., 13 C L J 532 (534)=11 Ind Cas 385 (386)]

APPEAL against the order of W C Holmes, District Judge of South Canara, presented against the order of U Babu Rau, District Munsif of Udipi, in execution petition No. 311 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Ramchandra Rau Saheb, for appellant

Madhava Rau, for respondent

JUDGMENT

This was an application for execution of the decree in original suit No 121 of 1882 on the file of the District Munsif of Udipi in the district of South Canara The appellant is the representative of the Puttige Mutt at that station, and respondent, Annappayya, is the execution-creditor The decree was passed against appellant's predecessor, but on his dismissal from his office and on appellant's succession to the office, respondent attempted to execute it against the later The District Munsif refused the execution, but on appeal the Judge held that execution should be granted if respondent showed in execution proceedings that the decree debt was one contracted for purposes of the Mutt From this order respondent preferred no second appeal and it became final The application for execution in which the above orders were made was not further proceeded with

[132] Meanwhile, execution was taken out by other decree-holders against the appellant and similar orders were passed by the District Munsif and by the Judge In one of them, in which one Budan Saheb was execution-creditor, there was a second appeal

As reported in *Sudindra* v *Budan* (1) the High Court held in that case that the decree should be executed against appellant unless he set it aside by a new suit for fraud and collusion Thereupon, appellant instituted suits to set aside several decrees passed against his predecessor, and brought original suit No 334 of 1882 against respondent in September 1889 The District Munsif dismissed the suit, and in December 1891 the Judge confirmed the decision in appeal suit No 441 of 1889 From this decision, a second appeal is still pending.

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* Appeal against Order No 114 of 1893

(1) 9 M. 80.

1894
Nov. 12.

APPELLATE CIVIL.

18 M. 131.

Meanwhile, another application for execution of the decree in original suit No. 121 of 1882 was made in No. 455 of 1889. The District Munsif called upon respondent to prove that the decree debt was binding on the Mutt and allowed him time for that purpose till the 28th June 1890. However respondent produced no evidence, and the District Munsif dismissed his petition for execution. On the 14th August 1893, respondent again applied for execution by attachment of immoveable property. In support of his claim, he alluded to the order of the High Court in the execution of Budan Saheb's decree in original suit No. 334 of 1888 brought by appellant against respondent, and to the dismissal of that suit. Appellant opposed this application as barred by the order on respondent's former application, which was passed in No. 455 of 1889. The District Munsif observed that that order operated as a decree under Section 2 of the Code of Civil Procedure, and barred the present application. On appeal, the Judge considered that the mere striking off of the application did not amount to an adjudication, that the order granting time to prove that the debt was binding on the Mutt was not one passed under Section 158 of the Civil Procedure Code, that appellant was under no obligation to produce his evidence, and that he was therefore not barred from renewing his application for execution. It is contended on second appeal that the order dismissing the application for execution No. 455 of 1889 was passed under Section 158, Civil Procedure Code, and that it precludes, under [133] Section 13, Civil Procedure Code, any fresh application for execution of the same decree.

I agree in the opinion of the Judge that the dismissal of a petition for execution for default does not bar a fresh application. The Judge states that Section 158 is inapplicable, because the order on the prior application does not purport to have been made under that section, and that there is nothing to show that time was granted at the instance of the respondent. I also think that Section 158 is inapplicable, but I prefer to rest my opinion on the general ground that by reason of Section 4 of Act VI of 1892—nothing in Chapter VII or XIII of the Code of Civil Procedure applies to proceedings in execution. It was held by the Full Bench of the Allahabad High Court in *Dhonkal Singh* v. *Phakkar Singh* (1) that when an execution case is struck off the file or dismissed upon a ground other than a distinct finding that the decree is incapable of execution, or that the decree-holder's right is barred by limitation, or by any other law, or on some ground touching the merits, its dismissal whether termed as dismissal for default or as struck off the file does not operate to bar a fresh application for execution.

In *Hajrat Akramnissa Begam* v. *Valiulnissa Begam* (2) the High Court of Bombay held that while there is no statutory authority for restoring to the file an application for execution which has been once dismissed for default, the order of dismissal is ineffectual to bar a subsequent application for execution. In *Delhi and London Bank* v. *Orchard* (3) the Privy Council held that an order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*. The real question is whether the order of the District Judge that respondent's right to execute the decree against appellant can only be recognized on proof that the decree debt is binding on the Mutt is still in force, and whether it bars execution until the condition mentioned therein is complied with. I must answer the question in the affirmative. That the order in question

(1) 15 A. 84. (2) 18 B. 429. (3) 4 I.A. 127.

was made is not denied. That it became final is also admitted. It is clear that whatever order the High Court made in execution of Budan Saheb's decree cannot affect the respondent who was no party to that order. The former order being then still in force, it must be complied [134] with and the decree could not be executed as if it had no existence. It is open to respondent to apply for a review of that order and to have it vacated. It is suggested that by instituting original suit No. 334 of 1888 respondent waived the benefit of the previous order and that he is not now at liberty to fall back upon it. But the suit and the order are not necessarily inconsistent with each other. The judgment may not be tainted by fraud and the debt may yet not bind the Mutt. I am unable to hold that, as a matter of law, there was a waiver. I am therefore of opinion that, so long as the order of the District Judge is legally in force, execution must be refused unless the condition mentioned in it is complied with. On this ground I reverse the order of the Judge and restore that of the District Munsif. In the special circumstances of the case, each party will bear his costs here and in the Lower Appellate Court.

1894 Nov. 12.

APPELLATE CIVIL

18 M. 131.

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18 M. 134

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar.

SUBBARAYUDU (*Defendant*), *Petitioner* v. ADINARAYUDU (*Plaintiff*), *Respondent*.*

[22nd October and 8th November, 1894.]

Partnership—Advance made by one partner to another in respect of the latter's share of a partnership debt—Whether a suit for contribution lies.

A and B were partners. A decree was passed against them for the payment of a certain debt, each partner being liable for the whole sum and being bound to indemnify the other against the payment of more than his share. A paid B's share as well as his own and brought a suit against B for contribution. B contended that that A's claim, being in respect of a partnership transaction, ought to be adjusted when the partnership account was settled, and that the suit did not lie.

Held, that the advance made by A to B by paying his share was not an advance to the partnership, but to the other partner in respect of what he had to contribute, and that, consequently, A was entitled to contribution from B.

[R., 32 M. 76 (80)=19 M.L.J. 10=4 M.L.T. 456. Cons., 32 M. 203=4 M.L.T. 475.]

PETITION praying the High Court to revise the decree of V. Lakshminarasimham Pantulu, District Munsif of Masulipatam, in small cause suit No. 1866 of 1892.

[135] The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court.

Venkatarama Sarma, for petitioner.

Pattabhirama Ayyar, for respondent.

JUDGMENT

The plaintiff and the original defendant were partners. The former paid the amount due by the latter under a decree passed in original suit No. 911 of 1890. Thereupon he brought the present suit in the Small

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* Civil Revision Petition No. 690 of 1893.

1894 Nov. 8. — APPELLATE CIVIL. — 18 M. 134.

Cause Court for contribution. It was contended for defendant that the suit did not lie, and that the claim is one which ought to be adjusted when the partnership account is settled. The District Munsif decreed the claim.

It is urged on revision that the suit does not lie and is not cognizable by a Small Cause Court. It is no doubt a settled rule of law that advances made by one partner to the partnership concern can only result in matters of account and cannot be made the subject of a separate suit. But to this general rule there are exceptions when advances are made by one partner not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital, as in *French* v. *Styring* (1); or when two partners borrow from a bank on their joint promissory note and apply the money borrowed to the partnership concern and one of the partners is compelled to pay more than his share of the debt, the transactions have been considered to be separate and altogether *dehors* the partnership, and as such capable of sustaining an action for contribution. The present case is governed by the same principle. Under the decree each partner was bound to pay the whole decree debt and bound to indemnify the other against the payment of more than his share. This cannot be considered as a partnership transaction (see *Sedgwick* v. *Daniell* (2) The petition cannot be supported and is dismissed with costs.

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18 M. 136.

[136] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

MINAKSHISUNDRUM PILLAI (*Defendant No. 4*), *Appellant v.* AYYATHORAI (*Plaintiff*), *Respondent.**
[11th January and 22nd October, 1894.]

Malicious prosecution—Prosecution by a Police Constable—Whether acting in his official capacity or not—Malice

A Police Constable, who is in effect the prosecutor and not acting merely in his official capacity, who does not take reasonable care to inform himself of the truth of the case and who does not honestly believe in the charge preferred by him and is actuated by an indirect motive in preferring it, is liable in a suit for damages for malicious prosecution.

[R., 34 A. 273 (280)=9 A.L.J. 198 (203)=13 Ind Cas 573.]

SECOND appeal against the decree of J. W. F. Dumergue, District Judge of Madura, in appeal suit No. 416 of 1892, reversing the decree of A. David Pillai, District Munsif of Tirumangalam, in original suit No. 256 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the finding returned by the District Judge.

Mr. *K. Brown*, *Subramania Ayyar* and *Sundara Ayyar*, for appellant.

Sankaran Nayar, for respondent.

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* Second Appeal No. 863 of 1893.

(1) 2 C.B.N.S. 365. (2) 2 H. & N. 319.

1894 Oct. 22.

APPELLATE CIVIL.

18 M. 136.

ORDER.

"The first question, which does not seem to be prominently brought "to the notice of the District Judge, is whether the appellant, the Con-"stable, was in effect the prosecutor in the case or whether he was only "acting in his official capacity The first branch of the first issue was "evidently based on this question But the District Judge only notices "it in the introductory part of his judgment We must observe that in "considering this question as also the other questions arising, the District "Judge must confine himself to the evidence before him, and must not "be influenced by the Magisrate's opinion or depositions taken before him "and not made evidence in this case

[137] "In respect of the other questions arising in the case the "issues as framed do not raise them in the proper form The proper "issues are those stated in the summing up in *Abrath* v *North-Eastern* "*Railway Company* (1) Assuming that the District Judge finds the "first-mentioned issue in the affirmative, we must request him to return "findings on the other three issues as stated in the case cited

"The findings are to be returned within one month from the date of "the receipt of this order, and seven days will be allowed for filing object-"tions after the findings have been posted up in this Court"

In compliance with the above order, the District Judge submitted the following finding —

FINDING.

"The leading facts of the case are that the house of one Shanmuga "Velayudam Pillay in Tirumangalam was broken into on the night of the "28th April 1889, when jewels valued at Rs 500 were stolen The plaint-"iff in the suit and two others were arrested by the fourth defendant, "who is the Station-house officer of Tirumangalam, on the 10th May "1890 The plaintiff was charged with abetment of the offences of house-"breaking and theft, and was discharged by the Second-class Magistrate "of Tirumangalam in Calendar Case No 55 of 1890 The plaintiff then "sued to recover damages from the fourth defendant among others for "malicious prosecution

"2 The first question on which I am directed to return a finding is "whether the fourth defendant, the Station-house officer, was in effect "the prosecutor or whether he was acting in his official capacity With "regard to the first branch of this question, I think the record leaves no "doubt that the fourth defendant was really the prosecutor No accusa-"tion had been laid against the plaintiff specifically by the complainant, "the plaintiff was arrested by the fourth defendant on information said "to have been given by one Andravana Chetty (eighth witness for plaintiff) "more than a year after the commission of the alleged offences and five "months after the fourth defendant had recommended that the case "should be struck off, as it was useless taking any further steps in the "matter; and when the plaintiff applied for bail the application was "opposed by the [138] fourth defendant, not by the complainant The "complainant was made the first defendant in the suit and was examined "as the first witness for the defence He opposed an application made "by the plaintiff for a transfer of the criminal case to the file of another "Magistrate, but on the other points he makes the following statements: "'I never implicated the plaintiff in the case nor did I even supect him

(1) L R 11 Q P.D. 440 (444)

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"'I never complained to the Police or the Magistrate that the plaintiff "'was one of the thieves or that I suspected him. . . . I never "'opposed the application for bail presented on behalf of the plaintiff.' " The charge sheet (Exhibit E) was prepared by the fourth defendant on "the 11th May 1890, and with the exception of the occurrence report of "the 10th May 1890 (Exhibit D) also prepared by the fourth defendant, "this was the first time that the plaintiff was accused. Under these "circumstances I find on this part of the first question that the fourth "defendant was in effect the prosecutor.

"3. It follows from this finding that in my opinion the fourth "defendant was not acting only in his official capacity No doubt the "fourth defendant was bound, as a Police officer, to detect offenders "and bring them to justice, and hence it is now argued that he was "really acting in his official capacity. But in the first place it seems "to me that Police officers are protected against suits brought against "them for acts done in their official capacity only by Section 43 of Act "V of 1861, which provides that a Police officer is entitled to a decree "if he shows that any act in respect of which he is sued was done under "the authority of a warrant issued by a Magistrate. In this case the fourth "defendant was certainly not acting under such authority. Then in the "next place it is expressly declared by Section 23 of Act V of 1861 that it "is the duty of a Police officer to apprehend persons 'for whose apprehen- "'sion sufficient ground exists.' Unless sufficient ground does exist, "then it appears to me that a Police officer cannot be said to be acting "in his official capacity, but under colour of his official capacity. Hence "I would submit that unless the findings on the remaining issues show "that the fourth defendant had or in good faith believed he had sufficient "ground for arresting and prosecuting the plaintiff, he was not acting "in his official capacity.

"4. The next question on which I have to return a finding is [139] "the first propounded in *Abrath* v *North-Eastern Railway Company* (1). "Did the fourth defendant take reasonable care to inform himself of the "true state of the case? On this issue the plaintiff has proved that the "fourth defendant himself reported on the 9th December 1890 (Exhibit "G), after months said to have been occupied in investigation, that he "had failed to detect the real culprits and that it was useless to take "further steps. Notwithstanding this fact, the fourth defendant might "have obtained trustworthy information subsequently to his report. But, "according to his own case, the only person from whom he could have "obtained any information justifying the arrest and prosecution of the "plaintiff was Andravana Chetty, and Andravana Chetty examined as "the plaintiff's eighth witness, swears that he never gave the fourth "defendant any information on the subject This evidence is contradicted "by an acting Head Constable, who is the second witness for the defence, "and the fourth defendant has proved that Andravana Chetty is a thief. "If he had acted solely on information given him by a disreputable and "discreditable individual, he cannot be said to have taken reasonable "care, but it would be a fair argument that he verified the statements "made and actually found the plaintiff dealing with the stolen property. "The story of the plaintiff's arrest must therefore be examined. Accord- "ing to the second witness for the defence Andravana Chetty came "to the police station at 3 P.M. on the 10th May and said he had seen "the plaintiff and others dividing the stolen jewels in a certain manta-

(1) L.R. 11 Q.B.D. 440 (444).

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" pam, 3½ miles distant from the police station The fourth defendant " and the second witness for the defence and others reached the manta- " pam at 5 P M and found the plaintiff and his confederates still in the " act of weighing and dividing the jewels There were admittedly only " nine articles of jewellery, and it is represented that more than 2 hours " were occupied in weighing and dividing those articles This story is, " in my opinion, altogether incredible, and I think it also incredible " that the plaintiff, a village officer, was found making a division of stolen " property, a year after it had been stolen, in a place which must have " been open to public view or the transaction could not have been observ- " ed by Andravana Chetty Besides the inherent [**140**] incredibility of " this account, the plaintiff's second, third and fourth witnesses depose " that the plaintiff was arrested near the Sub-Registrar's office, which " is also known as Poochy Nadan's Chawadi, in Tirumangalam Since " then, the statements made by and on behalf of the fourth defendant as " to the plaintiff's arrest are, in my opinion, false, and since the plaintiff " was not arrested at a mantapam 3½ miles from Tirumangalam, I think " the statements that Andravana Chetty gave information which led " to the arrest at the mantapam is also false Hence I find that the " fourth defendant so far from taking reasonable care to inform himself " of the true state of the case made no enquiry and did not act on any " information, but acted with a total want of reasonable and probable " cause.

" 5 The third question is—Did the fourth defendant honestly believe " the case which he laid before the Magistrate? (*Abrath* v *North-Eastern* " *Railway Company* (1)) In respect of this issue it is proved in evidence " that no suspicion was entertained against the plaintiff until the 10th " May 1890, the day he was arrested But the fourth defendant's report " of the 9th December 1890 (Exhibit G) filed by the plaintiff proves more " It shows that the result of the enquiries made by the fourth defendant " from the date of the offences (28th April) to the date of the report was " that the greater portion of the stolen property had been recovered " through one Shonia Pillay, the father-in-law of the complainant, and that " the complainant himself was conniving at the acts of his father-in-law " and suppressing information Clearly, therefore, it was not the plaintiff " that the fourth defendant then suspected of abetment and he was " guilty of falsehood in attempting to repudiate his report I have already " found that he acted without reasonable or probable cause, and that the " reasons he has assigned for prosecuting the plaintiff are false The only " inference which can, in my opinion, be drawn from the circumstances " is that he did not honestly believe the case he laid before the Magistrate " to be true, but knew it to be groundless.

" 6 The last question is—Was the fourth defendant actuated by " any indirect motive in preferring the charge (*Abrath* v *North-Eastern* " *Railway Company* (1)) or, as the same question is stated on page 443 " of the case cited,—Was he actuated by malice, that [**141**] is to say, " was he actuated by some motive other than an honest desire to bring " a man whom he believed to have offended against the Criminal law to " justice Here it is argued that no malice was alleged and none proved. " But the action itself was an action for malicious prosecution As to " proof there is certainly no direct evidence of any weight, but according " to the Indian Evidence Act (Section 4) a fact is said to be proved if " the existence is so probable from matters under consideration, that a

(1) L R 11 Q B D 440 (444)

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"prudent man ought, under the circumstances of the particular case, to "act upon the supposition that it exists. It must, therefore, be seen "whether this probability exists in the circumstances of this case. "According to the second form of the present issue quoted above, malice "consists, in such a case as this, of some motive other an honest desire "to bring a man, who is believed to have offended against the Criminal "law to justice, and Brett, M R. (same case, page 448) defined a mali-"cious intention as 'not the mere intention of carrying the law into "'effect, but an intention which was wrongful in point of fact.' If, as "it seems to me, the fourth defendant acted without reasonable or "probable cause, and if, as it seems to me, he did not honestly believe "the case which he laid before the Magistrate, then he could not have "believed that the plaintiff had offended against the Criminal law and "he could not have been actuated by an honest desire to bring the plaintiff "to justice, but must have been actuated by some indirect motive, "that is to say, in the words of Cave, J., already quoted, by malice. To "institute a groundless prosecution, knowing that it is groundless, is "acting not in furtherance of justice, but with an intention wrongful in "point of fact. Therefore, the answer I would submit to the last ques-"tion is that the fourth defendant was actuated by an indirect motive, "that is to say, malice.

"7. To sum up these findings they are—

"(1) That the fourth defendant was in effect the prosecutor and not only acting in his official capacity.

"(2) That he did not take reasonable care to inform himself of the true state of the case.

"(3) That he did not honestly believe the case he laid before the Magistrate.

[142] "(4) That he was actuated by an indirect motive in preferring the charge."

This second appeal came on for final disposal, and the Court delivered the following

JUDGMENT.

We must accept the finding. We cannot say that the Judge dealing with the whole evidence has omitted to take into account that the burden of proof was on the plaintiff.

The appeal is dismissed with costs.

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18 M. 142=5 M.L.J. 34.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NAGAMONEY MUDALIAR (*Defendant*), *Appellant v.* JANAKIRAM MUDALIAR (*Plaintiff*), *Respondent.** [7th August, and 5th December, 1894.]

Letters Patent—Clause 12—Whether an order under this clause may form the subject of an issue for trial in the suit.

The legality of an order granting permission to institute a suit under clause 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted.

[R., 27 M. 157 (159).]

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* Original Side Appeal No. 34 of 1893.

1894 DEC. 5. APPELLATE CIVIL. 18 M 142-5 M. L. J. 34.

APPEAL from the decree of Shephard, J, sitting on the original side of the High Court in civil suit No. 391 of 1892.

This was a suit for redemption of a mortgage Leave to sue under clause 12, Letters Patent, was granted, but a preliminary issue was taken as to whether the Court had jurisdiction in the case, the mortgage property being alleged to be beyond the Court's local jurisdiction This issue was decided against the defendant on the ground that the leave to sue stood uncancelled. The defendant preferred this appeal

Sivagnana Mudaliar, for appellant

Subramanya Ayyar, for respondent

JUDGMENT

BEST, J —This is an appeal against the order of Mr Justice Shephard, deciding against the defendant, the preliminary issue " whether this Court " has jurisdiction in the case, the mortgaged [143] property being alleged " to be situated beyond the Court's local jurisdiction "

The learned Judge says, " In the face of the leave which stands un- " cancelled I must decide for plaintiff "

The cases cited before the learned Judge appear to have been *DeSouza* v *Coles* (1) and *Vythelinga Mudelly* v *Cundasawmy Mudelly* (2)

In the former it was held that an appeal lies from the decision of a Judge refusing an application made under Clause 12 of the Letters Patent for leave to institute in this Court a suit on a cause of action which arises in part only within the local limits of this Court's jurisdiction In *Vythelinga Mudelly* v *Cundasawmy Mudelly* (2) it was held that where such an application was refused by one Judge, it was not proper for another Judge in Chambers to grant the application when renewed on precisely the same grounds.

The above two decisions are authority for the propositions (1) that an order of a Judge refusing an application under Clause 12 of the Letters Patent is appealable, and (2) that such order of refusal by one Judge cannot be superseded by another Judge in Chambers But neither of them is in point when the question is whether an order granting permission to institute a suit under Clause 12 may form the subject of an issue for trial in the suit so instituted

In the present case the leave to sue was granted by the Registrar in exercise of the power conferred on him under Sections 637 and 652 of the Code of Civil Procedure " and all other powers thereunto enabling," see Appendix 1 of the rules published in the *Fort St George Gazette Supplement*, *dated* 16th June 1891

The order was passed *ex parte* without even issue of notice to the defendant

Under these circumstances it seems to me that defendant was entitled to take the objection in his answer to the plaint, and that the question is one that should be decided as an issue in the suit

I would, therefore, allow this appeal and setting aside the order of the learned Judge, remanded the issue for disposal on the merits

The cost of this appeal will abide and follow the result

MUTTUSAMI AYYAR, J —I concur.

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(1) 3 M H C.R. 384 (2) 8 M H C R 21.

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CIVIL.

18 M. 144.

18 M. 144.

[144] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard

PULLAYYA (*Defendant No.* 3), *Appellant v.* RAMAYYA (*Plaintiff*), *Respondent.** [22nd August, 1894.]

Code of Civil Procedure—Act XIV of 1882, Sections 316, 318—Execution of decrees—Delivery of immoveable property in possession of judgment-debtor—Suit by assignee of purchaser at Court sale for possession—Limitation.

The purchaser at an execution sale of a house, of which the judgment-debtor was in possession, sold it, agreeing at the same time to obtain the sale certificate and to deliver possession of the house. After more than three years had expired he applied for the certificate, which, however, was refused on the ground that his application was time-barred. On the purchaser's death his widow made a second application which was granted. In a suit by the purchaser's vendee to recover possession, she set up a title thereto under a sale by the original owner (the judgment-debtor) to herself and others executed more than three years after the Court sale:

Held that, since the execution purchaser would be barred, the plaintiff was equally barred. *Arumuga v. Chockalingam* (15 M. 331), followed.

[R., 25 B. 275 (279); 31 C. 618 (682) (F.B.)=8 C.W.N. 476.]

SECOND appeal against the decree of M. D. Bell, District Judge of Cuddapah, in appeal suit No. 107 of 1892, modifying the decree of T. R. Malhari Rau, District Munsif of Cuddapah, in original suit No. 16 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the foregoing.

Parthasarathi Ayyangar and *Jagarau Pillai*, for appellant.

Ramachandra Rau Saheb, for respondent.

JUDGMENT.

Here the judgment-debtor was in possession at the date of the sale and is now defendant. Plaintiff bought from the purchaser at the Court sale and can be in no better position than his vendor. Nothing was done upon the writ of possession issued at the suit of the vendor's widow. The execution purchaser would be barred and therefore the plaintiff is equally barred (*Arumuga v. Chockalingam* (1)). The decision in *Kishori Mohun* [145] *Roy Chowdhry v. Chunder Nath Pal* (2) is distinguished by the fact that in that case there was formal delivery. We must reverse the decree and we dismiss the suit with costs throughout.

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18 M. 145=5 M.L.J. 44.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard

PARVATIBAYAMMA (*Defendant*), *Appellant v.* RAMAKRISHNA RAU (*Plaintiff*), *Respondent.*† [12th, 16th and 26th October, 1894.]

Hindu law—Adoption—Estoppel by conduct.

A childless Hindu widow, aged 19, agreed with the plaintiff's father to adopt the plaintiff, stating that her husband, who died at the age of 12, had given her

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* Second Appeal No. 556 of 1894.
(1) 15 M. 331.

† Pauper Appeal No. 71 of 1894.
(2) 14 C. 644.

1894 Oct 26

APPELLATE CIVIL.

18 M. 145 = 5 M. L. J. 44.

authority to adopt Subsequently she adopted the plaintiff and had his upanayanam performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about 18 months, when she repudiated the adoption and refused to maintain the plaintiff

Held, that, the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of 18 months

In order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must then become so altered that it would be impossible to restore him to it

Gopalayyan v. *Raghupatiayyan* (7 M H C R 250) followed

[R., 18 M 397 (399), 15 Ind Cas 299=23 M L J 189=(1912) M W N 1127 (1128)]

APPEAL against the decree of E C Rawson, District Judge of Vizagapatam, in pauper original suit No 11 of 1892

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgments of the High Court

Kothandarama Ayyar, for appellant

Ramachandra Rau Saheb and *Narayana Rau,* for respondent

JUDGMENTS

SHEPHARD, J —The plaintiff claims as the adopted son of the late Seetharamiah. This title he fails to make good because he has not proved that the widow by whom the adoption was made [146] acted under authority from her husband There is admittedly no evidence of such authority having been given, and the circumstances are not such as to raise any presumption in the plaintiff's favour This being so, the plaintiff charges that the defendant is estopped from denying his adoption, and on the strength of that estoppel claims to recover the property to which as adopted son he would be entitled

At first sight it certainly would seem somewhat anomalous to hold that an adoption, invalid according to Hindu law, may nevertheless become effectual so as to confer on the person concerned the right in the family of a stranger which he could only acquire by a valid adoption No doubt under certain circumstances the law may raise a presumption in favour of the validity of an adoption as it may in questions of marriage or legitimacy But the principle contended for goes further than this and is one which I conceive could never be extended to marriage Nevertheless in the case of adoption the principle has been admitted, and the question we have to consider is within what limits it can properly be applied In *Gopalayyan* v *Raghupatiayyan* (1) the defendant claimed as the adopted son of the plaintiff's brother It was found that the adoption although true in fact was invalid in point of law, but having regard to the allegation that the conduct of the plaintiff's family had " debarred them in " consequence of their acting as if the law allowed the adoption and the " changed situation induced, from now taking the benefit of the ordinary " rule of law," the High Court directed the following issue to be tried " Has the conduct of the plaintiff and that of the members of his family " been such as to render it now inequitable for him to set up as against " the present defendant the rule of law upon which he now insists?"

Subsequently in dealing with the finding on this issue, which was in the defendant's favour, the Court observed " The situation is the result of

(1) 7 M.H.C.R. 250

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"the conduct of the whole family of plaintiff continued through a long "course of years, and we think that we cannot properly decree for the "plaintiff upon the footing that the defendant is wholly unentitled to any "part of the family property. On the contrary we are of opinion that "although the adoption was invalid and inadequate of itself to create com-"munion, that com-[147]munion has been created by the course of con-"duct of the plaintiff and his family, coupled with the defendant's chang-"ed situation which has resulted."

This case was cited in a recent case before the Judicial Committee, and although it was not considered that any question of estoppel arose in the case, stress was laid upon considerations similar to those mentioned in the Madras case. "It is no slight matter for a boy to be passed from "one family into another. Even in England such a thing cannot be done "without a serious effect, for good or ill, on the boy's welfare. In India "the ties of family life are far stricter, and if a boy has been transplanted "from his own family into another by a *de facto* adoption, and then the "adoption turns out to be invalid in law, and he is rejected out of his "adopted family, his relations to his natural family must be seriously "disturbed. Whether his previously existing legal status would be taken "away is a point not calling for any opinion. Assuming that the "plaintiff could return after an absence of five years, and so resume his "legal position, it is impossible that his personal position should be the "same as if the tie to his family had never been broken." Several other cases were cited to show that the principle of estoppel may be applied to claims founded on alleged adoption: *Sadashiv Moreshvar Ghate* v *Hari-Moreshvar Ghate* (1), *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (2), *Gopalayyan* v. *Raghupatiayyan* (3), *Kannammal* v. *Virasami* (4). In *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (1), the estoppel was founded on the fact of a long and general recognition of the adoption by the family into which he was brought by the adoption. In *Ravji Vinayakrav Jagganath Shankarsett* v. *Lakshmibai* (2), the plaintiff, whose adoption was questioned had been brought up and married by his adoptive mother, and although the period during which his adoption had been recognized had not been long, it had exceeded six years, and therefore it was no longer open to the persons who would have taken in default of adoption to challenge it. The judgment in *Kannammal* v. *Virasami* (4) proceeds on the authority of these cases. There too the adoptee had been married in the family in which he had been affiliated.

[**148**] From these cases it appears that estoppel like limitation may, for purposes not of a religious character, raise an adoption *ab initio* invalid to the level of a valid adoption. The members of the family by which the adoption is recognized or by whom it is not questioned within the six years from their learning of it which are allowed by the law of limitation —cannot deny to the adoptee the property-rights in the family which a legal adoption would have given him. See *Jagadamba Chowdhrani* v. *Dakhina Mohun* (5). If the claim is rested simply on estoppel, as it was in *Gopalayyan* v. *Raghupatiayyan* (3), I think the true limits, within which the doctrine is to be applied, are those stated in that judgment, The claimant has to show that by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation

(1) 11 B.H.C.R. 190 (2) 11 B. 381. (3) 7 M.H.C.R. 250.
(4) 15 M. 486. (5) 13 I.A. 84.

in his original family has been altered so that it would be impossible to restore him to it

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Now in the present case there is no question of limitation At the date when the suit was filed, it was not too late for the defendant's family to challenge the alleged adoption, for the six years had not elapsed, and, on the other hand, as the plaintiff was, as he still is, a minor, he had not by force of the law of limitation lost his rights in his original family The material facts proved are these.—In 1875 the defendant's husband died at the age of 12, leaving his widow aged 10, in 1884 a kararnama was drawn up between the widow and the plaintiff's father which is said to have been executed by the widow, in 1887 the adoption of the plaintiff by the widow took place and immediately afterwards the ceremony of upanayana was performed The suit was instituted in 1892, the widow having meanwhile repudiated the adoption and refused to maintain the plaintiff The plaintiff rests the claim by estoppel chiefly on the representation of authority from her husband contained in the kararnama executed by the defendant On the faith of that representation it is said that he was given by his father in adoption to the defendant and her deceased husband It might be objected that there is no evidence of the circumstances under which the karar was executed or of any explanation of it having been afforded to the defendant She was only 19 at the time There is also an entire absence of evidence to prove that the plaintiff's father in 1887 [149] really acted on the faith of the statement made three years before. No doubt, assuming that the assertion of authority was really made by the defendant, there was a positive statement which might under ordinary circumstances, have put the plaintiff's father off inquiry, and it might be assumed that he had acted upon it But here the circumstances were peculiar The statement was not in itself a probable one having regard to the ages of the husband and wife at the time when the authority was supposed to have been given No reasonable parent would have taken serious action upon such a statement standing by itself and uncorroborated The plaintiff's father had access to other means of ascertaining the truth He was not called as a witness and there is absolutely no positive evidence to prove that when he gave his son in adoption in 1887 he had in his mind the statement made in 1884 or had ever believed that it was true Under these circumstances, we think the plaintiff has failed in establishing this part of his case.

Then it is said that upanayanam was performed in the adoptive family and that the plaintiff was, therefore, debarred from returning to his natural family, the suggestion being that the performance of upanayanam irrevocably fixes the subject of it in the family in which it takes place That this, however, is not the correct view is pointed out in *Viraragava* v *Ramalinga* (1) It is by gift and acceptance of the boy and not by upanayanam that filiation is constituted So from the text of Prajapati cited in that case (page 162) it appears that an adoption made after upanayanam, although inferior, is not invalid. The evidence does not show whether or not the defendant's husband and the plaintiff's father belonged to the same gotra However that may be, I do not think that the mere performance of upanayanam altered the position of the plaintiff or prevented his restoration to his original family It was not proved that the plaintiff had been married by the defendant as was the case in *Kannammal* v. *Virasami* (2) No attempt was made to show that recognition of the

(1) 9 M 148 (161). (2) 15 M. 486.

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plaintiff as an adopted son was accorded generally by the members of the defendant's family; and accordingly the plaintiff's pleader seeing that the estoppel could not bind third persons not claiming under the widow, was forced to contend that as against her only the [150] plaintiff's title should be allowed to prevail. The contention is manifestly untenable. The widow represents the inheritance and as such is entitled to possession. She can only be displaced on proof of the plaintiff's affiliation into the family. The affiliation must be good against the whole family or not at all. It is impossible to hold that a Hindu widow may by a false assertion of authority from her husband, constitute a stranger a member of the family and invest him with all the rights of a son during her life-time.

Applying the principle laid down in *Gopalayyan* v. *Raghupatiayyan* (1). I am of opinion that the plaintiff has failed to prove his claim to be considered the adopted son of the defendant. The decree of the District Judge must, therefore, be reversed. The appellant is entitled to her costs throughout.

The respondent must pay the fees due to Government.

Muttusami Ayyar, J.:—The substantial question for determination in this appeal is whether there are any, and, if so, what limitations subject to which the doctrine of estoppel has to be applied in the case of invalid adoptions In the case before us, the Judge finds that the defendant agreed to adopt the minor plaintiff in February 1884; that she formally adopted him in April 1887 and had his upanayanam performed in the adoptive family on the next day. He further finds that from that day forward she administered her husband's property as the minor's guardian for a period of about 18 months. The Judge has also found that the defendant had no authority to adopt from her husband and that there is not a particle of evidence in proof of such authority. It is true that there is a recital in the agreement (A) executed by the defendant to the minor's natural father in 1884 that her husband had given her permission to adopt, but in the absence of any evidence the recital must be taken to be untrue.

That it is so is rendered probable by the fact that her deceased husband, Sitaramiah, was 12 years of age when he died, the defendant herself being about 10 years' old. If any authority had been given it must have been given in the presence of elderly relations and under the circumstances it would have been reduced to writing. The adoption being thus invalid as one made by a childless Hindu widow without authority, the Judge proceeded to consider the further question whether, by reason of the representation [151] in Exhibit (A) that she had such authority, she was estopped from pleading that the adoption is invalid and resisting his claim to recover her husband's property. On this point the Judge was of opinion that she took an active part in making the adoption and was therefore estopped; and in support of his decision relied on the cases in *Kannammal* v. *Virasami* (2) and in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (3).

In this opinion, however, I am unable to concur. The doctrine of estoppel is but a graft, somewhat incongruous though equitable, on the law of the adoption, to be applied in cases in which by the invalid adoption the status of the adopted boy is so irrevocably altered as to render it impossible for him to resume his original position in his natural family. In

(1) 7 M H.C.R. 250 (2) 15 M 486 (3) 11 B. 381.

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Bawani Sankara Pandit v *Ambabay Ammal* (1) it was held that the natural rights of a person adopted remain unaffected when the adoption is invalid I am, therefore, of opinion that so long as the adopted boy is in a position to resume those natural rights, his status cannot be treated as not irrevocably altered to his prejudice by the invalid adoption His ordinary remedy would then be to resume those natural rights and he is not at liberty to invoke the aid of the doctrine of estoppel unless he could show that it was impossible for him so to resume Otherwise, the Hindu law as to invalid adoption would be practically repealed In every case of adoption the adoptee must more or less take an active part and to say that because he took an active part he must not disaffirm his act, though it is clearly invalid under Hindu law is tantamount to repealing it as to the requisites of a valid adoption The foundation for the equity of applying the doctrine of changed position appears to me to consist in the view that it is not possible for him to resume his status in the natural family either by the operation of the law of limitation or by some other cause In *Gopalayyan* v *Raghupatiayyan* (2) where the doctrine of estoppel was applied, the adoption had been recognised for more than 50 years The learned Judges observed that even a long course of acquiescence by all the members of the family in the validity of the sonship asserted, would be hardly enough if, through the influence of that course of representation by conduct, the defendant had not altered his situation so that it would be impossible to restore him to [152] that original situation The learned Judges proceeded further to observe that the course of conduct of the plaintiff and his family coupled with the defendant's changed situation created that communion which adoption was intended to create, and which by reason of its invalidity was inadequate of itself to create The Judges considered that the application of the doctrine of estoppel even in a case like that was an extreme application of the doctrine of changed situation Though in *Kannammal* v *Virasami*, (3) the exact period during which the invalid adoption was recognized does not appear, yet there is reason to think that it was recognised for a long time Moreover, it appears that the widow not only brought up the adopted son, but also allowed him for years to perform the funeral ceremony of her husband and married him to a girl of her choice Here a long period of acquiescence and the marriage of the boy were properly considered to have irrevocably altered the status of the boy to his prejudice. In *Ravji Vinayakrav Jaggannath Shankarsett* v *Lakshmibai* (4) which is referred to in *Kannammal* v *Virasami* (3) there was a long course of acquiescence in the invalid adoption so as to render it impossible to restore the adopted boy to his original situation Mere active participation in the adoption is not of itself enough—unless it has the effect of altering his situation so as to be impossible to restore him to his original situation

In the case before us the adoption took place in 1887 and was recognized but for 18 months It is, therefore, clear that there was no sufficiently long course of acquiescence as in the cases in which the doctrine of estoppel was applied Nor was there any other cause which might be accepted as altering the boy's position to his prejudice Though the upanayanam was performed in the adoptive family, the ceremony is inefficacious because of the invalidity of the adoption, and there is no objection to its being repeated in the natural family as is generally done when the ceremony first performed had some essential defect which rendered it inefficacious As to the contention that upanayanam has the effect of fixing

(1) 1 M H C.R. 363 (2) 7 M H C R. 250 (3) 15 M 486 (4) 11 B 381

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the gotram it would be valid only if the upanayanam ceremony itself were valid.

For these reasons, I concur with my learned colleague that the adoption should be declared invalid and that the doctrine of estoppel has no application. I would also allow the appeal [153] reversing the decree of the Court below and direct that the suit be dismissed with costs throughout.

Plaintiff is to pay the Court fees to Government.

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18 M. 153.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KRISHNASAMI AYYAR (*Petitioner*), *Appellant v.* JANAKIAMMAL AND OTHERS (*Counter-Petitioners and their Representatives*), *Respondents.** [15th November, 1893 and 1st May, 1894.]

Execution—Sale in execution of decree of mortgaged land—Purchase of equity of redemption by decree-holder under Section 294 of the Code of Civil Procedure—Execution of decree in respect of balance—Nature of price paid by purchaser on the purchase of the equity of redemption.

A mortgaged certain land to B, but remained in possession thereof. Subsequently A sold a portion of the said land to C in consideration of her paying off the mortgage debt due to B. C entered into possession, but was unable to satisfy the debt. C died, and A sued C's daughter and legal representative, for damages sustained by him from the non-payment of the purchase money by C. A obtained a decree and, the money not being paid as therein decreed, applied for execution and brought to sale the equity of redemption vested in C by virtue of the sale. By leave of the Court A bid at the Court-sale and bought the right of redemption and recovered back possession of the land sold to C. Subsequently he again applied for execution of the decree in respect of the balance by attachment of certain moveable property, and contended that he was bound to give the defendant credit only for the price which he actually paid at the Court-sale for the equity of redemption. The defendant contended that A was bound to give credit for the full value of the land under mortgage.

Held, that having obtained leave of the Court to bid under Section 294 of the Code of Civil Procedure, A's position was that of an independent purchaser, and that the price, which an independent purchaser must be taken to pay when he buys property under mortgage for a cash payment made to the mortgagor on account of his equity of redemption, is the cash payment for the equity of redemption *plus* the debt, *i.e.*, the amount undertaken to be paid to the mortgagee, and that for these amounts A was bound to give credit.

[**Not Ap.**, 18 A. 31 (32); **D.**, 24 M. 96 (113); 12 Ind Cas. 130=10 M L.T. 240=(1911) 2 M.W N. 342 (344)]

APPEAL against the order of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, dated 26th November 1891, passed in [154] civil miscellaneous petition No. 696 of 1891, in original suit No. 28 of 1888.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Sundara Ayyar, for appellant.

Pattabhirama Ayyar, Subramanya Ayyar, Tyagaraja Ayyar and *Rajaratna Mudaliar,* for respondents.

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* Appeal against order No. 67 of 1892.

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APPELLATE CIVIL.

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JUDGMENT

This is an appeal from an order made by the Subordinate Judge at Kumbakonam in execution of the decree passed in favour of appellant, Krishnaswami Aiyar, against the second respondent in original suit No. 23 of 1888 on the file of the Subordinate Court Appellant owns landed property in the district of Tanjore and mortgaged a portion in 1884 to one Naranappier without possession for Rs 25,000, which he agreed to repay with interest at 9 per cent per annum on its security In order to pay off this mortgage, he sold outright part of the mortgaged property to second respondent's wife, Subbalakshmi (since deceased), on 1st March 1886 in consideration of her undertaking to pay Rs 25,000 to Naranappier in satisfaction of the mortgage The purchaser, second respondent's wife, since deceased, was the daughter of a late District Court Vakil named Subbaramanya Aiyar, who gave her by his last will and testament Rs 25,000 and directed the executor of his will to invest the amount in land, so that the annual income thereof might be enjoyed by her during her life and the corpus might devolve upon her death on her male issue But the legacy was never paid to Subbalakshmi till her death, nor was she otherwise able to satisfy the mortgage, though she was at once placed in possession of her purchase By virtue of the purchase, she became the owner of the property subject to the prior mortgage Subsequent to her death appellant instituted original suit No 23 of 1888 and claimed Rs 31,000 as damages sustained by him from non-payment of the purchase money from first respondent, Subbalakshmi's daughter and legal representative, and her father and guardian, second respondent The decree now under execution was then passed for Rs 29,353-8-0 with costs and subsequent interest at 9 per cent per annum against second respondent, and contained the direction that second respondent do pay into Court the decree amount within three months, that the properties mentioned in Schedule A referred to herein, and the assets in the hands of respondents 1 to 4 be [156] liable for the same, that the amount so paid into Court or so realized from the said properties and assets be kept in deposit for three months after such payment or realization, so that second respondent might take action within that time in the District Court, to have the property declared free from encumbrance under Section 57 of the Transfer of Property Act, and that in default the same be paid to plaintiff (appellant), that interest accruing due during the three months at the above-mentioned rate be also collected from second defendant (respondent) and from the properties and assets above-mentioned, &c

* * * * *

The decree amount not being paid as directed appellant applied for execution and brought to sale the equity of redemption vesting in Subbalakshmi's representative under the sale-deed of March 1886 With the leave of the Court, appellant bid at the Court-sale and bought the right of redemption for the sum of Rs 2,995, and recovered back by process of Court possession of the land sold to first respondent's mother On 25th March 1891 he again applied for execution of the decree in respect of the balance by attachment of the legacy of Rs 25,000 and interest thereon at 6 per cent. per annum from the 15th November 1884 and by the attachment of Subbalakshmi's moveables in the hands of the fourth defendant (fourth respondent) her mother Janakiammal The executor of the will of Subbaramanya Aiyar, his brother, Dandayudapani Aiyar, was also made a party to the execution proceedings., So far as the sixth respondent,

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the executor, and the fourth respondent, Janakiammal, are concerned, the Subordinate Judge refused execution against them, and from that portion of the order, no appeal has been preferred. One of the matters in controversy in the Court below between appellant and second respondent was the amount for which appellant was entitled to claim further execution or which he was bound to credit in part satisfaction of the decree by reason of the Court-sale. On this point appellant's case was that he was only bound to give respondents 1 to 3 credit for the price which he actually paid at the Court-sale for the purchase of the right of redemption. On the other hand, it was contended for respondents that the amount was the full value of the land under mortgage. The Subordinate Judge upheld this contention and credited the estimated value Rs. 24,578-11-3 to the decree and allowed further execution for [156] the balance. Hence this appeal. It is urged on appellant's behalf that no more than his bid at the Court-sale in the previous execution ought to have been credited towards the decree We do not consider that this contention can be maintained. What appellant bought at the Court-sale and intended to buy was the equity of redemption as it vested in Subbalakshmi under the sale-deed of 10th March 1886. It is an undisputed fact that the mortgagee, Naranappier, never had possession of the property under mortgage; that the appellant first continued to remain in possession; that it passed to Subbalakshmi when the property was sold to her subject to the mortgage debt; and that possession was delivered back to appellant by process of Court by reason of his purchase at the Court-sale.

It is also conceded that he bought after obtaining the leave of the Court to bid under Section 294, Code of Civil Procedure, and that his possession is that of an independent purchaser.

In support of the order appealed against, reliance is placed on four decisions, *Hart* v. *Tara Prasanna Mukherji* (1), *Sheonath Doss* v. *Janki Prosad Singh* (2), *Mahabir Pershad Singh* v. *Macnaghten* (3), and *Gunja Pershad* v. *Jawahir Singh* (4). In the first case the point determined was that when a mortgagee sells a portion of the mortgaged property under his decree and purchases it himself, he is bound before he can proceed further and claim rateable distribution under Section 295 to prove that there is a balance still due to him and that the property sold and purchased by him realized a fair price. The ground of decision is that the mere fact that the property was purchased at auction for a certain sum of money is not alone sufficient to prove its real value and it " would be manifestly " inequitable to allow a mortgagee to buy in the mortgaged property at " auction for a sum far below its real value and then to go on against other " property of the mortgagor to the injury of other creditors."

In the present case the question arises not between the holder of a money decree and the holder of a mortgage decree, but between the mortgagor and the mortgagee who has also become purchaser of the equity of redemption with leave of the Court previously obtained.

[157] The second case, *Sheonath Doss* v. *Janki Prosad Singh* (2) decided that a mortgagee, who buys the mortgaged property after obtaining leave of the Court, does not stand in a fiduciary position towards the mortgagor, and he is entitled to further execution after deducting the price actually paid by him at the Court-sale. Again in *Mahabir Pershad Singh* v. *Macnaghten* (3), the Privy Council referring to the case of *Kamini*

(1) 11 C 718. (2) 16 C. 432 (3) 16 C. 682 (692) (4) 19 C. 4.

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Debi v *Ramlochan Sirkar* (1) observed that the mortgagee must be taken to have purchased as trustee only when he purchases without leave of the Court and that if he obtains leave of the Court and then buys the right of redemption at a judicial sale, the leave puts an end to his prior disability and puts him in the position of an independent purchser In the fourth case of *Gunga Pershad* v *Jawahir Singh* (2), it was decided that the mortgagee, who bought the mortgaged property at a judicial sale after previously obtaining leave of the Court to bid, was in the same position as an independent purchaser and bound to give credit to the mortgagor *not* for what the mortgaged premises were worth, but for the actual amount of his bid These three cases proceed on the principle that the position of a mortgagee who would naturally desire to buy the equity of redemption as cheaply as possible is incompatible with the position of a purchaser at a judicial sale who has to pay a fair price, and that unless he obtains the leave of the Court the mortgagee's position must be taken to be fiduciary and carry with it the obligation to account for what the property is really worth It is true that a decree-holder is in the same position, and Section 294 of the Code of Civil Procedure is framed on the above principle, but in the present case it is an admitted fact that appellant had obtained leave of the Court to bid The decisions cited are not on all fours with the present case and do not support the Subordinate Judge's order Our decision must depend on the question of what is to be considered the price which an independent purchaser must be taken to pay when he buys property under mortgage for cash payment made to the mortgagor on account of his right of redemption Taking the case of a purchaser at a voluntary sale of the mortgaged property by the mortgagor, what is actually paid is not the price of the mortgaged property, but that of the right of redemption, the price of the mortgaged property being the price which he pays [158] for the right of redemption *plus* the amount undertaken to be paid to the mortgagor's creditor, the prior mortgagee In the case before us appellant stands in the position of one who buys property under mortgage partly for cash paid to the vendor and partly for an undertaking to pay a debt due by him The price in that case is the cash payment *plus* the debt, since it makes no difference in principle whether the whole price is paid in cash to the vendor or partly to the vendor and partly to the vendor's creditor So far as the vendor is concerned, he parts with the whole property, and as between him and the purchaser the price of the property consists not in the value of the mere equity of redemption, but in that *plus* the value of the mortgage right It will be seen from White and Tudor's Notes to the leading case of *Howard* v *Harris* (3) that the person entitled to the equity of redemption is to be regarded as the owner of the land and he may deal with it as land It is on this view that appellant obtained possession by process of Court, and the price for which he is bound to give credit to his vendor ought to be computed as the sum paid by him on account of the naked equity of redemption *plus* the amount of the mortgaged debt which he undertook to pay This amount, however, exceeds the amount for which the Subordinate Judge held that credit should be given, and there is no appeal from the other side On this ground we confirm the order of the Subordinate Judge and dismiss this appeal with costs

(1) 5 B L R 450 (2) 19 C. 4 (3) 11 White & Tudor, p 1042.

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Nov. 12.

APPELLATE CIVIL.

18 M. 158 4 M. L. J. 244.

18 M. 158=4 M.L.J. 244.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

GOPAL REDDI (*Plaintiff*), *Appellant v.* CHENNA REDDI AND ANOTHER (*Defendants Nos.* 1 *and* 3), *Respondents.**
[12th February, 7th March and 12th November, 1894.]

Riparian owners—Effect of an embankment erected by a superior riparian owner on the cultivation of lands lower down the stream—Cause of action.

The defendants, being owners of land on the banks of a jungle stream, raised embankments which prevented their lands from being flooded, but caused the stream [159] to overflow the land of the plaintiff situated lower down the stream In an action by the plaintiff against the defendants for damages, it appeared that it was not reasonably practicable for the defendants to defend their lands from inundation by any means other than those adopted which would not have caused damage to the plaintiff:

Held, that no actionable wrong had been committed by the defendants and that the suit was consequently not maintainable.

[D., 27 M. 409 (412, 413)=14 M.L.J 162; 28 M. 15 (16); 1 N.L.R. 182 (183).]

CROSS appeals by the plaintiff and defendants Nos. 1 and 3, respectively, against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 172 of 1890, modifying the decree of B. Ramasami Naidu, District Munsif of Vellore, in original suit No. 151 of 1889.

The plaintiff cultivated land on the bank of a jungle stream and the defendants cultivated lands on both sides of the stream and higher up than the plaintiff's lands. The defendants erected certain bunds on both sides of the river to prevent their lands from being submerged, from which, as the plaintiff alleged, it resulted that the water flowed on to his land whereby injury was caused to him. The plaintiff now sued to recover damages for the injury complained of and for an injunction compelling the defendants to remove the bunds above referred to, and also prayed that the defendants be decreed to remove the sand which had silted upon the plaintiff's lands. The District Munsif passed a decree as prayed which was modified by the District Judge on an appeal preferred by the defendants, the decree being permitted to stand as a decree for damages only. Against this decree these second appeals were preferred by the plaintiff and defendants Nos. 1 and 3, respectively.

Shadagopachariar, for plaintiff.

Seshagiri Ayyar, for defendants.

These second appeals came on for hearing before SHEPHARD and DAVIES, JJ., and their Lordships delivered the following judgments:—

SHEPHARD, J.—The plaintiff and the defendants are riparian proprietors, the former occupying lands lower down the stream than those occupied by the defendants. The stream is a jungle stream, not used for irrigation purposes and apt at times to rise suddenly and flood the lands through which it flows. In order to protect their lands against flooding and to keep the water to its proper channel the defendants recently raised the bund along the bank of the stream and fortified it with stone. This is the act [160] complained of by the plaintiff as wrongful, it being charged that the plaintiff's lands were, in consequence, inundated and sustained damage.

* Second Appeals No. 390 and 1670 of 1893.

The complaint is that the bunds have been raised above the height at which they stood before, for it is found or admitted that it has been long the practice to have some sort of bunds It is not suggested that the act complained of was done otherwise than with the object of protecting the defendant's lands On the contrary the District Judge finds, as I understand, that in the absence of a bund the defendants' lands will become uncultivable; and it is for that reason, coupled with the fact that the plaintiff can by also raising a bund and clearing out the channel protect his own lands, that the District Judge refused the injunction which the District Munsif had granted

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The question is whether, under these circumstances, any actionable wrong had been committed by the defendants

The only case cited in argument was *Nield v London and North Western Railway Co* (1)

In that case, the facts of which are certainly distinguishable from the present, Bramwell, B , observes that " in the case of a natural water-" course it may be that the riparian owner is entitled to protect himself " against extraordinary floods by keeping off extraordinary water "

In a later case, *Whalley v Lancashire and Yorkshire Railway Co* (2) Brett, M R citing the above case and *Rex v Pagham Commissioners* (3) says " There are two cases which have been decided An extraordi-" nary danger threatens you; you have a right to defend yourself against it " before it has occurred to you To protect yourself and only for the " purpose of protecting yourself, you prevent the danger from happening " to you, but the danger is so far common that the necessary consequence " of its being prevented from happening to you is that it will happen to " your neighbour In so acting in defence of yourself or of your property, " you have done nothing by any act intended to injure your neighbour, " and you are not answerable, because the danger which has been diverted " from you has done mischief to somebody else

The extraordinary danger in *Rex v Pagham Commissioners* (3) was the inroad of the sea brought about, one may presume, by [161] peculiar conditions of tide, wind and the like I fail to understand why the periodical rising of a stream, consequent on the fall of rain, should any the less be considered an extraordinary danger The case seems to be precisely that stated in the Digest XXXIX(2)

There is a great distinction between protecting oneself from an apprehended danger and getting rid of the consequences of an injury which has actually occurred The distinction was clearly marked in *Whalley v Lancashire and Yorkshire Railway Co* , (2) where it was held that the defendants were liable because, a misfortune having happened, they had transferred it from their own land to that of the plaintiffs

It is quite another matter to hold that the landowners are not at liberty to improve their land by keeping a stream within bounds Where an act of mere prevention is complained of, I think it must be shown that the defendant has in fact diverted the stream from its natural course Here, as I understand the facts, the stream, when in flood, took no definite course but simply spread itself over the defendants' lands and so did not come in its full volume to the plaintiff's lands What the defendants have endeavoured to do is to confine the flood water to the ordinary channel and it is open to the plaintiff to adopt the same measures of

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(1) L.R. 10 Ex 4 (2) L R. 13 Q B D. 131 (3) 8 B & C 355.

1894 Nov. 12. defence. Instead of so doing the plaintiff in effect demands that the defendants' land shall for ever continue to remain subject to periodical inundation and therefore less fit for cultivation than it might otherwise be. At present it is true that the plaintiff has only succeeded in getting damages, but if the judgment is right and the defendants, notwithstanding it, persist in maintaining their bunds there can be no reason why the demand for an injunction should not, on some other occasion, be granted.

APPELLATE CIVIL.

18 M. 158 = 4 M. L. J. 244.

In the view which I take of the facts as found the plaintiff has not succeeded in proving any actionable wrong to have been committed by the defendants.*

DAVIES J —I think there ought to be a finding in the following issue—Could the defendants have protected their property by any other means than those they adopted, by which other means no damage would have been done to the plaintiff's land? In the case of "a sudden and extraordinary casualty" such as the flood in *Neild* v. [162] *London and North Western Railway Co.* (1), the principle seems to me one of "*sauve qui peut.*" In cases where the casualty is of common recurrence and expected as in this case it is found to have been, I think the defendants, if it was reasonably possible, should have adopted protective works that would not have hurt their neighbour. If no other measures than those they did adopt were reasonably practicable, then they were justified on the ground that the damage caused was inevitable. Hence the issue I propose

SHEPHARD, J., agreed to the suggested issue, reserving the question whether the defendants would be liable even if some other equally efficacious expedient might have been adopted by them without any evil consequence to the plaintiff.†

The District Judge having recorded a finding on the above issue in the negative the second appeals came on for final disposal before PARKER and SHEPHARD, JJ., and their Lordships delivered judgment as follows.—

JUDGMENT.

In No. 1670 *of* 1893.—The finding of the District Judge on the issue referred is in the negative, and we think that the alternative plan suggested, *viz.*, that defendants should excavate the bed of the channel—would not be efficacious since no good could be effected unless the lower riparian proprietors did the same.

The defendants were entitled to protect their lands from submersion, and plaintiff might have taken similar or other steps to protect his lands. We do not think that what defendants have done furnishes plaintiff with any cause of action

The decrees of the Courts below must be reversed and the suit dismissed with costs throughout.

In No. 390 *of* 1893.—Following the decision in second appeal No. 1670 of 1893, this second appeal must be dismissed with costs.

* [For fuller Judgment, see 4 M.L.J 244 (246).—ED.]
† [For fuller Judgment, see 4 M.L.J 244 (247).—ED.]
(1) L.R. 10 Ex. 4.

18 M. 163=5 M.L.J. 26

1894 Sep. 27.

APPELLATE CIVIL.

18 M. 163=5 M.L.J. 26.

[163] APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best

SAYYAD AZUF (*Defendant*), *Appellant* v. AMEERUBIBI (*Plaintiff*), *Respondent* * [27th April and 27th September, 1894.]

Easement—Invasion of privacy—Suit for injunction.

The invasion of privacy by opening windows is not a wrong for which an action will lie.

SECOND appeal against the decree of H. G. Joseph, District Judge of Ganjam, in appeal suit No. 52 of 1890, affirming the decree of K. Ramalinga Sastri, District Munsif of Chicacole, in original suit No. 403 of 1892.

The plaintiff sued for an injunction against the defendant alleging that the defendant had made a window in his house whereby the privacy of the plaintiff's house which adjoined it had been invaded. The District Munsif passed a decree as prayed, which was confirmed on appeal by the District Judge.

The defendant preferred this second appeal.

Srirangachariar, for appellant.

Seshagiri Ayyar, for respondent.

JUDGMENT

The suit was brought for an order directing defendant to close a window opened by him in a wall newly built by him. Plaintiff's case is that the window opens on to a passage immediately to the west of the wall, which passage leads to the plaintiff's house, and the privacy of which is invaded by reason of the window. The District Munsif found it to be a fact that plaintiff's privacy was thus invaded and gave her a decree directing the closing of the window.

On appeal the District Judge affirmed the District Munsif's decree.

Hence this second appeal, in which we are referred to the decision of Holloway and Innes, JJ., in the case of *Komathi* v. *Gurunada Pillai* (1), where it was held, following the English [164] law on the subject, that the invasion of privacy by opening windows is not a wrong for which an action will lie. As observed by Innes, J., the person whose privacy is so invaded has it in his power to build on his own ground so as to shut out the view from the offending window. To the same effect is the decision of the Calcutta High Court in *Mahomed Abdur Rahim* v. *Birju Sahu* (2) and of the Bombay High Court in *Shrinivas Udpirav* v. *Reid* (3). The cases in *Manishankar Hargovan* v. *Trikam Narsi* (4) and *Kuvarji Premchand* v. *Bai Javer* (5) are decisions with reference to the special custom of Guzerat. The decisions of the Allahabad High Court in *Gokal Prasad* v. *Radho* (6) and *Abdul Rahman* v. *Emile* (7) rest on the customary right which prevails in various parts of the North-western Provinces.

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* Second Appeal No. 1740 of 1893.

(1) 3 M.H.C.R. 141. (2) 5 B.L.R. 676. (3) 9 B.H.C.R. 266.
(4) 5 B.H.C.R. A.C.J. 42. (5) 6 B.H.C.R. A.C.J. 143.
(6) 10 A. 358. (7) 16 A. 69.

1894 Sep. 27. — Appellate Civil. — 18 M. 163 5 M. L. J. 26.

Following the decision in *Komathi* v. *Gurunada Pillai* (7), we allow the appeal and, setting aside the decree appealed against, direct that plaintiff's suit be dismissed; but considering the circumstances of the case, we direct that each party do bear his and her costs throughout.

18 M. 164.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar

LATCHANNA (*Plaintiff*), *Appellant v.* SARAVAYYA AND OTHERS (*Defendants Nos.* 1 *to* 3), *Respondents.**
[20th April, 31st July and 3rd August, 1894.]

Civil Procedure Code—Act XIV of 1882, *Section* 13, *Explanation* 5—Res judicata *between defendants.*

In a suit to recover the plaintiff's share of lands appertaining to an agraharam the defendants pleaded that the lands in question were their own and were not subject to partition. It appeared that in a previous suit brought by a third party against the present plaintiff and defendants and others to recover his share of the [165] agraharam lands, it was held that the lands now in question formed part of the lands of the agraharam, and they were divided in execution of the decree in that suit The present plaintiff and defendants were then *ex parte*:

Held, that the defendants were precluded under Civil Procedure Code, Section 13, from raising the above plea.

[**N.F.**, 28 M 457 (462) (**F.B.**)=14 M.L.J. 404; **R.**, 9 M.L.J. 60 (61); **D.**, 16 C.P.L.R. 161 (162)]

APPEAL against the order of A. Venkataramana Pai, Subordinate Judge of Vizagapatam, in appeal suit No. 172 of 1891, reversing the decree of R. Hanumanta Rau, District Munsif of Yellamanchily, in original suit No. 537 of 1890 and remanding the suit for rehearing.

The plaintiff sued to recover an eleven-sixteenth share of certain inam land appertaining to an agraharam, the sharers in which were represented by the defendants. The facts of the case were stated by the Subordinate Judge in paragraph 7 of his judgment as follows:—

"Yerakabhupati agraharam belongs to plaintiff, defendants, and "others in certain shares. These sharers own 16 vrittis or lands in the "agraharam. Each vritti or portion of a vritti is held by one or more of "the sharers. A re-distribution of the land takes place among the sharers "every twenty years. The last re-distribution not having been made by "the sharers, one of them brought suit No. 28 of 1886 in the District "Court for possession of his own share 3 11/84 of the agraharam lands. The "present plaintiff and the first, second and third defendants were respec- "tively the twentieth, second, seventh and ninth defendants in that suit. "These four were among the *ex parte* defendants in that suit. The Court "decreed that if the parties should not effect a re-distribution within three "months, 'their re-distribution will be made through the Court and a "share of 11/24 of a vritti assigned to plaintiff' (Exhibit A). The decree "appears to have been sent for execution to the District Munsif's Court "In execution proceedings the agraharam lands, including the lands now "in dispute, were divided and the decree-holder's share was ascertained "and (it is admitted) was delivered to him, the District Munsif holding

* Appeal against Order No. 5 of 1893.

(1) 3 M.H.C.R. 141.

1894 AUG. 3. APPELLATE CIVIL. 18 M. 164.

"that the land now in dispute was included in the property ordered to be "divided by the decree—See his order (Exhibit D)"

On these facts the District Munsif held that defendant No. 1 was precluded by the decree in original suit No 28 of 1886 on the file of the District Court of Vizagapatam from pleading that the land in question was his own inam land and he passed a decree for plaintiff The Subordinate Judge on appeal reversed the [166] decree and remanded the suit as above stated, expressing his view on the question of *res judicata* in the following terms —

"Paragraph 8. Now, there can be no doubt that as between the "decree-holder and the defendants in suit No 28 of 1886 the question as "to whether the land now in dispute is comprised in the decree and was "liable to be brought to division along with the other lands in the "agraharam is *res judicata* But as between the defendants, the matter "would be *res judicata* only if there was conflict of interests between "them 'and a judgment defining the real rights and obligations of the "'defendants interested' *Ramchandra Narayan* v *Narayan Mahedev* (1) "In the present case both the plaintiff and the first defendant were *ex* "*parte* defendants in suit No 28 of 1886 So, any dispute between them "was not before the Court in that case Assuming, therefore, that the "land now in dispute is included in the property of which a share was "awarded to the former plaintiff, that decree does not operate as *res* "*judicata* as regards any dispute between the defendants therein

"Paragraph 9. But then it is urged that the former suit was for "partition, and that in such a suit the Court has power to award to each "co-sharer his proper share in the property sought to be divided The "decree does not show, however, that the Court either determined or "awarded the share of any party other than the plaintiff therein"

The plaintiff preferred the present appeal

Subramanya Ayyar, for appellant

Mr *J G Smith*, for respondents

JUDGMENT

The question for determination in this appeal is whether the defendant's claim to the land in dispute as his inam is *res judicata* The facts of the case are sufficiently stated by the Subordinate Judge in paragraph 7 of his judgment. It is observed by him that as between the plaintiff and the defendants in the previous suit including plaintiff and first defendant the question is certainly *res judicata* Though the plaintiff and defendants in the present suit were merely co-defendants in the previous suit, and though they were *ex parte* and there was no contest between them, yet my decision in this case must depend on Explanation V of Section 13 of the Code of Civil Procedure It was held with [167] reference to that explanation in *Chandu* v *Kunhamed* (2) that though the first defendant in that case under whom the then plaintiff claimed was *ex parte*, in the previous suit and the title of the second defendant cannot, therefore, be said to have been actively contested between the then first and second defendants in the previous suit, yet the first defendant and his other co-sharers must be held as claiming under the plaintiff in the previous suit by Explanation V of Section 13 of the Code of Civil Procedure The case now before me is on all fours with that case The parties to this suit were co-defendants in the previous suit, and though they were all *ex parte*, the land in

(1) 11 B 216

(2) 14 M 324 (327).

1894 AUG. 3. — APPELLATE CIVIL. — 18 M. 164.

question was claimed by the then plaintiff as part of the agraharam land which was liable for re-distribution among him and the defendants who are other agraharamdars and his co-sharers. It was the first defendant who claimed the land in question as his inam in execution; but his claim was disallowed under Section 244. Upon these facts it is clear that the other co-defendants who were co-sharers in the agraharam with the plaintiff in the previous suit must be taken as claiming under him as he claimed the land as common to himself and other agraharamdars and as such partible amongst them. The principle on which this explanation rests is that when an adjudication is necessary to give the appropriate relief to the plaintiff in the prior suit, the adjudication is *res judicata* even as between co-defendants when the right asserted by the plaintiff and decided in the previous suit was one so asserted and decided as common to himself and others.

The order of the Subordinate Judge must be set aside and the decision of the District Munsif restored. Respondents will pay appellant's costs both in this Court and in the Lower Appellate Court.

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18 M. 168=5 M.L.J. 22.

[168] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

BALAMMA AND ANOTHER (*Defendants Nos.* 3 *and* 4), *Appellants v.* PULLAYYA AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.** [13th July and 27th September, 1894.]

Hindu law—Inheritance—Widow's right as heiress—Female gotraja sapinda.

In a suit on a mortgage executed by a Hindu, since deceased, to the plaintiff, it appeared that the mortgage premises had been the property of A, whose daughter, since deceased, was the mortgagor's wife and had executed a will purporting to devise the property to him. The suit was defended by B, who was the widow of a great grandson of A's great grandfather and she claimed title to the property against the plaintiff under the law of inheritance:

Held, that B had no title to the mortgage premises

[R., 19 M. 35 (37); 21 M. 263 (267)=8 M.L.J. 130; 16 Ind. Cas. 939=23 M.L.J. 518 (519)=12 M.L.T. 499=(1912) M.W.N 1166 (1167); 20 P.R. 1906=69 P.L.R. 1906.]

SECOND appeal, against the decree of K. C. Manavedan Rajah, Acting District Judge of Kurnool, in appeal suit No. 26 of 1892, confirming the decree of V. Ranga Rau, District Munsif of Nandyal, in original suit No. 407 of 1890.

Suit to recover principal and interest due upon a hypothecation bond, dated 26th November 1877, and executed by Govindappah, the husband of defendant No. 1, to secure the repayment of Rs. 500 together with interest. The mortgagor had died before suit leaving first defendant, his widow, and no issue. The second defendant had obtained from the mortgagor a lease of the mortgage premises for thirteen years, dated 17th January 1888. The third defendant and her alleged adopted son, defendant No. 4 claimed title under the following circumstances. The mortgage premises were the properties of Aswartha Rau, whose family held the office of karnam and who was himself karnam, and who had died about twenty years before the suit, leaving a

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* Second Appeal No. 1724 of 1893.

1894 Sep. 27. — Appellate Civil. — 18 M. 168=5. M. L. J. 22.

widow and a daughter named Onkaramma. Govindappah married Onkaramma as his first wife, and he managed the property during the lifetime of his father-in-law and remained in possession after the death of his wife, who left [169] a will purporting to devise the property to him According to the present case of the plaintiff, Govindappah was in fact entitled to the property under a gift from his father-in-law The third defendant was the widow of Seshayya, whose great grandfather was also the great grandfather of Aswartha Rau, and she pleaded that the alleged gift to Govindappah was false, and that she was entitled to the land as sapinda of the last owner

The District Munsif held that the alleged gift was proved and that the alleged adoption of defendant No 4 was disproved and passed a decree for the plaintiff as prayed The District Judge on appeal concurred in his finding as to the adoption, but held that there was no gift to Govindappah, he also held that the third defendant had no right to the land and consequently he upheld the decree of the District Munsif

Defendants Nos 3 and 4 preferred this second appeal

Rajagopalachariar and *Desikachariar*, for appellants

Bhashyam Ayyangar and *Seshachariar*, for respondent No 1

JUDGMENT

Best, J —The land in question belonged to one Aswartha Rau, and on his decease devolved on his widow, and then on his daughter Onkaramma, the wife of Govindappah (by whom the property was mortgaged to the plaintiff in this suit), who is the present first respondent The Judge has found the will by Onkaramma in favour of her husband Govindappah to be true

The appellants are (i) the widow of one Seshayya, great grand-son of the great grandfather of Aswartha Rau, and (ii) the alleged adopted son of the said Seshayya.

Both the Courts below have found the alleged adoption of second appellant to be untrue This is a finding of fact, but it is contended that it is open to objection in consequence of the wrongful admission of Exhibits B and C which are decrees in suits to which this plaintiff was not a party The finding against the alleged adoption rests not alone on B & C, but also on a consideration of the other evidence in the case including that of the appellants' witnesses which is rejected for very good reasons We must, therefore, accept the finding of the Lower Appellate Court that the adoption is not true

Such being the case, has third defendant, as widow of Seshayya, any *locus standi* for opposing the plaintiff's claim? The law as settled in this Presidency is that a widow can only succeed to her husband's property which was actually vested in him either in title or in [170] possession at the time of his death As observed by Mr Mayne, she must take at once at her husband's death, or not at all No such right can accrue to her as widow in consequence of the subsequent death of any one to whom her husband would have been heir if he had lived. Cf *Peddamuttu Viramani* v. *Appu Rau* (1)

This appeal fails therefore and should be dismissed with costs

Muttusami Ayyar, J.—I come to the same conclusion. My learned colleague has stated the facts found by the Courts below The District Munsif has also found that Onkaramma died eight or ten years before the

(1) 2 M H C R. 117

1894 SEP. 27. — APPELLATE CIVIL. — 18 M. 168=5 M. L. J. 22.

suit, and the District Judge has not expressed a different opinion on the subject. It was argued in second appeal that a cousin's widow is a relative, and that as such the third defendant was an heir to Aswartha Rau, while Govindappah, who was his son-in-law, was no heir at all. In support of this contention, reliance was placed on *Kutti Ammal* v. *Radakristna Aiyan* (1) and *Lakshmanammal* v. *Tiruvengada* (2). I may refer also to the decision in *Venkata Subbaiya* v. *Narasingappa* (3).

Under the Mitakshara law, as administered in this Presidency, a cousin's widow is a female gotraja sapinda, and the last case is an authority for the proposition that as between her and her husband's coparcener or male sapinda, she is not entitled to succeed to another coparcener or sapinda. As pointed out by my learned colleague, she can only succeed to property vested in her husband prior to his death as his widow, and not to a sapinda who survives her husband, as a female gotraja sapinda. As regards the decision in *Lakshmanammal* v. *Tiruvengada* (2), it was held there that a sister's son excludes a sister, that he has a preferential right as a bhinna gotra male sapinda. In *Kutti Ammal* v. *Radakristna Aiyan* (1), it was held that a sister was entitled to succeed as a bandhu. This decision proceeds on the view that any relative who is also a cognate may be treated as coming within the definition of bhinna gotra sapinda, and that the term sapinda, as used in Chapter 2, Section 6 of the Mitakshara, includes females. A cousin's widow, who is a gotraja sapinda, cannot be also a bhinna gotra sapinda, for her gotra is by marriage that of her husband. She is therefore not among the relatives who are contemplated as being among bandhus. A cousin's widow, if she is an heir at all, must be an [171] heir as a gotraja sapinda, and all female gotraja sapindas such as brother's and paternal uncle's widows are excluded from the table of heirs prescribed by the Mitakshara. The decision of the District Judge is right, and I would also dismiss the appeal with costs.

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18 M. 171.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

GOVINDA PILLAI (*Plaintiff*), *Appellant v.* RAMANUJA PILLAI AND OTHERS (*Defendants Nos.* 1 *to* 4 *and* 6), *Respondents.** [17th January and 19th April, 1894.]

Limitation—Adverse possession—Non payment of melvaram—Claim of kudivaram right by prescription.

In a suit to recover land, of which neither the plaintiff nor his predecessor in title had been in possession within a period of forty years before the suit, the defendants pleaded that the plaintiff had been entitled to receive melvaram only, that the payment of melvaram had been discontinued fifteen years before the date of the suit, and that they themselves were entitled to the kudivaram right in the land. It was found that the non-payment of melvaram had not been accompanied by an assertion of adverse title and that the defendant's kudivaram right had not been set up twelve years before the suit.

Held, that the suit was not barred by limitation.

SECOND appeal against the decree of W. F. Grahame, District Judge of South Arcot, in appeal suit No. 271 of 1892, reversing the decree

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* Second Appeal No. 773 of 1893.

(1) M.H.C.R. 88. (2) 5 M. 241 (249). (3) 3 M.H.C.R. 116 (117).

of T. B. Vasudeva Sastri, District Munsif of Chidambaram, in original suit No. 661 of 1891 1894 APRIL 19.

Suit to recover possession of land with mesne profits It appeared that neither the plaintiff nor his predecessor in title had actual possession for the forty years previous to this suit, and the defendants, who were in possession, pleaded that the plaintiff, like his vendor, was a manyamdar merely, and that the arrangement was that the manyamdar should receive a fixed permanent rent of twelve cullums of paddy per cawni *per annum*, and that the raiyats should pay the quit-rent to Government and enjoy the land with [172] all rights of ownership, and that the melvaram had been paid accordingly up to fifteen years before the institution of the suit The District Munsif determined the suit in favour of the plaintiff, but his decree was reversed on appeal by the District Judge, who held that the claim was barred by limitation APPELLATE CIVIL. 18 M. 171.

The plaintiff preferred this second appeal

Ramachandra Rau Saheb and *Ranga Ramanujachariar*, for appellant

Bhashym Ayyangar, for respondents

This second appeal coming on for hearing, the Court delivered the following

JUDGMENT

We must accept the Judge's finding that plaintiff was not dispossessed in February 1891 as alleged, and that neither plaintiff nor his vendor had possession for the last forty years The finding, however, that defendants' possession was adverse is not warranted by the circumstances from which it is inferred Defendants themselves admitted that they paid melvaram and claimed only a kudivaram right Mere non-payment of melvaram for any number of years is not sufficient to give defendants a kudivaram right unless their possession has been accompanied by an assertion of such right for more than twelve years prior to the suit The Judge's finding that plaintiff's vendor exercised no rights of ownership for a period of forty years is opposed to the defendants' plea that melvaram was paid till fifteen years ago, and Courts are not at liberty to go in defendants' favour behind the plea set up by the defendants themselves in the suit.

Therefore the question whether the defendants have acquired a kudivaram right by prescription depends on the further question whether such right was set up more than twelve years prior to the suit.

We must ask the Judge to try the issue indicated above

Fresh evidence may be adduced on either side, and the finding is to be submitted within one month from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court

In compliance with the above order, the District Judge submitted a finding, which was to the effect that the defendants had not set up a claim to the kudivaram right for more than twelve years prior to the suit. The case coming on for final disposal, the Court delivered the following

JUDGMENT (FINAL).

[173] Upon the finding we must allow, this appeal, and setting aside the decree of the Lower Appellate Court, restore that of the Court of First Instance.

1894 April 19. — Appellate Civil. — 18 M. 171.

The present case is not on all fours with that in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1). In that case the defendants denied the plaintiff's title as proprietor and set up that of a third party. Here the plaintiff's title is found to be established, and the defendants' plea of non-payment of melvaram is found not to have been accompanied by assertion of adverse title.

We, therefore, allow this appeal and decree as above and direct respondents to pay appellant's costs in this Court and in the Lower Appellate Court.

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18 M. 173=5 M.L.J. 32.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATANARASIMHULU (*Plaintiff*), *Appellant v.* PERAMMA (*Defendant*), *Respondent.** [12th December, 1894.]

Limitation Act—Act XV of 1877, Schedule II, Articles 62, 97—Suit to recover price paid on a void sale.

In 1885 the plaintiff obtained from the defendant a sale-deed of a certain land and paid part of the purchase money. Subsequently a judgment-creditor of the defendant's husband sought to execute his decree against the land in question, and eventually in October 1889, obtained a decree in the High Court under which the plaintiff was ejected. The plaintiff now sued in 1892, less than three years from the date of the last-mentioned decree, to recover the sum paid by him to the defendants as above mentioned:

Held, that the suit was not barred by limitation.

[N.F., 26 B 750 (756); F., 27 M 380 (382); 8 Bom. L.R 283 (287); R., 25 B 593 (598, 605); 15 Bom I. R. 559 (562); 10 Ind. Cas. 716 (717)=14 O.C. 74.]

SECOND appeal against the decree of N. Swaminadha Ayyar, Subordinate Judge of Vizagapatam, in appeal suit No. 346 of 1893, confirming the decree of Y. Janakiramayya, District Munsif of Vizagapatam, in original suit No. 632 of 1892.

Suit to recover from defendant Rs. 800. It was averred in the plaint that on 16th April 1885 the defendant executed a [174] sale-deed of certain land and received the agreed consideration and placed the plaintiff in possession; that the defendant sued in original suit No. 414 of 1885 in the Court of the District Munsif of Bimlipatam for the cancellation of the sale-deed, but her suit was dismissed; that subsequently a judgment-creditor of the defendant's husband sought to execute his decree against the land in question, and eventually, on the 31st October 1889, obtained a judgment in his favour in the High Court, where it was held that the present defendant had no title to convey to the present plaintiff; and that the present plaintiff was ousted in consequence of the decision of the High Court. This suit was instituted less than three years from the date of the judgment of the High Court. The District Munsif held that the suit was barred by limitation and his judgment was upheld on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Ramachandrau Rau Saheb, for appellant.

Respondent was not represented.

Second Appeal No. 1327 of 1894.

(1) 16 C. 473.

JUDGMENT

The article applicable is clearly No. 97 of Schedule II, and the cause of action accrued on the date of failure of the consideration, i e, the date of the High Court's decree, dated 31st October 1889 This suit brought within three years from that date is in time

It has been found in a former suit between the same parties that Rs. 737 were paid and that the sale-deed could not be set aside by the respondent by whom it was executed voluntarily

In order that the cause of action should run from the date of the sale, it must be found that the sale was void *ab initio*.

It is only in such a case that Article 62 can apply, *cf Hanuman Kamat* v *Hanuman Mandur* (1) It was found, no doubt, in the former suit that the plaintiff had the means of knowing that defendant's husband had been absent for only three or four years But the ground of the present suit is failure of consideration which must depend upon the result of the suit and not on a particular finding in that suit

We set aside the decrees of the Lower Courts and remand the suit for replacement on the file and the disposal on merits

The costs hitherto incurred will abide and follow the result.

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18 M. 175=4 M L.J. 257.

[175] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Shephard

GOPALUDU (*Plaintiff*), *Appellant v* VENKATARATNAM AND OTHERS (*Defendants*), *Respondents*.* [6th and 18th September, 1894]

Contract Act—Act IX of 1872, Section 74—Penal sum—Enhanced interest—Mortgage—Construction of covenant to pay

In a suit to recover principal and interest due on a mortgage, dated 19th April 1882, it appeared that the instrument provided that the principal should be repaid with interest at 21 per cent per annum in two instalments on 8th May 1883 and the 27th April 1884, respectively, and proceeded as follows —"If the amount of "each instalment be not paid on the date of such instalment, we shall make "payment with interest at three rupees per cent per mensem from the date of the bond" No payment had been made on account of principal or interest

Held, that the plaintiff was entitled to recover the principal, together with interest calculated at 21 per cent. up to the dates when the instalments respectively became due, and at 12 per cent from those dates to the date of the plaint and at 6 per cent from that date until payment

SECOND appeal against the decree of H T Ross, District Judge of Godavari, in appeal suit No 83 of 1893, modifying the decree of P Lakshminarasu Pantulu, District Munsif of Amalapur, in original suit No 311 of 1892.

Suit to recover principal and interest due upon a mortgage bond, dated 19th April 1882, and executed by defendants Nos 1 and 2 in favour of plaintiff Defendants Nos 3 to 5 were brought on to the record as being the undivided sons of defendant No 1

The mortgage in question was executed to secure the repayment of Rs. 200 with interest at the rate of 21 per cent. per annum in two instalments on certain days therein mentioned and it provided as follows:—

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* Second Appeal No 736 of 1894

(1) 19 C. 123.

1894 SEP. 18.

APPELLATE CIVIL.

18 M. 175=4 M. L. J. 257.

"If the amount of each instalment be not paid on the date of such "instalment, we shall make payment with interest at three rupees per "cent. per mensem from the date of the bond."

In his plaint the plaintiff claimed interest at the enhanced rate from the date of default only, and the District Munsif passed a [176] decree for the amount claimed up to the date of the plaint. On appeal, the District Judge modified the decree by allowing to the plaintiff in respect of interest the sum of Rs. 84-14-11 only up to the date of the plaint, together with interest at 6 per cent. on the whole debt from that date to the date of payment. He held that on the right construction of the mortgage it contained no provision for the payment of interest from the due date to the date of discharge, and the sum awarded in the decree on account of interest was calculated on this basis.

The plaintiff preferred this second appeal.

Sundara Ayyar and *Subramanya Ayyar*, for appellant.

Srirangachariar, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This was a suit on a hypothecation bond dated the 19th April 1882. As regards the principal amount Rs. 200, both the Courts below decreed the claim. As regards interest, the bond provided that the principal shall be paid back in two instalments with interest at 21 per cent. per annum—Rs. 100 with interest on the 8th May 1883 and the remainder with interest on the 27th April 1884. The bond then proceeds to stipulate that if each instalment is not paid on the due date, then interest shall be paid at 36 per cent. per annum from the date of the bond. The plaint stated that there was default in paying both instalments and claimed Rs. 699-1-0 as interest due at the enhanced rate from the date of default. Relyng on *Nanjappa* v. *Nanjappa* (1), the District Munsif decreed the interest claimed. But on appeal, the Judge was of opinion that there was no provision in the bond for interest from the due date to date of payment, and that the agreement to pay the enhanced rate extended only to the due date. Upon this construction of the document the Judge decreed interest at the enhanced rate as provided in the bond up to the due date, refused interest from the due date to that of the plaint, and awarded interest at 6 per cent. per annum from date of plaint to date of realization. To this decision the plaintiff (appellant) objects on three grounds, *viz.*, (i) that the Judge has misconstrued the document, (ii) that he ought not to have refused interest from date of default to date of payment, and (iii) that the interest is payable till date of payment as provided in the [177] bond. I am of opinion that the Judge is in error in holding that the bond contains no provision for payment of interest after the due date. The words from the date of the bond are used in contradistinction to the words from the date of default which is premised, and they are not designed to limit the time up to which interest is payable. The natural construction is that in case there is no default, interest shall be paid at 21 per cent. per annum, and that in case there is default, interest shall be paid at 36 per cent. per annum, and that the payment at such higher rate shall be not only prospective from the date of default, but shall also be retrospective from the date of the bond. This being so, the next question is whether the agreement to pay interest at 36 per cent. in case of default is in the nature of a penalty, and as such governed by Section 74 of the Contract Act. That section pre-supposes a case in

(1) 12 M. 161.

which a contract is broken and a sum is named as the amount to be paid on such breach, the party complaining of the breach is entitled to receive reasonable compensation not exceeding the amount so named. The general rule is that effect is to be given to the intention of the parties as expressed by the contract in the absence of any rule of law to the contrary. When the contract is to pay a higher rate of interest from the date of breach, its operation is prospective, and the proper construction is that the debtor who commits default intends to pay the alternative rate and to return the money lent On this point all the High Courts are agreed. When the agreement is to pay the higher rate on default from the date of the contract, the question arises whether it falls under Section 74, and as to this there is a conflict of opinion. The Full Benches of the High Courts at Calcutta and Bombay have held that Section 74 is applicable and that the agreement is penal and ought to be relieved against. *Kalachand Kyal* v *Shib Chunder Roy* (1) and *Umarkhan Mahamad Khan Deshmukh* v *Salekhan* (2) But the Full Bench of the High Court at Allahabad has held that Section 74 does not apply to agreements to pay alternative rates of interest In *Nanjappa* v *Nanjappa* (3) a Divisional Bench of the High Court at Madras held that such agreement falls under Secion 74, and that though no sum is named in rupees, the extra sum payable is fixed and ascertainable before hand, or at any rate at the time when the default is made In [178] *Bassavayya* v *Subbarazu* (4), where a mortgage bond provided for repayment of the debt in four instalments with interest at 6 per cent , and, in default of payment on the due date, provided for interest at 12 per cent from the date of the bond, another Divisional Bench held that the stipulation being reasonable, the higher rate of interest was payable from date of the bond. This may be reconciled with *Nanjappa* v *Nanjappa* (3) by the fact that the alternative rate provided by the contract was one which might be adopted under the measure of reasonable compensation In *Narayanasami Naidu* v *Narayana Rau* (5), in which I took part, I followed *Basavayya* v *Subbarazu* (4) In the present case the contract was to pay interest at 36 per cent from the date of the bond, and it is therefore governed by Section 74, according to *Nanjappa* v. *Nanjappa* (3) and the High Courts at Calcutta and Bombay I would therefore award interest at 21 per cent per annum from date of bond to due dates, 12 per cent from these dates to date of plaint, and 6 per cent from date of plaint to date of realization Costs will be assessed proportionately

1894 SEP. 18.

APPELLATE CIVIL.

18 M. 175=4 M. L. J. 257.

SHEPHARD, J.—The question is to what sum the plaintiff is entitled on account of interest payable in respect of the sum of Rs 200 due under the bond executed by the defendant The District Judge has held that there is no stipulation in the bond for payment of interest after the dates when the two instalments became due The words used are "If the "amount of each instalment be not paid on the date of such instalment, "we shall make payment with interest at three rupees per mensem per "hundred rupees from the date of the bond" There is a *terminus a quo* given, but no express *terminus ad quem*, and the Judge has accordingly held that the interest was to run only up to the dates fixed for the payment of the instalments.

In this construction it appears to me that the Judge is wrong. The provision for enhanced interest pre-supposes a case of default. The date

(1) 19 C 392 (2) 17 B. 106 (3) 12 M 161
(4) 11 M 294. (5) 17 M 62 (65).

1894 SEP. 18. APPELLATE CIVIL. 18 M. 175=4 M. L. J. 257.

at which the instalment with interest at 21 per cent. fell due having passed, it is reasonable to suppose that it was intended that the substituted interest should run until the date of payment, and there are certainly no words indicating the contrary intention. The question then is whether the provision for enhanced interest is [179] of such a character as to make Section 74 of the Contract Act applicable.

According to the view expressed in *Nanjappa* v. *Nanjappa* (1) and adopted elsewhere, a stipulation for retrospective enhancement of interest is generally a penalty which has to be dealt with by the Court under the provisions of Section 74. The Court has to give a reasonable compensation not exceeding the amount named. In addition to the interest at 21 per cent. on the two instalments up to the dates when they respectively fell due, I would allow interest from those dates at the rate of twelve per cent. up to the date of the institution of the suit and subsequent interest at six per cent.

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18 M. 179.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBBA AYYAR AND OTHERS (*Defendants Nos.* 1 *to* 3), *Appellants v.*
GANASA AYYAR AND ANOTHER (*Plaintiffs*), *Respondents.**
[19th and 20th November, 1894 and 9th January, 1895.]

Hindu law—Partition of family property—Suit by plaintiffs against their father and uncles.

In a suit for partition of family property, the plaintiffs were the sons of one and nephews of others of the defendants who defended the suit:

Held, that the suit was maintainable.

[**F.,** 31 C. 111 (129)=7 C.W.N. 088; 4 Ind. Cas. 797 (800)=5 N.L.R. 181; **R.,** 7 Bom. L R. 232 (234).]

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 253 of 1893 modifying the decree of T. Venkatarama Ayyar, District Munsif of Valangiman, in original suit No. 183 of 1892.

Suit for partition of the family property. The plaintiffs, of whom the second being an infant sued by the first as his next friend, were the sons of defendant No. 2 and the defendants Nos. 1 and 3 were his brothers. Defendants Nos. 4 and 5 were the sons of defendant No. 1; the other defendants were strangers to the family who were in possession of part of the property of which the plaintiffs claimed their share. It was objected by the contending [180] defendants that the suit was not maintainable. This contention was overruled by both the Lower Courts, who passed decrees in favour of the plaintiffs.

Defendants Nos. 1, 2 and 3 preferred this second appeal.

Subramanya Ayyar, for appellants.

Pattabhirama Ayyar, for respondents.

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* Second Appeal No. 1297 at 1894.
(1) 12 M. 161.

JUDGMENT

1895 JAN. 9. APPELLATE CIVIL. 18 M. 179.

Appellants are brothers and respondents are the sons of the second appellant Natesayyan Respondents sued appellants for partition, and the question raised for decision in this appeal is whether the suit is maintainable under the Mitakshara law

The property, of which partition is decreed by the Subordinate Judge, is admittedly ancestral, and it is conceded that if the second appellant had no brothers the suit would lie The contention on appellant's behalf is that when the father has brothers, and when he is alive, the sons cannot enforce partition against his will according to the Mitakshara We are of opinion that both in principle and on authority the contention must be disallowed The son's right to demand partition from his father arises from the co-parcenary right of the former by birth, and it is confined to ancestral property, because the son and the father confer equal spiritual benefit upon the grandfather and ancestors and they have equal right in such property, whilst in paternal property the father has a dominant right as its acquirer The basis on which the son's right of partition rests is the same whether the father has brothers or not, and there is therefore no legal foundation for the contention

It is further at variance with *placita* 8 and 11, Mitakshara, Chapter I, Section V

Placitum 8 shows that the partition takes place by the will of the son, though the mother is capable of bearing more sons and the father does not desire partition

Placitum 11 refers to Manu, IX, 209, and draws an inference from it to the effect that the father, however reluctant, must divide with his sons, at their pleasure, effects acquired by the paternal grandfather

Placitum 3 refers to the Smriti of Yadnavalkya to the effect that the ownership of father and son is the same in land which was acquired by the grandfather. *Placitum* 5 contains Vigyaneswara's comment upon it "In such property which was acquired by the paternal grandfather "through the acceptance of gifts, by [181] conquest or other means, the "ownership of father and son is notorious and therefore partition does take "place For, or because, the right is equal or alike, therefore partition is "not restricted to be made by the father's choice nor has he a double "share"

Thus, the Smritis of Yadnavalkya and Manu, as commented on in the Mitakshara, recognize the son's right to enforce partition against the father's will of immoveable property acquired by the paternal grandfather on the ground that they have equal ownership in the same

Appellant's pleader relies in support of his contention on *placita* 1, 2, and 6

Placitum 1 refers to the equal division of paternal estate and states that a special rule is propounded by Yadnacalkya concerning the division of grandfather's effects among grandsons That special rule is among grandsons by different fathers, the allotment of shares is according to the fathers *Placitum* 2 comments upon that rule and explains and illustrates it *Placitum* 6 repeats the rule It is contended that since the grandson's share has to be carved out of the father's allotment, there can be no partition at the instance of the grandson when the father is alive, has brothers and does not desire partition, and consequently, the son's right of partition is taken away in the case suggested. Reliance is placed in support of this view on a passage in Mayne's treatise on Hindu Law,

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Section 432, and on West and Buhler, page 295. This suggestion rests on a misconception of the reason of the special rule. *Placitum* 2 commences with the words, " although grandsons have by birth a right in the grandfather's estate equally with the sons," and goes on to say " still the distribution of the grandfather's property must be adjusted through their fathers and not with reference to themselves."

Thus the very text which prescribes the special rule postulates the existence of the equal right of father and son in the grandfather's property. It is therefore not correct to infer from the text a negation of that right. It is then asked how is the father's allotment to be ascertained if he does not desire partition? The answer is it is to be ascertained against his will, leaving him, after the son separates, to reunite with his brother if he desires to do so, or in the same way in which a brother's share is ascertained when one of three or more brothers desires partition and the others desire to continue in coparcenary. The right to demand partition is in the [182] son and it is by his will, and not by the father's desire, the partition takes place. *Placitum* 8 gives the same answer.

It is again asked why then is division *per stirpes* enjoined between class and class whilst partition *per capital* is prescribed among the sons of the same father?

The answer is that a coparcenary family is, according to Hindu theory, to be disintegrated in the same manner in which it is constituted. When several brothers or sons of the same father live in union by choice, on the understanding that when they elect to separate, they are to take equal shares in their father's property, we have before us a coparcenary family in its simplest form. When the brothers have sons, grandsons and great-grandsons who stand in their shoes by right of representation, we have a coparcenary family in its complex form. When death removes some and birth introduces others, the complexity is enhanced. According to Hindu Law, partition is but a mode whereby the coparcenary family is disintegrated into individual or single families, without prejudice, to the natural rule of inheritance that sons take like shares in their father's property. Hence it is that division *per stirpes* is sanctioned between class and class, in order that no violence may be done to the understanding on which the coparcenary family was first constituted.

Appellants' pleader next lays stress on *placitum* 3, Section 5, Chapter I. In this *placitum* the commentator anticipates an objection and answers it, and the rule of decision is to be sought for, not in the anticipated objection but in the answer given to it. The first part of the *placitum* states the objection and the answer to it is contained in these words. To obviate this doubt the author Yadnavalkya says " for the ownership of father and son is the same in land which was acquired by the grandfather " implying thereby what is stated in *placitum*, 5. " For, or because, the right is equal or alike, therefore partition is not restricted to be made by the father's choice nor has he a double share." Thus it appears to us that on the correct interpretation of Section V, Chapter I, Mitakshara, there is no exception to the rule that a son is entitled to demand partition from his father of ancestral property.

The foregoing is the view taken by this Court in 1862 in *Nagalinga Mudali* v. *Subbiramaniya Mudali* (1). In that case the [183] ancestor who acquired the property was one Tirumalai Mudali who died many years before, leaving two sons, the defendants Subramania and Veerasami.

(1) 1 M.H.C.R. 77.

The defendant Subramania had two sons, one named Perumal the plaintiff's father who died in 1850, the other was the defendant Dharmalinga It was held by Sir Colley Scotland, C.J , and Bittleston, J , that a grandson may by Hindu Law maintain a suit against his grandfather for compulsory division of ancestral family property The same view of the law under the Mitakshara was also taken by the Full Bench of the High Court at Allahabad in *Jogul Kishore* v *Shib Sahai* (1), and Viramitrodaya, Chapter II, Part 1, Verse 28, is also cited in support of the decision A similar view was also expressed in *Laljeet Singh* v. *Rajcoomar Singh* (2) We should have considered ourselves concluded by authority had it not been for the decision of the majority of the High Court at Bombay in *Apaji Narhar Kulkarni* v *Ramchandra Ravji Kulkarni* (3) After carefully reading the judgments in that case and comparing them with the Mitakshara and the decision in *Nagalinga Mudali* v *Subbiramaniya Mudali* (4) we agree in the opinion of Mr Justice Telang who has reviewed at length all the authorities on the subject and dissented from the conclusion arrived at by the majority of the Court This appeal must therefore fail and we dismiss it with costs

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18 M. 183.

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar

RAMASAMI AYYAR (*Plaintiff*), *Petitioner v* MUNICIPAL COUNCIL OF SALEM (*Defendant*), *Respondent*.* [1st & 13th August, 1894.]

District Municipalities Act (Madras)—Act IV of 1884, Section 53, Schedule A—Profession tax—District Court pleader—Court situated outside municipal limits.

The plaintiff, who was a pleader, lived and had his office and occasionally practised in Courts within the limits of the municipality of Salem, but he claimed to be entitled to the refund of a sum levied on him for profession tax under the [184] District Municipalities Act for the reasons that he practised as a District Court pleader and that the District Court was situated outside the municipal limits

Held, that the plaintiff was liable to pay profession tax to the Municipality of Salem

[R., 8 M L J 73 (74)]

PETITION under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the decree of S Dorasami Ayyanger, District Munsif of Salem, in small cause suit No 1390 of 1892

Suit to recover the sum of Rs 25 which had been levied from the plaintiff as profession tax under the District Municipalities Act of 1884 (Madras).

The facts of this case are stated sufficiently for the purposes of this report in the judgment of the High Court

Pattabhirama Ayyar, for petitioner.

Parthasaradhi Ayyangar, for respondent

JUDGMENT.

The plaintiff is a first grade pleader and defendant is the Municipal Council at Salem. On the 29th June 1892, the latter assessed the former

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* Civil Revision Petition No. 143 of 1893

(1) 5 A. 430 (2) 12 B. L. R 373
(3) 16 B 29. (4) 1 M.H C.R 77

1894 AUG. 13 — APPELLATE CIVIL. — 18 M. 183.

at Rs. 25 for exercising his profession as a pleader of the District Court under class III, Schedule A, of Madras Act IV of 1884. Plaintiff paid the tax under protest and brought this small cause suit for its refund. Two questions were raised for decision before the District Munsif at Salem *viz.*, (1) whether the Small Cause Court had jurisdiction to entertain the suit, and (2) whether the plaintiff is entitled to the refund claimed by him? The District Munsif held that he had jurisdiction and that plaintiff was lawfully taxed. It is urged in revision on petitioner's behalf that he was not liable to pay profession tax and that if he was, he could only be taxed under class IV.

Schedule A, class III, specifies " a Pleader practising in any Civil and " Sessions Court, Subordinate Judge's Court or Court of Small Causes " as liable to pay a profession tax of Rs. 25. Class IV specifies " every Pleader " and practising Vakil not included in class III " as liable to pay a tax of Rs. 12. It is an undisputed fact that the District Court of Salem and the Subordinate Courts of Salem and Bellary are situated outside the municipal limits. The District Munsif's Court, which is invested with the powers of a Small Cause Court up to a certain limit, is located within the municipal limits. There is, however, no separate [186] Court of Small Causes in the district constituted as was formerly the case under Act XI of 1865. Although the District and Subordinate Courts are outside the municipal limits, the plaintiff admitted before the District Munsif that he receives his clients, takes instructions from them, accepts vakalats, and draws up pleadings in his house which is situated within the municipal limits. He admitted also that he has his office within the municipality and that he practises in other Courts within the municipality. It is provided by Section 53, Act IV of 1884, that if the Municipal Council notify, under Section 50, that a tax on arts, professions, trades and callings, and on offices or appointments shall be levied, every person who within the municipality exercises after the date specified in the said notification, any one or more of the arts, professions, trades or callings or holds any one or more of the offices or appointments specified in Schedule A, shall, subject to the provisions of Section 59, pay in respect thereof the sum specified in the said schedule as payable by persons of the class in which such person is placed. It is argued that petitioner can be said to practice only in the District Court outside the limits and that neither the other acts ancillary to such practice nor his practising as a Pleader in the Courts of District Munsifs by reason of his status as District Court Pleader constitute the basis of his liability to be taxed. I am of opinion that the District Munsif has arrived at a correct conclusion. It is Section 53 that defines the cause of liability to pay a profession tax and that section describes the tax as a tax on professions and declares the cause of liability to be the exercise of one of the professions specified in Schedule A, within the municipality. Schedule A, class IV, declares every Pleader and practising Vakil as liable, whilst class III refers to every Pleader practising in any Civil and Sessions Court, Subordinate Judge's Court or Court of Small Causes as liable to be placed in that class for purposes of taxation. The real question then is—Does the petitioner exercise his profession as Pleader within the municipality?

The term, profession, is not defined by the Act. In ordinary parlance any act done by a Pleader which is incidental to his profession is an exercise of his profession, and it is not necessary that all the acts incidental to that profession must be done by him before he can be said to exercise that profession. It often happens that a junior Vakil takes instructions,

prepares the brief, draws up [186] the memorandum of appeal, prepares a summary in his house of the arguments and of decided cases and handing them over to a senior, accompanies him to the Court where the senior addresses the Court. Do not both the senior and the junior alike exercise the profession of Pleaders? 1894 AUG. 13. APPELLATE CIVIL. 18 M. 183.

In the case before us, all the acts ancillary to pleading in Court are done within the municipal limits as already mentioned It appears further that by reason of petitioner's status as a District Court Pleader he practises in the Courts of District Munsifs which are within the municipal limits. I see no warrant either in the language of Section 53 or of Schedule A for eliminating from his profession all acts preparatory to pleading and acting in Court and saying that pleading and acting in Courts alone constitute the exercise of his profession Even on the view that the location of the District and Subordinate Courts outside the municipality was not foreseen when the local area was defined, there remains the fact that all acts save pleading and acting in Court are done within the municipal limits, and the former constitutes as much as the latter the exercise of the profession of a District Court Pleader within the meaning of Section 53 and Schedule A. Nor do I see any sound reason for excluding from our consideration petitioner's practising in other Courts within the municipal limits. The case of *Kali Kumar Roy* v *Nobin Chunder Chuckerbutty* (1) is not in point. The point decided there is that a person, who looks after a regular appeal and gives instructions to pleaders in connection with it, is not practising as a Muktyar within the meaning of Section 13 of Act XX of 1865. The words in that section are " who shall practise as a Muktyar " in any Civil or Criminal Court without having previously obtained a certificate " The words in Schedule A " practising in any Civil and Sessions Court," are intended to be descriptive of his rank as a Pleader and practising Vakil and not to be words which limit his liability or constitute pleading and acting alone as the exercise of a Pleader's profession

I dismiss this petition with costs

18 M 187

[187] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

ANDI ACHEN (*Defendant No* 2), *Appellant* v KOMBI ACHEN (*Plaintiff*), *Respondent* * [20th February, and 14th November, 1894.]

Pensions Act—Act XXIII *of* 1871, *Sections* 4, 6—*Suit for malikana without certificate of Collector*

In a suit against the Rajah of Palghat and other members of his family for a declaration of the plaintiff's status as the third Rajah, and to recover a sum of money payable to him as such on acount of his share of malikana, it appeared that the plaintiff had obtained no certificate under Pensions Act, 1871, Section 6.

Held, that the suit was not maintainable.

[**F.**, 26 M 69 (71); **R.**, 29 B 480 (491)=7 Bom L R 497, 2 O C 57 (59); **D.**, 30 M 266 (268)=17 M L J 139=2 M L T 188]

APPEAL against the order of E. K Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No 901 of 1891, reversing the

* Appeal against Order No 124 of 1892

(1) 6 C 585

1894 Nov. 14. — APPELLATE CIVIL. — 18 M. 187.

decree of V. Rama Sastri, District Munsif of Palghat, in original suit No. 298 of 1891.

The plaintiff sued the Rajah of Palghat and three other members of the family for a declaration of his status as third Rajah of Palghat and to recover Rs. 769 being the malikana due and payable to him as such. The plaintiff had brought a previous suit (see *Kombi* v. *Aundi* (1), asking for declaration of his status only. The present suit was dismissed by the District Munsif on the ground that malikana being a pension the suit was not maintainable without a certificate under Act XXIII of 1871, Section 6. This decree was reversed on appeal by the Subordinate Judge on the ground that the ruling of the District Munsif was contrary to the judgment of the High Court in the case above referred to, and he accordingly remanded the suit to be disposed of on the merits.

Defendant No. 2 preferred this second appeal.

Bhashyam Ayyangar and *Desikachariar*, for appellant.

Sankara Menon, for respondent.

JUDGMENT.

BEST, J.—As observed by the Subordinate Judge, the difference between the present suit and the former one is that in his former suit [**188**] plaintiff asked only for a declaration of his status without seeking further relief in the shape of payment to him of his share of the malikana, whereas he now seeks both for the declaration and the further relief.

The former suit was expressly held to be not barred by the Pensions Act XXIII of 1871, on the ground that it was merely for a declaration as to the plaintiff's status and that though " no doubt malikana is paid by " Government on behalf of the stanom of the fifth Rajah " the suit " did " not seek a declaration that the plaintiff is entitled to anything so " payable."

As the malikana, in question, is clearly money paid by Government within the meaning of Section 4 of the Pensions Act (*cf*) the recent decision of the Privy Council in *Deo Kuar* v. *Man Kuar* (2) the present suit is, in my opinion, not maintainable in the absence of a certificate under Section 6 of that Act.

I would, therefore, allow this appeal and, setting aside the order of the Subordinate Judge, restore the decree of the District Munsif and direct the respondent (plaintiff) to pay the appellant's (second defendant's) costs in this Court and also in the Lower Appellate Court.

MUTTUSAMI AYYAR, J.—In this case judgment was reserved on account of an opinion expressed by me in my judgment in *Kombi* v. *Aundi* (1), to the effect that unless the suit is brought against the Government, no certificate is perhaps necessary under Section 6 of Act XXIII of 1871. It was not necessary to determine the question for the purpose of the previous suit which could not be maintained under Section 42 of the Specific Relief Act.

On re-considering the question which arises for adjudication in this suit and taking time to consider it, I see reason to alter my opinion. I think that upon the proper construction of Section 4 of the Pensions Act, it is enough that the suit relates to a " malikana " and it is not necessary that it should be instituted against the Government or its officers. I was influenced by the notion that the Legislature did not probably intend to shut out the co-sharers from the ordinary Courts, even in regard to the

(1) 13 M. 75.

(2) 21 I.A. 148.

determination of their relations *inter se* which must prevail in regard to other property But having regard to the language of Section 4 and the scheme of the Act suggested by Sections 5 and 6, the [189] narrower construction, *viz*, that it is enough that the suit relates to malikana, appears to be the true construction. Possibly, the intention was that the distribution of what is regarded as the bounty of Government among the co-sharers should remain under its control or that of its executive officers This view is the result of the grammatical interpretation of Section 4 confirmed by the scheme of the Act embodied in Sections 5 and 6. It is also the view taken in *Babaji Hari* v *Rajaram Ballal* (1) and *Syed Mahommed Isaack Mushyack* v *Azeezoon Nissa Begam* (2) and recently in *Deo Kuar* v *Man Kuar* (3) by the Privy Council On the ground that a certificate from the Collector is necessary to give jurisdiction to the Civil Courts to entertain the suit relating to the malikana in dispute, I concur in the judgment proposed by my learned colleague

1894 Nov. 14.

APPELLATE CIVIL.

18 M. 187.

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18 M. 189=4 M.L J. 106.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Davies

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SRIRANGCHARIAR AND OTHERS (*Defendants Nos* 1, 3, 4 *and* 6), *Appellants v* RAMASAMI AYYANGAR AND OTHERS (*Plaintiffs*), *Respondents* * [19th, 20th February and 6th March, 1894]

Contract Act—Act IX of 1872, *Section* 23—*Consideration in part illegal—Stifling a prosecution—Limitation Act—Act XV of* 1877, *Section* 22, *Schedule II, Articles* 91, 120—*Civil Procedure Code—Act XVI of* 1882, *Section* 13—Res judicata—*Decree in suit of small cause nature—Subsequent suit for declaration*

The plaintiff, claiming to be entitled together with two of the defendants to the office of archaka of a temple, sued in 1889 for a declaration of his title, and for a declaration that an agreement entered into by them in 1886 with the other defendants was void as having been executed under coercion, and because part of the consideration was the withdrawal of a pending criminal charge of trespass and theft against them These averments were proved The first named defendants were made plaintiffs in the suit more than three years after the execution of the agreement The remaining defendants pleaded that the validity of the agreement was *res judicata* for the reason that they had brought a previous action upon it against the plaintiffs and had obtained a decree for Rs 75

[190] *Held*, (1) that the validity of the agreement was not *res judicata*, because the previous suit was of a small cause nature,

(2) that the agreement was void although the withdrawal of the criminal proceedings formed part only of the consideration for it

(3) that the first plaintiff was entitled to declaration of the invalidity of the agreement, but not the others who had been joined as plaintiffs more than three years from its date

[**Diss.**, 8 A L J 498=10 Ind Cas 210 (218), **F.**, 29 M 195 (198) **(F.B.)**=16 M L J 41=1 M L T 25, 3 L B R 42 (43) 54 P R 1904, **R.**, 22 A 224 (230), 8 Ind Cas 1117 (1118)=6 N L R 148, 11 Ind Cas 321 (327)=31 P R 1911=192 P L.R 1911, 16 Ind Cas 555 (560)=8 N L R 97, 82 P R 1904, 41 P L R 1901, **Cons.**, 24 M. 444 (447), **D.**, 1 S L R 47 (51)]

APPEAL against the decree of W F Grahame, District Judge of South Arcot, in original suit No 4 of 1889

Suit filed on 18th February 1889 by the plaintiff against nine defendants for a declaration that he was an archaka of the Thillai Govindrajaswami

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* Appeal No 55 of 1893

(1) 1 B 75. (2) 4 M 391 (3) 21 I. A. 148.

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temple, Chidambaram, with a hereditary mirasi right thereto, and that he was entitled to the perquisites of the office unaffected by certain recent arrangements made by defendants Nos. 1 to 7, and for a further declaration that an agreement, dated 16th February 1886, and executed by the plaintiff and defendants Nos. 8 and 9 to the remaining defendants was void, and for a decree that the key of the temple be delivered to him and for further and other reliefs.

The plaintiff's case was that he and defendants Nos. 8 and 9 were the hereditary archakas of the temple and that they had been induced to enter into the agreement above referred to surrendering their rights to defendants Nos. 1 to 7, who claimed that office by a similar title, under coercion and undue pressure and to procure the withdrawal of a charge of criminal trespass and theft which had been brought against them. Defendants Nos. 8 and 9 were made plaintiffs by an order bearing date subsequent to 16th February 1889. The defendants pleaded, *inter alia* that the suit was barred by limitation and that the claim with reference to the agreement was *res judicata* by reason of the decree in appeal suit No. 269 of 1887 on the file of the District Court of South Arcot, reversing the decree of the District Munsif of Chidambaram in original suit No. 790 of 1886, in which the validity of the agreement was directly in issue. In that case the plaintiffs were the present defendants Nos. 1, 2 and 4, and they sued the present plaintiffs for a sum of Rs. 75 on the footing of that agreement.

The District Judge overruled the pleas of limitation and *res judicata*, held that the agreement was void for the reasons appearing in the judgment of the High Court, and passed a decree as prayed.

[**191**] Defendants Nos. 1, 3, 4, and 6 preferred this second appeal.

Pattabhirama Ayyar, for appellants.

Subramanya Ayyar, *Bhashyam Ayyangar* and *Sivasami Ayyar*, for respondents.

JUDGMENT.

There can be no doubt that part of the consideration for the agreement A was the withdrawal of a pending criminal charge of trespass and theft laid against the plaintiffs and others (*vide* Exhibit B on the 14th February 1886, that is, two days before the execution of A. The first plaintiff as plaintiff's third witness has sworn that it was so and his evidence stands uncontradicted, not even one of the defendants denying it. It is further proved that the very Magistrate, who would have tried the charge laid if it had been proceeded with, was present taking part in the negotiations that led up to A. There is also no doubt of the law that a consideration that proceeds upon the withdrawal of criminal proceedings that have been instituted is illegal as being opposed to public policy, as it is held to be the stifling of a prosecution. And even if this illegal consideration is only part of the consideration, it renders the whole agreement void because there is not good and sufficient consideration (*Lound* v. *Grimwade* (1) We therefore confirm the District Judge's finding in this respect. It is next contended for the appellant that the question of the validity of the agreement could not be re-opened, because it was *res judicata* by reason of the previous decision of the District Court in appeal suit No. 269 of 1887 holding it to be valid. That appeal, however, was made in a suit of a small cause nature before the District Munsif of

(1) L.R. 39 Ch. D. 605.

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Chidambaram (original suit No. 790 of 1886), and the subject-matter thereof was consequently not open to second appeal It has been held by the Bombay High Court (*Govind Bin Lakshmanshet Anjorlekar* v *Dhondbarav Bin Ganbarav Tambye* (1)) that a decision in a suit of that character will not operate as *res judicata* and that ruling has been more than once followed by this Court (*vide Vithilinga Padayachi* v *Vithilinga Mudali* (2) and *Namasivaya Gurukkal* v *Kadir Ammal* (3)), and we see no reason to depart from it now, and must therefore disallow this contention.

We find however that the second and third plaintiffs are not entitled to the declaration setting aside the agreement A, because [192] we find that they did not sue in time for this relief The agreement A is dated the 16th February 1886, and this suit was brought by the first plaintiff alone on the last day allowed by a three years' limitation The second and third plaintiffs not having joined the first plaintiff in bringing the suit, he made them defendants It was not until the 25th January 1892 that, by an order of the Judge passed under Section 32, Code of Civil Procedure, they were made plaintiffs They were therefore not made co-plaintiffs till more than three years after their cause of action arose, and under Section 22 of the Limitation Act, the suit should be deemed to have been instituted when they were so made parties The period of limitation for setting aside a document is under Article 91 of the second schedule to the Limitation Act three years from the time the plaintiff knew of it These plaintiffs Nos 2 and 3 knew of it on the 16th February 1886 when they executed it, and therefore their inclusion as plaintiffs in the suit on the 25th January 1892 was made too late It is contended on their behalf (i) that being defendants in the suit they were already parties thereto when it was brought, and Section 22 of the Limitation Act is therefore not applicable to their case, (ii) that the relief as prayed for was not to set aside the document, but merely to declare it invalid and the article of limitation applicable was Article 120 of the second schedule, allowing six years' time as for a suit for which no period of limitation is otherwise provided, under which these plaintiffs would be in time We cannot accede to either of these views, and the cases quoted *Nagathal* v *Ponnusami* (4) and *Khadir Moideen* v *Rama Naik* (5) do not support either contention As to the first point the second and third plaintiffs were 'added' as such only on the date they were taken from the ranks of the defendants, and it is only then they were so made parties Section 22 of the Limitation Act therefore clearly applies to them As to the second point there is no such suit as for a mere declaration to declare an instrument invalid Section 42 of the Specific Relief Act shows in what matters mere declaratory suits are admissible The only suit possible under that Act in regard to an instrument is one under Section 39 to have the document adjudged void and to have it cancelled, and Article 91 of the second schedule to the Limitation Act is the particular article applicable to such a case The result [193] is that the decree so far as it sets aside the agreement A must be modified by declaring that it is not set aside against plaintiffs Nos 2 and 3 It is then argued by appellants' vakil that first plaintiff cannot alone sue for that relief, as the agreement is a joint agreement of all three plaintiffs If there was any technical defect in this respect, it was cured by the addition of the second and third plaintiffs before the decree was

(1) 15 B 104 (2) 15 M 111 (3) 17 M 168.
(4) 13 M 44 (5) 17 M 12.

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passed. But in our opinion, had the name of first plaintiff stood alone throughout, he was entitled to sue to evade his individual responsibility under the agreement because there was a several as well as a joint liability under it.

The appeal is therefore dismissed with costs as against first plaintiff. It is allowed as against second and third plaintiffs to the extent indicated above, and the decree of the Lower Court will be modified accordingly.

These plaintiffs will bear their own costs.

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18 M. 193=4 M.L.J. 275.

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Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUNDRAMMAL AND ANOTHER (*Defendants Nos.* 4 *and* 5), *Appellants v.* RANGASAMI MUDALIAR AND OTHERS (*Plaintiffs Nos.* 1 *to* 3), *Respondents.** [17th, 18th January and 2nd May, 1894.]

Hindu law—Inheritance—Bandhu ex parte paterna *Bandhu* ex parte materna—*Limitation—Adverse possession—Alienation of an infant's property by his mother and guardian*

Suit filed in 1891 to recover possession of certain land, the property of a Hindu, who died an infant leaving him surviving his adoptive mother, who entered into possession and enjoyed the property till her death in 1890. It appeared (1) that in 1861 the deceased and his adoptive mother had conveyed absolutely certain of the properties to the widow of one of his first cousins on his adoptive father's side for her maintenance and that of her daughter, and that it had been assigned by her to A, B and C; (2) that other portions of the property had been conveyed in 1889 by the same persons, with the concurrence of D, as a gift to the daughters of the adoptive sisters of the deceased; (3) that D was the son of a sister of the [194] adoptive mother. The plaintiffs were grandsons of the brother of the deceased's adoptive father, being respectively the sons of his daughters:

Held, (1) that the plaintiffs being *bandhus ex parte paterna* were preferential heirs to D who was a *bandhu ex parte materna;*

(2) that the sisters' daughters had no title whether by the law of inheritance or under the gift asserted by them;

(3) that the plaintiffs' claim to the lands in the possession of A, B and C was barred by limitation

[F., 29 M 342 (349); 24 M L J 301 (305)=13 M.L.T. 213=(1913) M.W N. 202 (206); R., 21 M. 263 (267)=8 M L J 130; 11 Ind Cas 907 (909)=7 N.L.R. 116.]

APPEALS against the decree of L. A. Campbell, District Judge of Coimbatore, in original suit No. 7 of 1891.

The plaintiffs sued to recover posession of certain land as the heirs of Venkatachala Mudali, deceased, the adopted son of Chidambara Mudali whom he survived. On the death of Venkatachala Mudali, which took place before he attained his majority, the properties passed into the possession of his adoptive mother Muttammal who died in May 1890. The plaintiffs claimed that they and defendants Nos. 1 and 2, who refused to join in the suit, were entitled to inherit under Hindu law as being the grandsons of Chidambara Mudaliar's undivided brother named Venkatachala Mudali whose daughters were their mothers respectively. The third defendant, who was in possession of part of the property, claimed to be entitled to retain it on two grounds, firstly, because it had been

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* Appeals Nos. 63 and 64 of 1893.

conveyed to his wife by way of gift by Muttammal above referred to, secondly, because he was a preferential heir to the plaintiffs as being both a cousin in the male line of the deceased and also the son of his maternal aunt. Defendants Nos 4 and 5, who were in possession of other portions of the property, were, respectively, the daughters of Sornatammal and Paivatiammal, the adoptive sisters of the deceased, and they claimed title under a gift made as they averred under his directions by his adoptive mother to them. They also pleaded that the gift had been acquiesced in and the deed relating to it attested by defendant No 3 Certain other items of property, to which issue No 8 related, were alleged to have been given in 1861 by the deceased and his adoptive mother to one Tanatiammal, the widow of one of Chidambaram's nephews, for her maintenance and that of her daughter, and the persons in possession of this part of the property, *viz*, defendants Nos 7 to 11 and 13 to 20, claimed title in various ways through Tanatiammal During the hearing the plaintiffs entered into a compromise with defendants Nos 1, 2, 3, 6 and 12

The District Judge held that the plaintiffs' claim was preferable [195] to that of defendant No 3 as the son of the deceased maternal aunt and that it was not established that defendant No 3 was a cousin in the male line as alleged With regard to the defence of defendants Nos 4 and 5, it was held that the consent of the deceased to the alleged gift was not proved, and even if established that it would not prevail against the claim of the reversioners With regard to the gift to Tanatiammal the Judge was of opinion, regard being had to the amount of the property conveyed and to the wealth in possession of the family, that the grant was not beyond the powers of the mother and guardian of the deceased, and accordingly that the plaintiffs were not entitled to recover possession during the lifetime of Tanatiammal In the result the District Judge passed a decree for possession in favour of the plaintiffs as against defendants Nos 4 and 5 and made a declaration that the alienations by Tanatiammal were not binding upon the reversioners after her death The rest of the decree was in conformity with the compromise above referred to.

Against this decree the contending defendants preferred the present appeals Appeal No 63 being preferred by defendants Nos 4 and 5 and appeal No 64 by the persons claiming title through Tanatiammal

Bhashyam Ayyangar and *Jivaji*, for appellants

Subramanya Ayyar and *Ranga Ramanujachariar*, for respondents

JUDGMENT

These two appeals are preferred from the decree of the District Court of Coimbator in original suit No 7 of 1891 No 63 by defendants 4 and 5 and No 64 by defendants 7, 10, 11, 13 to 15 and 17 to 20

The properties in dispute belonged to one Chidambara Mudali, upon his death they devolved on his adopted son Venkatachalla mudali, the last full owner He died unmarried during his minority and his adoptive mother Muttammal succeeded him Upon her death in May 1890, several persons claimed the right of succession

The three plaintiffs and defendants Nos. 1 and 2, the third defendant and defendants Nos 4 and 5 are the several classes of relations who claimed the succession The third defendant claimed to be a dayadi or sapinda of Venkatachella Mudali the last male owner and also his mother's sister's son The fourth and fifth defendants are the daughters of two sisters of Venkatachella [196] Mudali, and the plaintiffs, and

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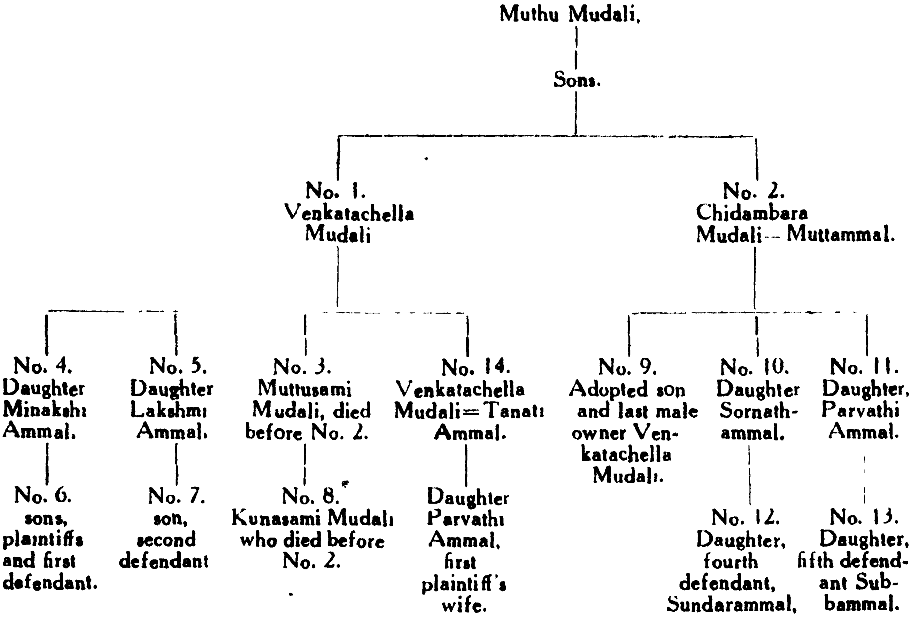
defendants Nos. 1 and 2 are the daughter's sons of Venkatachella Mudali, the senior, who was the paternal uncle of the last male owner. The subjoined genealogical table shows how the several claimants are related to each other and to Venkatachella Mudali.



[197] The eight issues fixed in this case indicate the contentions of the parties now in possession of the several items of property and the several defences set up by them. The Judge decided the first issue for plaintiffs and the second and third issues against third defendant. As to the fifth and eighth issues, his decision is that Muttammal did make a gift of the lands to the several defendants, but that it is not proved that she had authority to do so.

As plaintiffs and defendants Nos 1, 2, 3, 6 and 12 entered into a compromise pending decision, the Judge has recorded no findings on the fourth, sixth and seventh issues.

Against his decision two sets of defendants have appealed.

Appeal No. 63.—The appellants' first contention is that the Judge's finding that third defendant is not a dayadi is contrary to the weight of evidence. The Judge has stated his reasons for his finding in paragraphs 4 to 6 of his judgment. On reading the evidence, we see no sufficient reason to come to a different conclusion. The evidence consists in the main first of declarations made by Muttammal, and secondly of those alleged to have been made by Chidambara Mudali, her husband, and thirdly of statements of witnesses that he is a dayadi and that he performed the funeral and other obsequies of both Chidambara Mudali and his widow. The witnesses, who depose in appellants' favour and to admissions of third defendant's relationship, are mostly unconnected with the family and their statements are not consistent with each other. In endeavouring to help the appellants several go too far when they say that third defendant was not only a *gnati* but also a co-parcener or undivided

gnati and that he performed Chidambaram's obsequies while the last male owner, his adopted son, was alive It is true that there is documentary evidence in support of Muttammal's admission, but, as observed by the Judge, it is not safe to attach weight to it. Admittedly the third defendant is her sister's son and she made the admission on occasions when she had reason to be specially kind to him The contention that he is a *gnati* or sapinda must be disallowed as not proved Another contention in appeal is that fifth defendant's first witness Subbaraya Mudali is also a sapinda of the last full owner The Judge refers to Subbaraya Mudali in paragraph 4 of his judgment and remarks that he has made no attempt to secure the reversion We observe further that fourth and fifth defendants did not plead his *status* as a sapinda in answer to plaintiff's claim or ask for an issue in regard to it

[**198**] It is, however, admitted, that third defendant is the son of Muttammal's sister and therefore mother's sister's son of the last male owner The Judge finds, and it is also proved, that during her life, Muttammal gave portions of the property in dispute to fourth and fifth defendants who are her daughter's daughters, with the consent and approval of third defendant It is in evidence that she gave other portions of her son's property to third defendant and his wife and to other defendants As plaintiff's relationship to Venkatachella Mudali is admitted the question of law arising for decision is whether as the sister's daughters of Venkatachella or by reason of the consent of his mother's sister's son, the third defendant, fourth and fifth defendants exclude plaintiffs from succession In paragraph 2 of his judgment the Judge relies on the table of succession in Mayne's Hindu Law, Sections 466 and 535 and concludes that uncle's daughter's sons are preferable heirs as compared either with sister's daughters who have no place among bandhus or with the maternal aunt's son who is only related on the mother's side Appellant's pleader contends that male bandhus are to be preferred to females only when they belong to the same class and that appellants are entitled to the reversion In support of his contention he relies on *Muttusami* v *Muttukumarasami* (1) On the other hand, it is urged for plaintiffs that as bhinna gotra sapindas on the father's side they are the next reversioners and reliance is placed on the decision in *Umaid Bahadur* v *Udoi Chand* (2)

We are of opinion that the contention on appellant's behalf cannot be supported. As sister's daughters they are not bandhus in the sense that bandhus are bhinna gotra sapindas as stated in Chapter II, Section V, Sloka 5 of the Mitakshara, and if they are heirs they can only take after them as female relatives—according to the decision of the High Court in *Muttusami* v *Muttukumarasami* (1) There can be no doubt that whatever their rights may be as relatives, they cannot exclude male relatives who as bhinna gotra sapindas or regular bandhus are entitled to succeed under the Mitakshara law in preference to them

The learned pleader for appellant argues that under Hindu law males exclude females only when they belong to the same class of relatives, but to this proposition we cannot accede Take, for instance, the case of competition between a sister and the son of [**199**] another sister, and it cannot be denied the latter excludes the former, because he is a bhinna gotra sapinda, whilst the sister is a mere relative and being a female can offer no funeral oblations Again it is a well-known

(1) 16 M 23 (29). (2) 6 C 119

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principle of Hindu law that when, in the table of succession, one class of heirs ranks above another, the class that is named first must be exhausted before the class that is named next can be let in, as in the case of a brother and nephew or of nephew and brother's grandson. As female relatives form a class inferior to male bhinna gotra sapindas as in the case of a sister and sister's son, plaintiffs as daughter's sons of the last male owner's paternal uncle are preferable heirs to appellants who are only his sister's daughters, who, if, as such in the list of heirs at all, have a place therein as mere relatives before the property escheats to the Crown. As between plaintiffs and the third defendant the latter is a bandhu *ex parte materna*, whilst the former are bandhus *ex parte paterna*. The decision in *Muttusami* v. *Muttukumarasami* (1) is not in point. There the competition was between a maternal uncle and the father's paternal aunt's son both of whom were bhinna gotra sapindas and bandhus. This appeal must fail and is dismissed with costs.

Appeal No. 64.—As regards appeal No. 64, it refers to the contention which forms the subject of the eighth issue. The properties to which it relates passed into appellant's possession from that of one Tanatiammal, a widow of one of the first cousins of the last male owner, No. 14 in the pedigree. The Judge finds as a fact that Muttammal, the widow of Chidambara Mudali, and his adopted son, the last male owner, executed a deed by way of partition assigning certain lands to the mother and daughter in 1864. He was of opinion that Muttammal had no right to convey the lands absolutely and that her son was then a minor, but that effect could be given to the alienation as a provision for maintenance which it was competent to Muttammal to make. On this view he held that alienation was not binding upon the reversioners as a body after the demise of Tanatiammal, and that in the meantime, the plaintiffs were not entitled to claim possession and passed a decree accordingly. He declared the title of plaintiffs as reversioners and as a body after Tanatiammal's death because he did not desire to adjudicate on the effect of first plaintiff's attestation [200] of document IX whereby Tanatiammal and her daughter Parvati who is first plaintiff's wife conveyed the lands in dispute for Rs. 6,000 in July 1876 to one Aravan Pusari. The contentions on appeal are—(1) that no declaration ought to have been made; (2) that defendants Nos. 3, 4 and 5 are as bandhus preferable heirs; (3) that a suit for a declaration of title was barred by limitation; and (4) that it was competent to Muttammal as the guardian and adoptive mother of her minor son to alienate absolutely a portion of the property in lieu of maintenance. We do not think that the Judge's decree can be supported so far as it is against these appellants. He finds as a fact that the alienation was made by Muttammal and her minor son and that what was conveyed was an absolute estate. As the last male owner was alive the alienation was not that of a widow's estate by a widow but that of an absolute estate by the guardian of the last male owner. It was open to any next friend of his to have stepped forward during his minority and set aside the alienation on the ground that it was an act done without adequate necessity or in excess of the limited authority of a guardian. As the alienation took place in 1861 whilst the present suit was brought in 1891, a suit to set it aside would be barred, if the minor were still alive and his reversioners cannot take a higher position. The plaintiff's claim must, therefore, be held to be time-barred.

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(1) 16 M. 23 (29).

This appeal must be allowed and the decree of the Judge set aside, so far as it refers to the properties in appellant's possession with costs throughout 1894 MAY 2

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18 M. 123=4 M. L. J. 275.

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18 M. 201=5 M.L.J. 40.

[201] APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr Justice Parker

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KALELOOLA SAHIB (*Plaintiff*), *Appellant* v. NUSEERUDEEN SAHIB (*Defendant*), *Respondent* *

[1st October and 23rd November, 1894]

Muhammadan law—Wakf—Charitable and religious trusts—Perpetuities, rule against

A Muhammadan, by an instrument in writing, dedicated certain moveable and immoveable properties for the upkeep of her husband's tomb and " for the daily, " monthly and annual expenses of the aforesaid mausoleum, such as lighting, " frankincense, flowers, and the salaries of repeaters of Koran and readers of " benedictions, &c, as well as for the annual fatheha ceremonies of the deceased "and after my death for my annual fatheha ceremony" It was found that a travellers' inn was erected by the endower of the property as an appurtenance to the tomb, and that the performance of the ceremonies necessarily involved the distribution of charity, and that the lights at the tomb were of use to passers by

Held, on appeal reversing the judgment of DAVIES, J, that the instrument was not a valid wakf and was void as contravening the rule against perpetuities

[F., 36 B 111 (115)=13 Bom L R 1025=12 Ind Cas 702, 2 A L J 519 (530), R, 21 A 329 (335), 33 M 118 (119)=4 Ind Cas 136=6 M L T 307, 34 M 12 (15)=6 Ind Cas 1=20 M L J 254=8 M L T 16, 6 A L J 115, 6 Bom L R 1058 (1063), D., 33 A 400 (405)=8 A L J 162=9 Ind Cas 753, 5 Bom L R 1010 (1015), 2 M L T 55 (56), 8 O C. 379 (384)]

APPEAL against the decree of Mr Justice Davies sitting on the original side of the High Court, in civil suit No 199 of 1892

Suit to recover, with mesne profits, certain land, the property of Ghousee Begam Sahiba, deceased, whose heir the plaintiff was The defendant was in possession of the properties in suit under an instrument, dated 20th December 1886 and executed by the deceased whereby she purported to impress them with certain trusts of a religious character and appointed the defendant to be the superintendent of the same The plaintiff averred that the instrument above referred to was void for among other reasons those stated in paragraphs 13 and 14 of the plaint as follows.—

" That the said endowment or wakf properties in Schedule A afore-" said is entirely invalid and void under the Muhammadan law, as the " object or purpose thereof is entirely illegal and sinful "

" That the same (endowment or wakf) is also void by reason of its " having been brought about by the defendant while the endower was in a " state of deep mental affliction as aforesaid '

[202] *Srinivasaraghavachariar*, for plaintiff

Sundaram Sastri, for defendant

DAVIES, J —The matter in dispute in this case is the property of the late Ghousee Begam Sahiba, the widow of the late Prince Oomduth-ud-Dowlah Bahadur It is admitted that she was the absolute owner of the properties and that the plaintiff is her sole heir, being the son of her brother She died on the 4th of June 1892, leaving, as alleged by the

* Original Side Appeal No. 17 of 1894

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18 M. 201=5 M. L. J. 40.

plaintiff, jewels and other moveable properties of the value of about Rs. 8,000, the details of which are given in the Schedule B to the plaint. Several years before her death, that is on the 20th of December 1886, she made an endowment of certain immoveable properties worth, according to the plaint, Rs. 16,000, together with moveables worth Rs. 2,500 for the upkeep of her husband's tomb and for ceremonies connected therewith, including ceremonies to be performed for herself after her death. The plaintiff alleges that this endowment is not a valid endowment according to the Muhammadan law and that he as heir is therefore entitled to the properties which are the subject of endowment, as well as to the moveables, of which the deceased lady was possessed at the time of her death. The defendant, who married a daughter of the late Prince Oomduth-ud-Dowlah Bahadur, the mother being one Moham, was appointed Muttuvalli or manager of the endowment by the deceased lady. He contends that the endowment was a valid endowment binding on the plaintiff, who also acquiesced in it at the time when it was made, that as to the property left by the deceased at the time of her death, it consisted of but a few articles worth only Rs 300, of which the deceased lady made a gift to his daughter, and that consequently the plaintiff is entitled to nothing. The following are the issues framed in the suit:—

First.—Is the deed of endowment void for the reasons stated in paragraphs 13 and 14 of the plaint?

Second.—If not altogether void, is it valid for more than one-third of the estate of the deceased as being executed during her death illness?

Third.—Is plaintiff estopped from disputing the validity of the endowment by reason of his having attested the document which he admits having done?

Fourth.—Is the suit barred by the law of limitation?

[203] *Fifth.*—Is defendant in possession of all the properties mentioned in Schedule B and is plaintiff entitled to the same? and

Sixth.—To what relief, if any, is plaintiff entitled?'

Dealing with these issues *seriatim*, the first is whether the deed of endowment is void for the reasons stated in paragraphs 13 and 14 of the plaint. The reasons there stated are that the endowment is invalid, as the objects or purposes thereof are entirely illegal and sinful, being contrary to, and prohibited by, the Muhammadan law, and that it is void as having been brought about by the undue influence of the defendant at a time when the endower was in a state of deep of mental affliction. The second ground may at once be dismissed. There is no evidence to show that the defendant exercised any undue influence over the deceased. Her husband had died in 1881, and after his death she had erected his tomb and had herself performed ceremonies thereat; and it was on the eve of her departure on a pilgrimage to Mecca that she entrusted the defendant with the sole management thereof, as it was impossible for her in the circumstances to continue it herself. As to the first ground, it will be best first to set forth terms of the endowment as they appear in the deed of endowment A, dated the 20th of December 1886. After reciting the properties which were made the subject of the wakf consisting of a house and its site valued at Rs. 10,000, a garden valued at Rs. 6,000 and the ground upon which the mausoleum of Prince Oomduth-ud-Dowlah Bahadur and its connected buildings were built together with articles of moveable property appertaining to the tomb, such as grave cloths, incense burners and so on valued at Rs. 2,500, the deed proceeds as follows:—" I have appointed " Mahomed Nuseeroodeen Khan, son-in-law of the deceased Junnath-ma-ab

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"(may he be in paradise) as the Muttuvalli of the aforesaid three immoveable "properties and the moveable articles It is required that the aforesaid "Muttuvalli shall, out of the income of Kasmahal and the ground of "Narayana Pillai's garden, which I have delivered into his possession, "after deducting the expenses of repairs and taxes relating to the endowed "buildings, &c, spend so much of what remains as he may consider fit, "or as the funds may permit, for the daily, monthly and annual expenses "of the aforesaid mausoleum, such as lighting, frankincense, flowers "and the salaries of Hafizes (repeaters of the Koran) and Daroodies "(readers of benediction, &c), as well as for the annual [204] Fatheha "ceremonies of the deceased (may he be in paradise), and after my "death, he should also spend for my annual Fatheha ceremony" It then provides for the continuance of the management in the family of the defendant and for the removal of any manager who shall be guilty of mismanagement, ending up by declaring the property to be inalienable Now, the plaintiff's case is that a *wakf* of this nature to be valid must be a dedication of property to the service of God in such a way that it may be beneficial to man, in other words it must be for a religious and charitable purpose This is no doubt the accepted law in the case of public *wakfs* See McNaghten's Muhammadan Law, Book 1, Chapter X, *Abdul Ganne Kasam* v *Hussen Miya Rahimtula* (1), *Mahomed Hamidulla Khan* v *Lotful Huq* (2) and Syed Ameer Ali's law relating to gifts, trusts, &c, among the Muhammadans (*Tagore Law Lectures*, 1884, page 179) It is contended that in this case the endowment is neither for religious nor for charitable purposes, as none of the objects stated is a lawful religious object, the building of mausoleums over graves, the sprinkling of flowers and frankincense thereat, the repeating of the Koran, &c, at the grave and the lighting thereof being all prohibited by the Muhammadan law, and there being no provision for any charitable object As regards the latter contention, there is good evidence to show that, in the performance of the religious ceremonies, charitable objects are also involved It is proved that on the occasion of the annual ceremony at the grave, alms are given to the poor either in money doles or in cooked food and it is also proved that among the buildings attached to the mausoleum there is an inn for travellers where they may halt and rest This was erected by the deceased lady, the endower herself and with perhaps a twofold object, for the defendant says that sometimes rest-houses are built by the side of tombs for the benefit of the soul of the deceased, so that the travellers' repose may be communicated to him So that it cannot be said that there was no charitable object in this endowment Of course the plaintiff has denied the existence of the charities referred to, but beyond his denial there is nothing to establish their non-existence The only witness on behalf of the plaintiff who speaks to this matter is his fourth witness who while agreeing with him in denying the existence of the [205] travellers' inn, admits that at the annual ceremonies the poor are fed, while on the defendant's side the existence of the travellers' inn is proved beyond all doubt as well as the fact of alms being given to the poor It is argued for the plaintiff on the strength of the cases (*Fatmabibi* v *The Advocate-General of Bombay* (3) and *Pathukutti* v *Avathalakutti* (4)), and that these objects, if they exist, should have been expressly set forth in the deed of endowment, but as it is clear from the evidence that the travellers' inn was erected by the endower of the property as an appurtenance

(1) 10 B.H.C.R 7 (13) (2) 6 C 744 (747) (3) 6 B 42. (4) 13 M 66

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to the tomb and that the performance of the annual ceremonies entailed as a matter of course the distribution of charity, it was unnecessary to specify these matters in detail. Finding then, that there were charitable purposes in view, the arguments addressed to the Court with the object of showing that the present endowment offended against the law of perpetuities must fail.

To come now to the further question whether the other purposes were not religious on the ground that they were opposed to the Muhammadan law, a number of authorities were quoted from ancient texts. Thus, to prove that it was unlawful to erect a monument over a grave, the *Mishcat-ul-mashabih* was quoted. In a translation of this work from the original Arabic by Captain A. N. Mathews, printed at Calcutta in 1809 at Chapter VI, part I, " on burying the dead," the Prophet is reported to have said that tombs must be low and made with unburnt bricks, and in a Persian work *Shurhai-safar-us-Saadat*, printed in the Afzululmatba Press at Calcutta (in the Hijri year 1252) at page 349, it is said " thou " shalt not raise grave, nor shalt thou construct it with stones, granite " and bricks, nor shalt thou harden it with compounded chunam and mud, " or otherwise than that Thou shalt not construct a building or tomb " over the grave. These are altogether invented acts and are contrary to " the precedents laid down by the Prophet." As opposed to these texts there is quoted for the defendant an extract from another Persian work the *Madaraj-un-naboowah*, printed in the Muzhurul-Ajaib Press (in Hijri year 1271), in which at page 410 it is said: " It is stated in *Mattabil-ul-* " *Moumoneim* that (the learned persons of) former times considered it a " lawful pleasure (any indifferent action, which incurs neither praise nor " blame) to superstruct the graves of holy [206] persons and the renowned " learned, so that people may perform pilgrimage and take rest therein, " and also they may sit under their shelter. That has been tran- " scribed from *Mafathi-i-shurhai Masabeeh*. The author of it had said " that he had seen the graves in Bokhara having buildings of cut bricks. " It had been approved by Ismail-i-Zahid (Ismail the pious) who is one " of the distinguished law officers (lawyers or theologians)." This passage would, however, seem to refer only to the tombs of saints or sages and not to those of private individuals however lofty their station in life may have been. So that it would seem that the Prophet did disapprove of the erection of stately sepulchral monuments But it is contended that there is a difference between things sinful and things merely disapproved, and that in the texts quoted for the plaintiff it is not said that the erection of such structures is sinful and therefore forbidden as such. It is an admitted fact that now-a-days it is a common practice of Muhammadans all over the world to have substantial tombs erected over their graves. The defendant's fifth witness says that all the graves of Muhammadans of respectable class in this city have tombs built over them. The Moulvi who appears as tenth witness for the plaintiff, while he allows the existence of this practice, declares it to be illegal, and he even goes to the length of stating that the well-known Taj Mahal at Agra, which is a monument over a grave as well as the erections over the Prophet's tomb at Medina are contrary to law. " Such monuments of Mussulman piety " or magnificence exist in all Muhammadan countries and in none more " than in Hindustan," (*see* Introduction to Hamilton's Hedaya, page LXXIII); and although in primitive times there may have been a moral precept against them, there can be no doubt that in the present time they have been sanctified by long use and custom. It would unsettle the

minds of the whole of the Muhammadan community in India, if such a well-established practice were now declared to be illegal and no Court of Justice in India, where the approved customs of any race are recognized and accepted as law, would be justified in making such a declaration.

Then as to the ceremonies that are to be performed, under the deed of endowment, at the tomb of the deceased Prince Oomduth-ud-Dowlah, it is contended also on the authority of old texts that they are, one and all, illegal The recital of the Koran, [207] &c , at the grave, the lighting of lamps there, the strewing of flowers and the sprinkling of frankincense are, it is said, all condemned The following are the authorities quoted — In the *Shurhai-safar-us-saadat* already referred to, it is said at page 350, " He (the Prophet) directed abstinence from erecting mosques on " the top of the grave, or lighting lamps upon them He pronounced " curse (of God) upon the perpetrator thereof," and again at page 352, " There was no practice for persons to congregate, out of time, for prayers, " and read the Koran, or repeat Khatams (benedictions) either at the " grave or elsewhere All these are invented and abominable acts " In the *Madaraj-un-naboowah* also referred to before, it is said at page 410 " it is prohibited to light lamp at the grave . But this gathering of people, especially on the third day, and other grand observances " . are abominable and prohibited," and at page 411, " but " inasmuch as, to sit around the grave and repeat (the Koran and the " benediction) at it is abominable " At page 149 of the same work, it is " said it is mentioned by Sheikh Abdul-kareem-i-saloosy that should the " reader of the Koran, while reading it, have the object that its virtue " should be for the dead, it will not reach him " Against these texts there are quoted for the defendant extracts from the Arabic work *Fathava-i-aulum ghiri*, printed in the Education Press, in Calcutta in Hijri year 1243, wherein at page 233 it is said " repeating the Koran near " the graves is not abominable with Mahomed (may blessings of God " be upon him) And our (spiritual) sages have adopted it from his saying " (if it is asked) whether any benefit derived by it? It is an adopted " doctrine (to say) that benefit is really derived from it In this manner, " it is mentioned in " *Muzmerath*." and at page 520 it is stated to place " flowers and sweet basils upon the graves is good, and if alms are given " of the value of the flowers it is better " It is so in *Gharaib*. In the *Madaraj-un-Naboowah* already referred to, it is said at page 149 " Khazhi " Hussain has decided that to make contract for repeating the Koran at " the grave is permissible It is just as making contract for calling out " for prayers and teaching the Koran " and at page 410 it is said " to " light lamps at the graves is forbidden, except when any work is done " under it or any road goes near it " And lastly an extract was quoted from *Thufseer-i-Futhhool Azeez* (commentary in Hindustani on the Koran), printed in the Mohammadi Press, Bombay, wherein at [208] page 168 it is said " and the assistance rendered by the living persons to the " deceased in this state, approaches them readily, and the dead, on " such occasion, expect impatiently help from this side (of the world), and " they suppose themselves as if they are still alive For this reason, it " is mentioned in the holy traditional sayings (of the Prophet) about the ' circumstances in the grave that the Mussulman person says there " leave " me, so that I may pray (to God) " And it is also mentioned that " a " deceased man in this state is like a drowning person, as if expecting " (some one) impatiently who would attend to his complaint. At this " time, alms, prayers and *fatheha* (prayers for the souls of the dead)

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"become very useful to him. And, therefore, most of the people exert "themselves in such sort of works up to one year, especially for forty "days after death. And the soul of a dead person, during the days "shortly after his death, also visits the living people in their dreams, "as well as in their waking state and relates its condition." It will be seen that on every point except the lighting up of the grave, there is a conflict of authority in the texts quoted, that by the one set of authorities quoted for the defendant it is lawful to recite the Koran at the grave (even the Moulvi for the plaintiff admits this, provided the recital is not in a loud tone), to strew flowers and sprinkle frankincense there, and that it may also be lighted, if the light is of use to passers-by or to carry on work. It is stated that the lights at the tomb in this case being in a frequented place are of use to passers-by. I am therefore unable to find any proof that the practices referred to are in any way illegal. They are also proved to be of every day practice. Defendant's second and third witnesses say that there are very many tombs in Madras where these things are done. Defendant's fifth witness says that strewing flowers on graves is permitted, and so is frankincense to attract angels near them. At Medina, which he has visited, the Prophet's grave is lighted up with a thousand lights and scented wood is burnt. "All the Muhammadan people of this city, who can afford it," he says, "have the Koran read by their graves." In the face of these facts, it would be absurd to hold that any of the practices are repugnant to the Muhammadan law, when every Muhammadan performs them. What were considered "grand" observances in the days of the Prophet may well have become common place now. It has been held in *Meer Mahomed Israil Khan* v. *Sashti* **[209]** *Churn Ghose* (1) that the words "charitable" and "religious" must be taken in the sense in which they are understood in the Muhammadan law. Mr. Justice Ameer Ali in that case observes at page 427 that the words "piety" and "charity" have a much wider signification in Mussulman law and religion than perhaps in any others; and it would be very difficult to say in this case that from a Muhammadan point of view the objects of the endowment are not both pious and charitable.

Having disposed of the alleged illegality as regards the objects of the endowment, the next contention for the plaintiff is that the endowment of moveable property is invalid. This objection does not appear to have been taken in the pleadings, nevertheless it is no doubt a fact that moveable, and therefore perishable, properties, are ordinarily not fit subjects for endowment. But there is an exception to this rule when the moveables are appurtenant to the immoveable property. (*See* Hamilton's Hedaya, Vol. II, pages 342-344). In an Arabic work *Shurhai-Vakaya*, Vol. II, printed in the Anwar-i-Mohammadi Press (in the Hijri year 1302) at page 418, it is said, "and the endowment of lands is valid, but not of "moveables. With Mohamed, endowment of moveables that are usually "endowed is valid, such as hatchet, spade, adze, saw, coffin, its cloth cover, "mud pots and copper pots and the Koran. Most of the doctors of law "act upon this in other countries;" and the plaintiff himself admits that in this case all the moveables endowed are kept at the tomb of the deceased Prince Ooomduth-ud-Dowlah and are appurtenant thereto. This objection therefore also fails. Another objection was also taken at the hearing, though it was not seriously pressed, *viz.*, that the plaintiff should have been chosen as the Mutuvalli of the endowment in preference to the defend-

(1) 19 C. 412.

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ant who is a stranger Admitting for the sake of argument that defendant is a stranger, there is no clear law prohibiting his appointment. For the plaintiff is quoted page 507 of *Fathava-i-aulum ghiri*, previously referred to, wherein it is said " and really the ruler (Judge) cannot appoint a " manager, out of strangers, when there may be (a person) amongst the " family of the endower competent for it If a competent person amongst " them is not forthcoming, and a stranger is appointed, and if a competent " person is found amongst the relatives [210] afterwards he should " cause the same to be reverted to the relatives of the endower " For the defendant, on the other hand, is quoted a text from *Ruddul Mohthar*, an Arabic work, in which at page 448, it is said " in spite of the existence " of the donor's children, who are competent, if a stranger is appointed " it is justified " This objection, therefore, also fails, no allegation being made that the endowment is not properly managed by the defendant This disposes of the first issue

With regard to the other issues the learned Judge held that the suit was not barred by limitation, that the plaintiff was not estopped by reason of his having attested the deed of endowment and having acquiesced in its provisions and that the deed was not executed during the death illness of the executant He also decided the fifth and sixth issues against the plaintiff

The result is that the plaintiff's suit is dismissed with costs

The plaintiff preferred this appeal

Mr. *H G Wedderburn*, for appellant

Sundaram Sastri and *Kumarasami*, for respondent.

JUDGMENT

The plaintiff is the sole heir of the late Ghousee Begam Sahiba, widow of the late Prince Oomduth-ud-Dowlah Bahadur This lady died on 4th June 1892, and by an instrument, dated 20th December 1886, she endowed certain immoveable and moveable properties for the upkeep of her husband's tomb and for ceremonies connected therewith including ceremonies to be performed for herself after her death The sole question argued in this appeal is whether an endowment for such a purpose is a valid *wakf* under Muhammadan law Other pleas have been abandoned

The objects of the endowment as stated in the deed are " for the " daily, monthly, and annual expenses of the aforesaid mausoleum, such " as lighting, frankincense, flowers, and the salaries of Hafizes (repeaters " of the Koran) and Daroodies (readers of benediction, &c), as well as " for the annual Fatheha (prayers for the dead) ceremonies of the deceased " (may he be in paradise), and after my death for my annual Fatheha " ceremony "

The learned Judge held that none of the above practices were illegal under Muhammadan law He pointed out that, though there were texts disapproving of such practices, there was a distinction between things sinful and things merely disapproved,—that as a matter of fact such practices were not uncommon either in India or in other Muhammadan countries, and that at Medina itself the [211] Prophet's grave was lighted up with a thousand lights and scented wood burnt On these grounds he held that, though there were moral precepts against such practices, they had at the present time become sanctioned by long use and custom To the objection that the endowment was not for any charitable object, he pointed out that, as a matter of fact, alms were given to the poor, and there was an inn for travellers, &c

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We may at once say we do not think the fact that the Muttuvalli has dispensed certain charity in connection with this tomb can at all affect the case. The object of the trust must be judged from the terms of the instrument, and there is not a word in Exhibit A to indicate any charitable purpose, or purpose for the benefit of mankind. The objects indicated are of a religious character. (See *Pathukutti* v. *Avathalakutti* (1) and *Fatmabibi* v. *The Advocate-General of Bombay* (2)).

Admitting that the practices referred to by the learned Judge are not uncommon, and may have become to a certain extent sanctioned by usage, we must point out that the evidence on record fails to show that the expenses for such observances either at Medina or elsewhere come from endowments of the nature of *wakf*. There is nothing to show that the expenses are not paid for by the contributions of the faithful or by the voluntary offerings of the families of those who desire to commemorate their deceased ancestors.

It is urged by the learned counsel that the object of this endowment though in a sense religious is not *for the advancement of religion*, and that unless it is intended to benefit mankind by the advancement of religion, it is not a valid *wakf*. It is pointed out that McNaghten, Chapter X, defines an endowment as the appropriation of property to the service of God when the right of the appropriator becomes divested and the profits of the property so appropriated are devoted to the benefit of mankind, and in the appendix to that work we are referred to two decisions—the first of the Bengal Sudr Adawlat of 6th December 1798, in which it was held that *wakf* implies the relinquishing the proprietary right in any article of property and consecrating it to the service of God that it may be of benefit to man, *Moohummud Sadik* v. *Moohummud Ali* (3); the other a decision of 21st February 1857 (*Syed Khodabundha Khan* [**212**] v. *Musst. Oomutul Fatima* (4)), in which it was held that inasmuch as *wakf* implied consecration for the above purpose, the provisions for reading the Koran at and lighting the tomb of a testator did not create a valid *wakf* (McNaghten App. to Madras re-print, 423)

In Baillie's Muhammadan law, Chapter III, regarding the proper objects of appropriation, we find (page 576, 2nd edition) that the appropriation of an estate for those who may read at a tomb is not regarded as valid.

A great many cases were quoted to show the nature of *wakf*, but none of them bear directly upon the present point. They go to show the nature and requisities of a valid *wakf*, and that whatever be the interposed interests, the appropriation must be for an ultimate charitable trust which will not fail. The question here is whether the ultimate object is for a charitable purpose at all. (Vide *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (5), *Fatmabibi* v. *The Advocate-General of Bombay* (2), *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla* (6), *Nizamudin Gulam* v. *Abdul Gafur* (7), *Abdul Gafur* v. *Nizamudin* (8), *Mahomed Hamidulla Khan* v. *Lotful Huq* (9), *Luchmiput Singh* v. *Amir Alum* (10), *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (11), *Bikani Mia* v. *Shuk Lal Poddar* (12).

(1) 13 M. 66. (2) 6 B. 42.
(3) 1 Sel. Rep. S.D.A. Beng. 17=6 I.D. (O.S.) 17.
(4) S.D.A. Beng. (1857), 235. (5) 10 B.H.C.R. 7. (6) 11 B. 441.
(7) 13 B. 264. (8) 17 B. 1. (9) 6 C. 744, (748).
(10) 9 C. 176. (11) 17 C. 498. (12) 20 M. 116.

In *Luchmiput Singh* v *Amir Alum* (1), the deed directed that the manager should in the first place pay certain debts and afterwards apply the property for the expenses of the musjid and the tomb of the holy personages of the settler's family, the servants of a certain Asthana, and for performing *urs* and *fatheha* at the tomb, as well as for the maintenance of the settler's grandsons and their male issue The Subordinate Judge (a Muhammadan gentleman) held that the endowment was valid, but the only question raised in appeal was whether the provisions for the payment of debts and maintenance invalidated the *wakf* The question now in issue was not discussed

Similarly no question appears to have arisen regarding the validity of a similar endowment in *Delroos Banoo Begum* v *Nawab Syud Ashgur Ally Khan* (2), but in that case the *fathehas* to be [**213**] performed were those of Mahomed and the twelve Imams, and the expenses of the first ten days of the mohurrum, &c. The ceremonies there to be performed were at the tomb of the saints and not at the settler's own tomb In that case the decision in *Syed Khodabundha Khan* v *Musst Oomutul Fatima* (3) that a provision for the lighting of the testator's own tomb and reading of the Koran was invalid was referred to

It was urged that in the construction of a deed of *wakf* the words " charitable " and " religious " must be taken in the sense in which they are understood in Muhammadan law, and we were referred to the judgment of Mr Justice Ameer Ali in *Meer Mahomed Israi Khan* v *Sashti Churn Ghose* (4) In that case, however, the question was whether a provision for the settler's children and kindred was a charitable and religious act, and the learned Judge held that according to the Muhammadan law it was

The result therefore of an investigation of the authorities seems to be that endowments purely for purposes like the present seem to be against the principles of Muhammadan law, and that in such cases when *wakfnamahs* for such purposes have been upheld, the dedication has had relation to the tombs of saints only and has been intermixed with charitable purposes either for the poor or for the settler's own kindred

In the absence of any express authority showing that a dedication for ceremonies at a private tomb—and for that purpose only—is valid under Muhammadan law, we do not think we ought to uphold the deed It creates a perpetuity of the most useless description which would certainly be invalid under English law The observance of these ceremonies may be considered by the Muhammadans as a pious duty, but it is certainly not one which seems to fall within any definition of a charitable duty or use These observances can lead to no public advantage, even if they can colace the family of the lady herself. The case bears a close analogy to one in which a Roman Catholic has devised property for masses for the dead, which has been held to be invalid in India on grounds of public policy irrespective of any territorial law, *Colgan* v *Administrator-General of Madras* (5). A similar bequest in a Chinese will has also been held to be invalid in an appeal to the Privy Council from the Supreme Court of the [**214**] Straits Settlements, *Yeap Cheah Neo* v *Ong Cheng Neo* (6) Had it been shown that such perpetuities were recognized as valid under Muhammadan law, we should have felt constrained to upheld the deed; but in the absence of such proof, we think the general rule of public policy should prevail

(1) 9 C 176 (2) 15 B L R 167. (3) S.D A. Beng (1857) 235
(4) 19 C. 412 (5) 15 M. 424 (446) (6) L.R. 6 P C 381

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We must reverse the decree of the learned Judge and direct that a decree be passed in plaintiff's favour as prayed. As the point is a new one, we shall make no order as to costs.

Ramanujachariar, attorney for appellant.

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18 M. 214 (F.B.)=5 M.L.J. 39.

APPELLATE CIVIL.—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PICHUVAYYANGAR (*Defendant No.* 1), *Petitioner v.* SESHAYYANGAR (*Plaintiff*), *Respondent.**

[15th September, 1892, 23rd November, 1893 and 14th December, 1894.]

Civil Procedure Code—Act XIV of 1882, *Section* 206 *Amendment of decree—Power of Court of First Instance after appeal*

In a suit for land with mesne profits the District Munsif delivered judgment for the plaintiff and recorded therein a finding that he was entitled to mesne profits as from a certain date, it having previously been arranged that the amount, if any, awarded for mesne profits should be determined in execution. In the decree no mention was made of the date from which the mesne profits were to be calculated, but it was stated merely that the amount was to be determined in execution The case went on appeal before the District Judge, who modified the decree in certain particulars unconnected with mesne profits. With a view to execution the plaintiff applied to the Court of First Instance to bring the decree into conformity with the judgment. The Court having made an order accordingly, it was objected in the High Court on revision that the order was made without jurisdiction.

Held, that the jurisdiction of the Court of First Instance to amend the decree under Section 206 was ousted by the confirmation of his decree on appeal

[**F.**, 22 M. 293 (294), P.L.R (1900) 528; **Appr.**, 4 M.L.T. 341; **R.**, 32 M 416=2 Ind. Cas. 802=19 M.L.J 388 (392)=6 M.L.T 135; 6 C.L.J 542; 9 C.W.N 605 (607); 10 Ind Cas. 96 (97); **Expl.**, 10 M.L.J 216]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the order of S Dorasami Ayyangar, District Munsif of Valangiman, dated 28th December 1889, and made on civil miscellaneous petition No. 1037 of 1889.

In the last-mentioned petition the plaintiff in original suit No. 137 of 1886, on the file of the District Munsif, applied under Civil [215] Procedure Code, Section 206, for the amendment of the decree in that suit by bringing it into conformity with the judgment. In the suit above referred to the plaintiff sought to recover his half share in the property of his family together with mesne profits, and in its judgment the Court recorded that the plaintiff was entitled, *inter alia* to recover mesne profits from the month of August 1885; but there was no declaration with reference to this matter inserted in the decree, which provided merely that the amount to be paid to the plaintiff on account of mesne profits should be ascertained in execution An appeal was preferred against this decree which was modified by the District Court in regard to certain particulars not relating to the mesne profits. On the plaintiff proceeding to execution in respect of mesne profits, he was met with the objection that the decree was too vague to be executed by reason of the omission to fix the period for which the plaintiff was entitled to recover mesne profits. He accordingly

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* Civil Revision Petition No. 364 of 1891.

preferred his petition for amendment above referred to, and the District Munsif passed an order as prayed by him

Defendant No 1 preferred this petition under Civil Procedure Code, Section 622

1894 Dec. 14. — Full Bench. — 18 M. 214 (F.B.) = 5 M. L. J. 39.

Subramanya Ayyar, for petitioner.

Sadagopachariar, for respondent

This petition first came on for hearing on the 15th September 1892 before MUTTUSAMI AYYAR and WILKINSON JJ , when the Court made the following

ORDER OF REFERENCE TO FULL BENCH

The decision in *Sundara* v *Subbanna* (1) was dissented from in *Muhammad Sulaiman Khan* v *Muhammad Yar Khan* (2), and in *Chathappan* v *Pydel* (3), the learned Judges said that if it had been necessary to decide the question, they would have referred the matter to the Full Court The final decree in the present case was the decree of the Appellate Court, and the only Court which had jurisdiction to amend that decree was the Court of the District Judge —(See *Manavikraman* v *Unniappan* (4) and cases quoted there)

We therefore refer the following question to the Full Bench — Whether the jurisdiction of the District Munsif to amend the decree under Section 206 was ousted by the confirmation of his decree by the District Court on appeal

[216] This petition came on for hearing on the 23rd November 1893 before the Full Bench

Mahadeva Ayyar, for petitioner.

Rajagopalachariar, for respondent

Reference was made in the argument to Civil Procedure Code, Sections 230, 235, 545, 579, 582, 587, 610; Limitation Act, Schedule II, Article 176, *Krishto Kinkur Roy* v *Rajah Burrodacaunt Roy* (5), *Noor Ali Chowdhuri* v *Koni Meah* (6), and *Daulat and Jagjivan* v *Bhukandas Manekchand* (7), as well as to the cases mentioned in the order of reference

JUDGMENT OF THE FULL BENCH

We are of opinion that when there has been an appeal against the decree of the District Munsif and a decree has been passed thereon, the District Munsif has no longer any power to amend his decree

We therefore answer the question in the affirmative

This petition coming on for final disposal before MUTTUSAMI AYYAR and SHEPHARD, JJ , the Court delivered the following

JUDGMENT (FINAL)

Following the ruling of the Full Bench we dismiss the petition for amendment and cancel the amendment made with reference to it

The petitioner is entitled to his costs

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(1) 9 M 354 (2) 11 A 267 (3) 15 M 403 (4) 15 M 170
(5) 14 M I A. 465 (490). (6) 13 C 13 (7) 11 B 172.

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DEC. 20.

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18 M. 216.

18 M. 216.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATA NARASIMHA NAIDU (*Plaintiff*), *Appellant v.* RAMASAMI AND OTHERS (*Defendants*), *Respondents.** [13th July, 1893 and 10th, 16th July and 20th December, 1894.]

Rent Recovery Act (Madras)—Act VIII of 1865, Sections 9 and 11—Enforceable terms of patta—Established rates of rent.

The Zemindar of Vallur sued certain raiyats in his pargana of Gudur to enforce the acceptance of pattas providing, among other conditions, that the raiyats should relinquish their holdings at the end of the term unless fresh pattas were tendered to them, that they should pay half the cost of repairs by a cess proportioned to the wet rate, that if they irrigated dry land they should pay a wet rate to the [217] Zemindar, as well as the water-rate due to Government, that they should not cut crops without permission and should supply grass and vegetables to the Zemindar's servants It appeared that in 1853 the pargana in question was surrendered to Government who restored it subject to the payment of a newly assessed peishcush in 1862, a date when the present defendants were already in occupation of their respective holdings. In the interval, Government collected village rents in money The pargana was not surveyed and a money assessment fixed prior to 1859 The District Judge expunged the conditions in the patta above referred to and held that the Zemindar was entitled to collect by way of rent from the raiyats respectively the quota of the village rents which each raiyat paid in 1861. He found, however, that there was no contract express or implied as to the rent to be paid; and that prior to 1851 the raiyats held their lands under the Zemindar on the sharing system, and that for the first year after the restoration of the pargana the arrangement enforced by Government had remained in force, but that from 1863 to 1870 the sharing system was in force and varam was paid by the raiyats, after which for five years individual money rents were collected, and then there were two leases with money rents each for a period of five years:

Held, (1) that the conditions in the patta above referred to were unenforceable and had been rightly expunged;

(2) that the plaintiff's rights were not limited by the rates of rent paid to Government in 1861, but that the rent should be discharged in kind according to the established rate of varam in the village;

(3) that the plaintiff was entitled to recover from the raiyats half the water-tax payble on the poramboke lands irrigated from the Kistna anicut

[R., 9 Ind Cas 41 (44)=9 M L T 191=(1911) 1 M.W N. 6]

SECOND appeals against the decrees of G. T. Mackenzie, District Judge of Kistna, in appeal suits Nos. 1388 to 1395 of 1890, modifying the decisions of W. E. Hall, Assistant Collector of Kistna, in summary suits Nos. 452 to 459 of 1889.

Suits under Rent Recovery Act by the Zemindar of Vallur against certain tenants on his Zemindari to enforce the acceptance of pattas and execution of muchalkas. The Assistant Collector directed that certain modifications be made in the pattas tendered by the Zemindar. Against this decision the Zemindar and the tenants preferred appeals and memoranda of objections, respectively, with the result that the District Judge modified the decision of the Assistant Collector and declared what should be the terms of the pattas which the Zemindar should impose upon his raiyats. From the pattas actually tendered he directed that certain conditions should be expunged, *viz.*, conditions that the raiyat should relinquish his holding at the end of the term unless a new patta is tendered

* Second Appeals Nos. 449 to 456 of 1892.

to him, (2) that the raiyat should pay half the cost of repairs by a cess proportioned to the wet rates, (3) that the raiyat irrigating dry lands should pay a wet rate to the Zemindar as well as the water-rate due to Government, (4) that the raiyat [218] should not cut crops without the Zemindar's permission and that he should supply grass and vegetables to the Zemindar's servants With regard to the rates of rent the Judge found that there was no implied contract and held that the settlement rates were the proper rates for fasli 1299, to which these suits related He pointed out that in 1853 that portion of the plaintiff's Zemindari in which were situated the lands now in question, *viz*, the village of of Mukkollu, had been given up to Government because it hardly defrayed its peishcush In 1861, the Government, by Government Order, No 1214, dated 18th June, restored the Gudur estate to the Zemindar "as an act of grace and not of right on such peishcush as may be adapted to its improved condition" During the time when the estate was in the hands of Government, a period to which dated the tenancy of the present defendants, the settlement rates were imposed by Government, but it was left in doubt whether this took place before or after 1st January 1859 The District Judge referred to *Palaniappa* v *Roya* (1) as an authority for saying that the Zemindar was entitled, under the re-grant of 1861, to collect the revenue at those assessed rates only

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The plaintiff preferred these second appeals against the decrees of the District Judge

Pattabhirama Ayyar, for appellant.

Parthasradhi Ayyangar and *Seshagiri Ayyar*, for respondents

These second appeals came on for hearing on 13th July 1893, when the Court (MUTTUSAMI AYYAR and DAVIES, JJ) made the following

ORDER

There is no finding as to what are the rates that the Judge considers to be binding The Government Order to which he refers is not in evidence Nor do the judgments of either of the courts below specify the settlement rates The parties were at issue on the question of rates and the appellant is therefore clearly entitled to a finding as to what those rates are There is no decree of the Assistant Collector on record and the decree of the District Judge does not mention any rates Under Section 11 of Madras Act VIII of 1865, the settlement rates prescribed for adoption must have been on a survey made previous to 1st January 1859, as noted by the Judge, but the Judge has not decided this [219] question It does not appear that the plaintiff had an opportunity of showing that what was assigned under the Government Order was not limited to the Government revenue We must therefore ask the Judge to return findings on the following questions —

(1) Whether the lands have been surveyed by Government previous to 1st January 1859, and if so, what money rent was fixed thereon?

(2) If the first issue is found in the negative, what was the nature of the interest assigned under the Government Order of the 18th June 1861?

(3) What are the rates to be inserted in the patta?

(1) 7 M 35

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The Judge finds there was no implied contract, and as this is a question of fact, we must accept the finding.

The Judge also finds that certain conditions in the patta are unreasonable and has expunged them We see no reason to differ from his findings on this point.

The return to the issues specified above will be made within eight weeks from the receipt of this order Each party will be at liberty to adduce fresh evidence. A copy of the Government Order of the 18th June 1861 and the issue paper (if any) should also be forwarded to this Court with the findings. Seven days will be allowed for finding objections after the finding has been posted up in this Court.

In compliance with the above order, the District Judge submitted the following

FINDING.

The Gudur pargana in the Vallur Zemindari is said to have been attached for arrears in 1851 by the Collector of Masulipatam In 1853, the Zemindar surrendered the pargana to Government, but in 1861, Government decided to restore it, and it appears to have been restored in 1862.

The defendants in the present suits have called five witnesses, who say that, when the pargana came under the Collector of Masulipatam in 1851, the villages were surveyed, and that money rents were imposed upon the fields. The Zemindar calls six witnesses, who say that the system followed by the Collector of Masulipatam was to impose a lump sum on each village, and that the raiyats, amongst themselves, classified their lands and arranged what each was to pay, so as to make up the total which the Collector required from each village. Both sides rely upon documents. The raiyats produce the village accounts which show classification of fields and money rents due by individuals. The Zemindar relies upon a village rent lease for a [220] whole village signed by Mr. T D. Lushingtion who was Collector of Masulipatam from 1849 to 1855.

Although I have studied Act VIII of 1865 for the last twenty-four years, I have never been able to find out why the date 1st January 1859 was inserted in Section 11 of that Act or what survey and money assessment in Zemindari tracts, the framers of that section had in mind. I do not know of any survey or any money assessment on fields in any Zemindari estate in the Madras Presidency. I have never met any person who could give any explanation of this section and I can find nothing in the statement of objects and reasons for the Act.

I am disposed to believe the Zemindar's witnesses who say that the Collector of Masulipatam imposed village rents from 1851 to 1861. That would be in accordance with the Revenue Administration which then existed in the Masulipatam district. (*See* page 355 of the *Kistna District Manual.*)

These village rents were fixed by the Collector upon the best estimate he could frame of the capability of the land and for the purposes of this estimate the fields were classified and individual money rents were imposed by the villagers themselves, but, so far as the Collector was concerned, all the raiyats of the village were jointly and severally liable for the whole village rent. I cannot find that this system of village rents with a rough individual adjustment of the burden was a survey and a fixing of money assessment on the fields, within the meaning of Section 11 of the Rent Act.

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I am next directed to find what was the nature of the interest assigned under the Government Order of the 18th June 1861. That order restored the pargana to the Zemindar and the view I take of the matter is as follows —

It may be that Government has the power to increase a raiyat's cist, but, when Government assigns that land revenue to a Zemindar, the Zemindar can collect only the cist which the raiyat was then paying to Government and cannot increase the amount As authority for the proposition, I cited special appeal suit No 15 of 1812 in which the Sudder Court reinstated a raiyat at the rates prevailing before the permanent settlement, and *Palaniappa* v *Raya* (1) where Turner, C J, and Hutchins, J, held that Section 11 of the Rent Act does not enable a landlord to collect more It appears to me that these two decisions have conferred this right upon the raiyats who hold under Government in the Madras Presidency It appears to me that when the Zemindar of Vallur surrendered this pargana to Government in [221] 1853, the raiyats in that pargana at once became raiyats holding under Government with all their rights It follows that in 1861 Government had not the power to thrust back these raiyats into their former status Government in 1861 might make what stipulations seemed fit about peishcush and such matters, but could not confer upon the Zemindar against the raiyats' powers which the case-law of this Presidency does not permit

This is a large question in this district Except the Palnad taluk, all this district was once held by Zemindars Many of these estates were attached and sold for arrears and bought in by Government, so that now the greater part of the district is directly under the Collector The raiyats in those tracts which once were Zemindari estates are treated in every respect by the Courts as are raiyats in tracts that have always been under Government It would astonish these raiyats to be told that Government could now hand them back again to the old pensioned Zemindars who live in their ruined forts in the Kistna district and that these Zemindars could then enhance the rents of all raiyats who could not prove occupation from 1801 But this consequence will follow if the High Court now decides that Government had power to reduce defendants to their former status Most of Zemindaris in this district were sold in 1846 That is only forty-seven years ago If the eight years from 1853 to 1861 will not protect the defendants, the forty-seven years from 1846 to 1893 will not protect the mass of raiyats in the Kistna district

Whether this view be unsound or not, the presumption is that the grant in 1861 was a fresh grant It will be remembered how the Privy Council held that there was a fresh grant of Nuzvid in 1802 *Raja Venkata Rao* v *Court of Wards* (2) The burden is upon the Zemindar to show that the grant purported to restore to him the rights he had over his raiyats in 1853 This the Zemindar has not shown All he has produced is Board's Proceedings, No 1878, dated 20th March 1862, which cites a sentence from the Government Order, proposes certain settlement rates as a basis for the calculation of the new peishcush and recommends Government to distinctly provide that the Zemindar shall settle with the raiyats at the rates assumed in this calculation It is not known what orders were passed by the Government upon this recommendation

(1) 7 M 325. (2) 2 M 128

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I therefore find that the grant of this pargana in 1861 was a fresh grant and that the Zemindar cannot levy from defendants more than the rates which they were paying to Government at the time of the grant.

[222] The question next arises what these rates were. It is admitted that before 1851 the defendants held under the Zemindar on the sharing system. Their second witness, the karnam, has extracted from the accounts which were the basis of the Collector's village rents a statement showing what defendants then paid and those are the rates which they now claim. The Zemindar made no change in the first year after he got back the pargana, then for seven years the sharing system was in force, then for five years individual money rents, and for two periods of five years there were leases with money rents, and in fasli 1296 and subsequently there have been disputes and the defendants have refused to pay more than what they called "settlement rates," that is, the rates which they paid when under Government. I am of opinion that the subsequent payments do not constitute an implied contract to pay higher rates and that defendants are entitled to pattas at the rates which they paid to Government.

These rates are as follows, as detailed in the statement prepared by the karnam:—

			ACRES.	RS.	A.	P.
449.	Chandana Ramaswami	..	2-33	5	7	10
450.	Sammeta Sami	...	18-62	43	11	1
451.	Ambati Venkatasami	...	20-12	17	4	6
452.	Chandana Venkatasami	...	4-98	12	6	6
453.	Sammeta Raghavayya	..	5-46	29	6	0
454.	Chandana Venkataratnam	.	16- 9	48	0	9
455.	Sammeta Subbanna	...	20-16	21	7	4
456.	Chandana Ratnam	...	2-36	13	9	8

The High Court calls for the issue paper. The only issue paper is the remarks printed at the opening of the Assistant Collector's judgment.

This finding will be submitted to the High Court.

These second appeals next came on for hearing on 10th and 16th July 1894, when the Court made the following order.

The parties were represented as before.

ORDER.

Appellant is Zemindar of Vallur in the District of Kistna and respondents are raiyats cultivating lands in the pargana of Gudur which is part of the Zemindari. For fasli 1299 the former tendered pattas which the latter refused to accept. Thereupon the Zemindar brought the suits from which these second appeals arise to enforce acceptance of the pattas under Section 9 of Act VIII of 1865. But the Judge found on appeal that they were not such as the tenants were bound to accept and that the latter properly objected to certain conditions and rates of [223] rent embodied in the pattas. The Judge then proceeded under Section 10 of the Act to decide what pattas ought to be offered and in so doing declared, *inter alia*, that respondents are liable to pay only those rates of rent which they paid to Government at the time when the pargana was restored to the Zemindar, *viz.*, 1862. It is urged on appellant's behalf that this declaration is contrary to the provisions of Section 11 of Act VIII of 1865.

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It was admitted before the Judge that prior to 1851 the raiyats held their lands under the Zemindar on the sharing system. In 1851 the Collector of Masulipatam attached the pargana for arrears of peishcush, in 1853 the Zemindar surrendered the pargana to the Government, in 1861 the Government decided to restore it, and in 1862 it actually restored the pargana to the Zemindar subject to the payment of a peishcush which was fixed with reference to its then improved condition. During the period when the pargana was under the Government, village rents were levied according to the Revenue Administration then in vogue in the District of Masulipatam. The village rents were money rents. The Collector fixed the rent due on each village upon the best estimate which he formed of the capability of the lands situated therein, and held the raiyats jointly and severally responsible for the entire amount charged on the village. The raiyats without his intervention apportioned the rent so fixed upon their individual holdings and recognised this rough individual adjustment of the burden imposed by the Collector as regulating the quota payable on each holding. It is the quota each raiyat paid at the time of the re-grant that is now claimed by the respondents and recognised by the Judge as the rent payable by them to appellant. After the pargana was restored in 1861, the Zemindar made no change for the first year. For the next seven years the sharing system was in force and varam was paid by respondents. Then for five years individual money rents were collected. Afterwards there were two leases with money rents, each for a period of five years. Upon these facts the Judge found with reference to the provisions of Section 11 of the Rent Act, that there was no contract express or implied as to the rent to be paid. He also found that the pargana was not surveyed and a money assessment fixed upon the fields prior to 1859 as contemplated in that section. Upon these findings, which we must accept on second appeal, it is clear that Rules I and II contained in Section 11 of Act VIII of 1865 do not [224] apply. Instead of then proceeding to apply rule III, embodied in Section 11, the Judge held that the rate of money rent paid by respondents to Government at the time of re-grant is the proper rent now payable to appellant by respondents. In his judgment, however, he specified only the name of each raiyat, the aggregate extent of his holding and the amount of rent paid by him to the Government instead of the rate of rent and the description of land comprised in each holding and its extent. We are unable to concur in the opinion that the rent paid in 1861 to the Government is all that is payable to appellant. It must be observed that even on the view that the grant of 1861 was a new grant, it was the grant of a permanently-settled estate in the pargana and the incidents attaching to such grant have to be determined with reference to the provisions of Regulation XXV of 1802, as explained by Regulation IV of 1822 and to the terms of the grant. In the cases before us the grant or the Government Order No. 1214, dated 18th June 1861, under which it was made, is not in evidence. Subsequently to the date of the grant, the rents levied for more than twenty years were, as already shown, not limited to the money rents paid to the Government in 1861. There is no proof nor finding that the grant expressly limited the rent which the grantee was entitled to collect. In support of his opinion, however, the Judge relies on two decisions as constituting the case law of this Presidency on the subject. *Palaniappa* v. *Raya* (1) was a case decided between a raiyat and an Inamdar whose inam did not consist

(1) 7 M. 325

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in the grant of land but in the assignment of one-third of the revenue due thereon and in an arrangement made in 1868 by the Collector with the Inamdar to the effect that the remaining two-thirds, which the raiyat paid direct to Government till then as quit-rent should thenceforward be collected by the Inamdar and paid by him to Government. The ground of decision was that the limited character of the inam tenure showed that the only patta which the Inamdar was entitled to grant was a patta prescribing payment of the revenue. In the cases before us, the appellant is the grantee of a permanently-settled estate who is entitled to waste land and to lands relinquished by raiyats in the pargana and who has an interest in occupied land as landholder though only subject to the prior rights already vested in the tenants. The raiyats [225] in occupation at the date of the grant in 1861 may have rights of occupancy as against appellant, but we see no reason to hold that the rent actually paid then was rent fixed in perpetuity. The Judge himself observed that it might have been competent to Government to revise it. Even assuming that assessment paid in 1861 constituted the assets upon which peishcush was fixed, we think that by reason of the permanent settlement the relation of land-lord and tenant which existed between the Government and the raiyats, with such incidents as the law and the conditions of the grant attached to it passed to the Zemindar.

The other decision relied on by the Judge is that in Sadar Adaulat No. 15 of 1812. In that case one Ramasami Ayyan holding lands under a mirasi tenure of which he had been deprived, sued the Zemindar of Ponneri to recover possession of those lands and damages sustained in consequence of his dispossession by the Zemindar, and further to compel the latter to grant him a patta under Section 9 of Regulation XXX of 1802. The Zilla Court, the Provincial Court and the Court of Sadar Adaulat upheld the claim to recover possession of the lands and damages and to obtain a patta. As regards the rent for which a patta should be tendered, the Zilla Court and the Provincial Court held that it should be a money rent at the annual fixed beriz of star pagodas 60-6-16 which amount was assessed on the land in question and paid by the raiyat to the Government in the year Raudri (when the permanent settlement was made); but the Court of Sadar Adaulat set aside this decision observing that there was not a tittle of evidence to show that a right to a patta with money rent paid to Government in the year Raudri existed on the part of Ramaswami Ayyar, that the evidence showed that the rent was not fixed, but was derived from a division of the produce which must fluctuate with the seasons and the commutation price, and that Ramaswami Ayyan was only entitled to receive a patta defining the rate of division of the produce which rate was as prescribed by Section 9, Regulation XXX of 1802, to be determined according to the rates prevailing in the year preceding the assessment of the permanent zamma on those lands. This decision does not appear to us to support the proposition put forward by the Judge, that the beriz paid to the Government in the year in which the permanent settlement was made is the rent properly payable by the raiyats to the Zemindar. On the other hand it appears to be an authority against such proposition. The [226] reference to Section 9 of Regulation XXX of 1802 was a reference to the rent law which then prescribed the mode in which the rates of assessment in money or of division in kind were to be determined.

Thus, there being no case-law, as stated by the Judge, the decision should be that the rent be discharged in kind according to the varam.

The appellant makes that claim before us and it is in accordance with the *proviso* of rule III embodied in Section 11 of Act VIII of 1865

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Before we finally dispose of these appeals, we must ask the Judge to ascertain what is the established rate of varam in the village On this point additional evidence can be admitted

The finding is to be submitted in a month from date of receipt of this order in the Lower Appellate Court, when seven days will be allowed for filing objections after the finding has been posted up in this Court

In compliance with the above order the District Judge submitted his finding

These second appeals came on for final disposal when the Court delivered the following

JUDGMENT

Though the Judge concludes his finding with the remark that there "is no established rate of varam in the village," it is clear from his return on the finding called for that the rate of varam prevailing in the village was 460 seers to the raiyats and 440 to the Zemindar out of every 900 seers, the raiyat's 460 including 57 seers, costs of cultivation, and the Zemindar's 440 including 37 seers for karnam's and other's fees As regards water-tax on poramboke lands irrigated from the anicut, the Zemindar is entitled to recover a moiety from the raiyats The patta will be amended as indicated in our former order and in accordance with the above finding.

Each party will bear his own costs of this appeal

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18 M. 227.

[227] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

CHAKRAPANI (*Counter-Petitioner No* 1), *Petitioner* v VARAHALAMMA (*Petitioner*), *Respondent* * [7th August, 1894]

Scheduled Districts Act—Act XIV of 1874—*Guardian and Wards Act—Act VIII of* 1890, *Section* 1, *Clause* (2)—*Scheduled District—Agency Rules*

A petition of appeal was presented to the Governor in Council against an *ex-parte* order made under the Guardian and Wards Act, 1890, by the Agent to the Governor in the scheduled district of Vizagapatam, the ground of the petition being that the petitioner's vakil had not been heard The appeal was referred to the High Court

Held, (1) that the Guardian and Wards Act, 1890, is in force in the Agency Tracts, although no notification to that effect had been made under the Scheduled Districts Act,

(2) that the High Court had jurisdiction to set aside the *ex-parte* order [N.F, 31 M 362=18 M L J 252=3 M L T 264, Appr., 27 M 109=13 M L J 151 (152)]

PETITION referred to the High Court under rule XXXI made under Act XXIV of 1839

The Agent to the Governor in the Vizagapatam district, purporting to act under Guardian and Wards Act, 1890, appointed a woman to be a guardian of the person and property of an infant The natural father of

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* Civil Miscellaneous Petition No 565 of 1893.

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the infant, in whose possession the property was, objected to the appointment on various grounds, but he was ill and did not appear when the appointment was made. A subsequent application to have the order of appointment set aside as having been made *ex parte* was-rejected. The natural father appealed to the Governor in Council complaining that his pleader had not been heard and the petition of appeal was referred to the High Court as above.

The Agency Tract of Vizagapatam is a district scheduled under Act XIV of 1874, and no notification had been under that Act extending the operation of the Guardian and Wards Act, 1890, to that district.

Mr. *J. G. Kernan*, for petitioner.

Seshagiri Ayyar, for respondent.

JUDGMENT.

It is urged on behalf of petitioner that the Guardian and Wards Act is not applicable to the scheduled district [**228**] in the absence of a notification under Section 5 of Act XIV of 1874 We find, however, that the Act VIII of 1890 extends to the whole of British India (see Section 1, Clause 2). Therefore no notification under Act XIV of 1874 is necessary.

It is urged, on the other hand, on behalf of counter-petitioner, that, under Act VIII of 1890, Section 47, the appeal lies directly to this Court, and that, therefore, the petition was wrongly presented to Government in the first instance; but we observe that the order appealed from is not that of a 'District Court' but of the Governor's Agent, and therefore we derive our jurisdiction not directly from Act VIII of 1890, but by the reference made by Government under Rule XXXI of the Agency Rules passed under Act XXIV of 1839. We are also not prepared to attach weight to the objection that it was not competent to Government to refer to us a petition such as the present, which is an application to set aside an *ex parte* order as to which no appeal is provided in the Act. Section 48 of the Act allows us to interfere under Section 622 of the Code of Civil Procedure and we observe that, in the present case, the order in question was passed without hearing the petitioner's vakil. The Vakil should have been heard before disposing of the petition.

We set aside the order and remand the case for disposal afresh in accordance with law after hearing the petitioner's vakil.

The costs hitherto incurred will abide and follow the result.

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18 M. 228=1 Weir 847.

APPELLATE CRIMINAL.

Before Sir Arthur J H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* ANDI.*

[22nd November and 5th December, 1894.]

Railways Act—Act IX *of* 1890, *Section* 125—*Permitting a cattle to stray upon a railway—Discretion of Magistrate.*

When the owner of cattle which have been allowed to stray upon a railway, is prosecuted under Railway Act, 1890, Section 125 (1), the Magistrate is bound to ascertain whether the person charged was himself guilty.

[F., 34 A. 91 (92)=8 A.L.J. 1249=12 Cr.L.J 614 (615)=12 Ind Cas 990.]

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* Criminal Revision Case No. 480 of 1894.

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APPELLATE CRIMINAL.

18 M. 228=1 Weir 874.

[229] CASE referred for the orders of the High Court by H. Moberly, Acting District Magistrate of Malabar, under Criminal Procedure Code, Section 438

. The case was stated as follows —

In calendar case No 2063 of 1894, on the file of the Calicut Town Sub-Magistrate, one Mataparambath Andi was prosecuted under Clause (1) of Section 125 of the Indian Railway Act, because his cow trespassed on the Madras Railway, which is provided with fences suitable for the exclusion of cattle Admittedly a cow belonging to the accused did stray on the railway The Sub-Magistrate acquitted the accused on the ground that he had appointed a person to be in charge of the cow, and that it was owing to that person's negligence that the cow strayed on the line

Clause (1) of Section 125 of the Act runs thus —" The owner or " person in charge of any cattle straying on a railway provided with " fences suitable for the exclusion of cattle shall be punished with fine " In the present case a cow strayed on a railway properly fenced, yet nobody was fined I submit that if the railway authorities prosecute the owner, the owner must be fined, no matter whether he had placed anybody in charge of the cattle or not To support this view I would refer to Clause (2) of the same section, which leaves it to the railway authorities to decide whether, in the case of cattle being wilfully driven on any railway, the person in charge or the owner shall be punished

In my opinion Section 125 of the Act leaves nothing to the discretion of the Magistrate If an offence has been committed, the Magistrate must fine the person prosecuted, whether he be the owner or the person in charge of the cattle

The Government Pleader and Public Prosecutor (Mr *Powell*), for the Crown

JUDGMENT

Section 125, Clause (1) of the Railways Act, makes punishable the negligence of the owner or person in charge of any cattle which stray upon the line The section recognizes the obligation of the owner to prevent the cattle from straying, while at the same time it provides that the negligence of the person in charge may be punished There is nothing in the clause to restrict the discretion of the Court in ascertaining upon whom the fault really lies and awarding the punishment accordingly

[230] The second clause of the same section makes punishable wilful acts of driving or knowingly permitting cattle to be upon a railway line, and provides that, at the option of the railway administration, the owner, instead of the person in charge shall be punishable. This provision is of a very penal character, and it removes the discretion as to the person to be held liable to punishment from the Court to the railway authorities No such discretion is given to the railway administration when the straying of the cattle has been through negligence There is nothing to restrict the power and duty of the Magistrate to ascertain in such cases whether the person charged has himself been guilty

In the case referred we are of opinion that the acquittal of the owner was correct.

1894
Nov. 29.

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18 M. 230=1 Weir 813.

18 M. 230=1 Weir 813.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMPRESS *v.* VEERADU.* [29th November, 1894.]

Christian Marriage Act—Act XV of 1872, Sections 3, 68—Unauthorized marriage of a Christian child—Persons professing Christian religion.

The accused who was charged with having committed an offence under Indian Christian Marriage Act, Section 68, was acquitted on its appearing that the Christian whose marriage he purported to solemnize was a child of the age of three years. The child had been baptized and her father was a Christian:

Held, that the child was a person professing the Christian religion within the meaning of Section 3 of the Indian Christian Marriage Act, and that the acquittal was wrong.

CASE of which the records were called for by the High Court in the exercise of its revisional jurisdiction being sessions case No. 22 of 1894 on the file of the Sessions Court of Masulipatam.

The facts of the case and the grounds of the judgment of acquittal were stated by E. C. Rawson, the Sessions Judge, as follows:—

The prisoner is charged under Section 68 of the Indian Christian Marriage Act (Act XV of 1872) with having solemnized a [231] marriage between Jalatati Kabulaya and Nakka Martha (the latter being a Christian), he not being authorized to do so under Section 5 of the Act.

The facts alleged are that the marriage was fixed for the 11th April last, but that the first four prosecution witnesses (who are respectively a catechist, a sub-catechist, a preacher, and an unofficial member of the Lutheran community) protested against it, and it was accordingly put off till next day. On the evening of the 12th, the marriage was performed by the accused. The witnesses give a detailed description of the ceremony.

The fifth prosecution witness, the Rev. Dr. Uhl, of the Lutheran Mission, deposes that he received a report of the marriage and filed a complaint. He also proves that accused has no license to perform marriages.

I do not think it necessary to discuss the prosecution evidence at length, as I am of opinion that, even assuming it to be true, no offence has been committed within the meaning of Section 68 of the Act.

It is admitted that the girl Martha, who was married, is only three years old. Now Section 68 renders penal the unauthorized solemnization of a marriage " between persons one or both of whom is or are a Christian or Christians." And the word " Christian " is defined for the purposes of this Act as meaning a " person professing the Christian religion."

In order, therefore, to convict the accused, it would be necessary to hold that the girl Martha is a " person professing the Christian religion."

It is argued by the Public Prosecutor that there is a general presumption, that the children of Christian parents are also Christians And he relies on the Privy Council case of *Skinner* v. *Orde* (1) wherein it was held that a child born in India, whose father was a European British subject and a Christian, must be presumed to have the father's religion and his corresponding civil and social status. But that was a case

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* Criminal Revision Case No. 398 of 1894.

(1) 14 M.I.A. 309.

1894 Nov. 29. — APPELLATE CRIMINAL. — 18 M. 230 = 1 Weir 813.

in which the question was one of guardianship, and I do not see how the ruling can be applied to the facts of this case The Indian Christian Marriage Act is a special law creating certain special offences in connection with Christians For the purposes of this Act, the Legislature has [232] specially defined what they mean by a Christian They say it is a person who " professes the Christian religion " It is not pretended by the Public Prosecutor, and it would of course be an absurdity so to pretend, that a baby of three years old can " profess " the Christian or any other religion

While I fully admit, therefore, that for ordinary purposes (for instance in questions relating to the girl's civil or social status), the presumption that she was a Christian might be made, I am unable in dealing with a special penal Act, creating a special offence, and containing a special definition, to read anything more into the definition than has been deliberately put there If it be argued that it is not likely that the Legislature intended to exclude a marriage of this sort (which from a Chrsitian point of view is of course more objectionable than that of a grown up woman) from the penal provisions of the Act, I can only say that Judges have power simply to administer the law as it is, and not to introduce things which they may think ought to be the law, into Acts which do not contain them

For the above reasons I am compelled to hold that the evidence for the prosecution does not show that the accused has committed the offence charged, and I, therefore, under Section 289 of the Criminal Procedure Code record a finding of not guilty, and order that the accused be set at liberty

The Government Pleader and Public Prosecutor (Mr *Powell*), for the Crown

The accused was not represented

JUDGMENT

The words " person who professes the Christian religion " as used in Act XV of 1872 mean in our opinion not only adults who profess that religion, but also their children, who are in law presumed to follow their father's religion; and it is in evidence that the child in this case was baptized.

We must set aside the order of acquittal and direct that the case be re-tired

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18 M. 233 (F.B.)

[233] APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J. H Collins, Kt, Chief Justice, Mr Justice Muttusami Ayyar and Mr Justice Parker

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REFERENCE UNDER STAMP ACT, SECTION 46 *

[17th December, 1894]

Stamp Act—Act I of 1879, Section 3, Clause (11), Schedule I, Article 54—Partition-deed-Release

A Hindu executed in favour of his father, as representing the interests of the other members of his family, an instrument by which he relinquished his rights over the general property of the family in consideration of certain lands being

* Referred Case No 10 of 1894

1894 Dec. 17. — Full Bench — 18 M. 233 (F.B.).

allotted to him for life, and certain debts incurred by him being paid. The instrument further provided that the lands allotted to the executant for life should go towards the shares of his sons at any partition effected after his death.

Held, that the instrument was not a deed of partition, but a release and should be stamped accordingly.

Case referred for the opinion of the High Court under Stamp Act, 1879, Section 46, by the Board of Revenue.

The case was stated as follows:—

The document is termed a deed of release and purports to be executed by a son in favour of his father who is treated as representing the interests of himself, another son, and the executant's minor sons. It sets forth that in consideration of certain lands being allotted to the executant for life out of the joint family property, and of certain debts incurred by him being discharged by his father, he relinquishes all claim on the other properties held by the joint family; that he has no power to alienate the said lands allotted to him so as to affect the reversionary right therto; that the relinquishment made by him will not affect his son's right to a share in the family property, but that such right will be subject to a deduction of the value of the life estate allotted to him; and lastly, that on his death the reversionary right in the said estate will be allotted to his sons at any future division.

The first question is whether the document should be charged as deed of release under Article 54, Schedule I of the Stamp Act, or whether it should be charged as a deed of partition under Article 37 of the same schedule. As the document secures to the executant [234] the enjoyment for life of a portion of the joint family property with a reversion to his sons at any subsequent division of the property and does not merely renounce the executant's claim against any or all of the property, the Board is of opinion that the decument must be stamped as a deed of partition.

If the document is to be stamped as a deed of partition, the further question arises whether the stamp duty should be calculated on the value of the entire family property or only on the value of the share assigned to the executant. The Collector of Madras is of opinion that the decision of the Allahabad High Court on this point (*Reference by Board of Revenue, N.W.P., under Act* I *of* 1879 (1)) is at variance with that of the Madras High Court (*Reference under Stamp Act,* Section 46 (2).) This, however, does not appear to be the case. The Allahabad High Court held that the stamp duty on an instrument of partition is chargeable on the value of the entire property to be divided and not on the portion allotted in partition. The Madras High Court merely decided that the stamp duty payable on partition should be apportioned with reference to Section 29 (*e*) of the Stamp Act. The Board presumes that the decision of the Allahabad High Court should be followed in calculating the stamp duty, but desires to receive the ruling of the Madras High Court on this point also.

The Government Pleader and Public Prosecutor (Mr. *Powell*), for the Crown.

Krishnasami Ayyar, for the executant of the deed.

JUDGMENT.

We are of opinion that the deed is not an instrument of partition within the meaning of Section 3, Clause 11 of Stamp Act since it is not a deed by which co-owners agree to divide the property in severalty. It

(1) 2 A. 664. (2) 15 M, 164.

is a deed by which one co-owner renounces his claim for partition against the family property in consideration of a certain income to be enjoyed by him for his life out of certain lands over which he has no power of alienation The case is similar to *Eknath S Gownde* v *Jagannath S Gownde* (1)

We are of opinion, that the deed is a release and should be stamped under Schedule I, Article 54 of the Stamp Act

1894 DEC. 17. — FULL BENCH. — 18 M. 233 (F.B.)

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18 M. 235 (F B)

[235] APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J H Collins, Kt., Chief Justice, Mr Justice Muttusami Ayyar and Mr Justice Parker.

REFERENCE UNDER STAMP ACT, SECTION 46 *

[17th December, 1894]

Stamp Act—Act I *of* 1879, *Section* 51—*Spoiled stamp—Accidental injury to stamp,*

The purchaser at a Court sale presented a stamped paper for the engrossment of the sale certificate The stamp was inadvertently punched by some officer of the Court, but the paper was used as intended, and delivered to the purchaser. Subsequently a Deputy Collector, treating the certificate as unstamped, levied the stamp duty together with a penalty

Held, that the document was duly stamped, and that the amount levied should be refunded

CASE referred by the Board of Revenue for the decision of the High Court under Stamp Act, 1879, Section 46

The case was stated as follows.—

On the 24th July 1893, Mr R Fischer of Madura purchased certain immoveable property sold in execution of the decree in original suit No 6– of 1892 of the Subordinate Court, Madura (East), and on 30th October 1893 he presented (through his pleader) a stamp paper of the value of Rs. 45 to that Court for engrossing the sale certificate thereon The stamp was inadvertently punched by some officer of the Court, the instrument was afterwards drawn up on it and delivered to Mr Fischer The Deputy Collector of Madura, under the orders of the then Collector, treating the stamp as a spoiled one, ruled that the certificate of sale was not duly stamped and levied a stamp duty of Rs 45 and a penalty of Rs 5 Against this order Mr. Fischer now appeals to the Board

The present Collector of Madura contends that there is nothing in the Stamp Act or the rules passed thereunder, which invalidates a stamp paper with a hole in it, and that it is nowhere laid down that cancellation is conclusively proved by punching He holds that the stamp in the present case was not a cancelled one, as it was punched by mistake, and that the document was duly stamped, and he considers that the penalty and the duty levied from Mr Fischer should be refunded to him

[236] The Board agrees with the Collector and is prepared to remit the penalty of Rs 5, but has no power to revise the Deputy Collector's decision so far as the stamp duty is concerned The case is therefore referred for the orders of the High Court After the decision of the High Court is received, the Board will proceed to dispose of the case conformably with that decision

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* Referred Case No. 11 of 1894

(1) 9 B 417

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Counsel were not instructed.

JUDGMENT.

The reason for making an allowance for a spoiled stamp under Section 51 is that the stamp has become unfit for use, but in this case the stamp was not rendered unfit for use by punching, for the Court itself engrossed upon the paper the deed for which the stamped paper was presented. We are of opinion that the Deputy Collector was in error in treating the document as unstamped.

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18 M. 236 (F.B.)=5 M.L.J. 114.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice. Shephard, Mr. Justice Best, and Mr. Justice Subramanya Ayyar.

RAJAM CHETTI (*Plaintiff*), *Appellant v.* SESHAYYA AND OTHERS (*Defendants*), *Respondents.**
[22nd and 27th March, 1895.]

High Court, powers of, make rules as to Small Cause Court—24 and 25 Vict. cap. 104, *Section* 15—*Civil Procedure Code—Act XIV of* 1882, *Section* 652—*Presidency Small Cause Courts Act—Act* XV *of* 1882, *Sections* 6, 18, *Clauses* (*a*) *and* (*c*), 33.

In 1885 the High Court made a rule under Presidency Small Cause Courts Act, Section 33, whereby it was declared that the granting leave to sue a defendant out of the jurisdiction under Section 18, Clauses (*a*) and (*c*) of that Act, was a non-judicial or *quasi*-judicial act within the meaning of that section and might be done by the Registrar of the Court of Small Causes, Madras:

Held, that the rule was *ultra vires* and void.

[**F.**, 34 C 619 (625)=5 C.L.J. 405 (411)=11 C.W.N. 649 (653)=2 M.L.T. 406; **R.**, 19 M. 90 (93); 11 C.W.N. 663 (665).]

CASE referred for the opinion of the High Court by R. B. Michell, Chief Judge of the Small Cause Court, Madras, under Civil Procedure Code, Section 617, and Presidency Small Cause Courts Act, Section 69.

Before the hearing of the case out of which this reference arose, the Chief Judge and the other Judges of the Small Cause Court had, in a similar case, delivered judgment as follows:—

[**237**] "This is an application to the Full Court preferred under Section 37 of the Presidency Small Cause Courts Act, 1882, against the order of the second Judge of this Court in suit No. 11239 of 1894, dismissing the suit on the ground that the Registrar, by whom acting, as he understood that he had authority to act, under Section 18, sub-Section (*a*) of that Act, leave to institute the suit had been granted, had no legal power to grant such leave. By a rule passed by the High Court of Judicature of Madras, dated 23rd November 1885, and published in the *Fort St. George Gazette* of 2nd December 1885, the High Court declared that certain acts were non-judicial or *quasi*-judicial acts within the meaning of that section, which might be done by the Registrar of the Court of Small Causes, Madras.

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* Referred Case No. 32 of 1894.

1895 March 27.

Full Bench.

18 M. 236 (F.B.) = 5 M.L.J. 115.

Among the acts so declared to be non-judicial or *quasi*-judicial was the following:—

(1) Granting leave to sue defendant out of the jurisdiction under Section 18, Clauses (*a*) and (*c*) of the Presidency Small Cause Courts Act, 1882.

Mr. Robert Grant, who argued the case for the applicant (the plaintiff in the suit), conceded that under Section 33 of the Presidency Small Cause Courts Act, 1882, under which the rule above-mentioned purported to be passed, the acts which the High Court was empowered to declare to be non-judicial or *quasi*-judicial acts within the meaning of that section were limited to acts provided for by the Code of Civil Procedure, as applied by the Presidency Small Cause Courts Act, 1882, and did not include acts provided for by the Presidency Small Cause Courts Act, but he contended that, under Section 652 of the Code of Civil Procedure and under Section 15 of the 24th and 25 Vict., cap. 104, read with Section 6 of the Presidency Small Cause Courts Act, 1882, the High Court had powers which comprehended, *inter alia*, a power to declare what acts should be deemed non-judicial or extra-judicial and exercisable by the Registrar of the Court of Small Causes of Madras. The learned counsel also referred to the rules of the High Court of Judicature, Madras, Original Side, 1891, published in the *Fort St. George Gazette* of 16th June 1891 by Appendix (i) whereto, relating to "non-judicial or *quasi*-judicial powers possessed by the Registrar," the Registrar of the High Court on the Original Side has been empowered, except where he shall see fit to direct the matter to be laid before a Judge, to [238] pass an order allowing a suit to be filed in the High Court—which appears to involve a power to grant leave to sue in the High Court in suits (not being suits for immoveable property) where, though the defendant does not dwell or carry on business or personally work for gain within the local limits of the ordinary original jurisdiction of the High Court, the cause of action has arisen in part within those limits. And he contended that, inasmuch as it is under Clause 12 of the Letters Patent, 1865, that the High Court, in its ordinary original jurisdiction (in suits other than suits for immoveable property) has power to grant leave to sue defendants in such cases and not under Section 17 of the Code (Act XIV of 1882), which does not apply to the High Court on its Original Side, and inasmuch as Section 637 of the Code like Section 33 of the Small Cause Courts Act, does not extend to non-judicial or *quasi*-judicial acts other than those provided for by the Code, it could not have been by virtue of Section 637 of the Code, but must have been by virtue of Section 652 of the Code or by virtue of Section 15 of 24 and 25 Vict., cap. 104, or by virtue of some other (if any) law empowering it in that behalf, that the High Court declared that such granting of leave to sue was a non-judicial or *quasi*-judicial act which the Registrar of that Court should have power to perform; and that if the High Court could thus under one or other or all of those laws, other than Section 637 of the Code make such a declaration, it had also the power, under one or other or all of those same laws and Section 6 of the Presidency Small Cause Courts Act, 1882, and independently of Section 33 of that Act, to make a similar declaration with reference to the Registrar of the Court of Small Causes of Madras. So far as this argument relates to Section 652 of the Code, it is to be observed that at the time when the rule of the High Court of 23rd November 1885 under consideration was passed, Section 652 did not extend to the Presidency Small Cause Courts, and it was not until the amending Act X of 1888 was passed that that Section 652 was extended

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to those Courts. As Section 652 relates only to action to be taken by a High Court, the exclusion of that section from the original second schedule to the Presidency Small Cause Courts Act, 1882, must, we think, be taken to have meant that the High Court could not take such action in respect to the Presidency Courts of Small Causes. There still remain, however, the powers under Section 15 of the Statute 24 and 85 Vict., cap. 104. But [239] assuming, for the sake of argument, that the High Court had power, if not under Section 652 of the Code, yet under Section 15 of the 24 and 25 Vict., cap. 104, or under some other law thereunto enabling it, to pass a rule or order declaring the granting of leave to sue defendants out of the jurisdiction under Section 18, Clauses (*a*) and (*c*) of the Presidency Small Cause Courts Act, 1882, to be a non-judicial or *quasi*-judicial act performable by the Registrar of this Court, it appears to us that we are precluded by the terms of the rule of the High Court now under consideration, from holding that the High Court did in fact make the declaration in question as to such granting of leave under any other law than Section 33 of the Presidency Small Cause Courts Act, 1882. That rule is as follows:—"Under Section 33 of the Presidency Small Cause Courts Act, 1882, the "High Court declares the following to be non-judicial or *quasi*-judicial acts "within the meaning of that section which may be done by the Registrar "of the Court of Small Causes, Madras.":—Then follow the acts so declared non-judicial or *quasi*-judicial acts of which the one now in question is the first mentioned. On the other hand, the order of the High Court (in the rules above referred to passed and published in 1891) passing the rule empowering the Registrar of the High Court on the Original Side to pass an order allowing a suit to be filed in the High Court, is expressed to be made "under Sections 637 and 652 of the Code of Civil Procedure (Act "XIV of 1882) and an other powers thereunto enabling." From the fact that, on that occasion, in addition to Section 637, Section 652 and all other powers thereunto enabling, are mentioned, in declaring under what authority the rule was made, we think that we ought, upon sound principles of construction, to conclude that if the rule now in question (under which the High Court declared the granting of leave to sue under Section 18 of the Presidency Small Cause Courts Act, 1882, sub-Sections (*a*) and (*c*), to be a non-judicial or *quasi*-judicial act, performable by the Registrar of that Court) was intended to be passed, and was passed, not under Section 33 of the Presidency Small Cause Courts Act, 1882, but under Section 652 of the Code or under any other power thereunto enabling, the High Court would, in declaring under what authority this rule was passed, have mentioned in addition to Section 33 of the Presidency Small Cause Courts Act, 1882, Section 652 of the Code, and all other powers thereunto enabling, and that, not having done so, the High Court intended [240] to pass, and did pass, this rule, only and solely as under Section 33 of the Presidency Small Cause Courts Act, 1882.

In one of the three other and similar applications, Nos. 48 of 1894, 55 of 1894, 56 of 1894, which were heard together with this application (*viz.*, application No. 55 of 1894 against the decree of the third Judge in suit No. 20930 of 1893, dismissing the suit on the ground that the Registrar had no power to grant leave to sue), it was contended by Mr. Venkatramayya Chetti who appeared for the applicant that if there was any law under which the portion of the rule of the High Court of 23rd November 1885 now under consideration was valid, it ought to be upheld as valid, notwithstanding that it purported to be passed under Section 33 of the Presidency Small Cause Courts Act, 1882, and no other law was mentioned

in it as authority under which it was passed, and that from the fact that the Registrar has been, ever since that rule came into operation, exercising the power of granting leave to sue in the suits in question, it should be presumed, unless and until the contrary is shown, that he has been duly and legally empowered to do so, and he relied upon the case of *Queen-Empress* v. *Ganga Ram* (1) In that case, the appointment by the Lieutenant-Governor of the North-West Provinces of Mr W K Burkitt to officiate as fifth puisne Judge of the High Court, North-West Provinces, which purported to be made in virtue of the authority vested in the Lieutenant-Governor by Sections 7 and 16 of 24 and 25 Vict, cap 104, was held by a Full Bench of that Court to be *ultra vires* of the Lieutenant-Governor and illegal, if it depended for its validity upon Sections 7 and 16 of the 24 and 25 Vict., cap. 104 But having regard to the fact of the notifications published in the Government Gazette, North-West Provinces and Oudh, relating to Mr Justice Burkitt's appointment, to the fact that apparently the Secretary of State for India in Council sanctioned the appointment of a fifth puisne Judge as a temporary appointment, and to the fact that he had in fact since his first appointment in November 1892 acted in all respects as a Judge of the High Court, which "last fact is according to a well-known principle of the law of evidence, "presumptive proof, until the contrary be shown, of his due appointment "to act a Judge of this Court," the Full Bench held, that, being in [241] ignorance as to whether or not any power existed under which Mr Justice Burkitt might have been lawfully appointed to act as a Judge of the Court, the presumption that he was duly appointed, which arose from the fact of his having acted as a Judge of the Court since November 1892, had not been rebutted Whatever justification there may have been in that case for the presumption "*omnia rite et solemniter esse acta*" being acted upon in the manner in which it was, we are of opinion that we ought not in the present case to presume from the fact that the Registrar has *de facto* been exercising the power now under consideration for many years, that he was legally invested with such power, notwithstanding that the rule of the 23rd November 1885 so far as it purported to make the power one exercisable by him was, in our opinion, *ultra vires*

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We regret that we have felt ourselves compelled to come to the conclusion at which we have arrived upon the point in question, there are a considerable number of suits pending, which are affected by the decision of the point

We were asked by the vakil for the applicant in application No 55 of 1894 to refer the question to the High Court for its opinion under Section 69, Presidency Small Cause Courts Act, 1882, but much though we should have preferred that this question should have been brought before the High Court for decision, we have no power to refer it under Section 69 of the Act (*See Oakshott* v *The British India Steam Navigation Company* (2)). Nor have we any power to make a reference of the question under Section 617 of the Code, as there is no suit, nor appeal, nor proceeding in execution of a final decree, now before the Court The Chief Judge asked the vakil why he had not taken the case before the High Court under Section 622 of the Code, instead of coming to this Court under Section 37 of the Act and then applying under Section 69, and he replied that he had considered the latter the preferable course

We must, with regret, dismiss this application

(1) 16 A. 136. (2) 15 M. 179.

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In the present case the same objection was taken by the defendant and the Chief Judge referring to the above judgment dismissed the suit, making his decree contingent on the opinion of the High Court upon the following question:—

[242] Was the Registrar of this Court legally empowered to give leave to institute this suit in this Court and such leave having been granted by him has this Court jurisdiction to try this suit?

Mr. *R. F. Grant* for the plaintiff, argued that the rule empowering the Registrar to grant leave was a valid rule; that it was competent to the Court to make such a rule and that the power was none the less effectually exercised, because a wrong section was quoted. He referred to *Queen-Empress* v. *Ganga Ram* (1).

Sivagnana Mudaliar, for defendants.

The further arguments adduced in the case appear sufficiently for the purpose of this report from the

JUDGMENTS.

COLLINS, C. J.—This is a case stated for the opinion of the High Court under Section 69 of the Presidency Small Cause Courts Act, 1882, by the Chief Judge of that Court.

On the 23rd November 1885, the High Court declared under Section 33 of the Presidency Small Cause Courts Act XV of 1882, that the granting leave to sue a defendant out of the jurisdiction under Section 18, Clauses (*a*) and (*c*) of the Presidency Small Cause Courts Act, 1882, was a non-judicial or *quasi*-judicial act within the meaning of that section, which might be done by the Registrar of the Court of Small Causes, Madras.

The question the High Court has now to decide is—Had the High Court power to make such a rule or is the rule *ultra vires*.

The 33rd section of the Presidency Small Cause Courts Act, 1882, enacts that "any non-judicial or *quasi*-judicial act which the Code of "Civil Procedure as applied by this Act requires to be done by a Judge " . . . . may be done by the Registrar of the Small Cause "Court or by such other officer of that Court as that Court may from "time to time appoint in this behalf. The High Court may from time to "time by rule declare what shall be deemed to be non-judicial and *quasi*-"judicial acts within the meaning of this section."

Chapter 2 of the Civil Procedure Code, in Sections 15 to 19, regulates the place of suing, and those sections are not applied to the Small Cause Court by Act XV of 1882, and the reason is obvious as by the 18th section of Act XV of 1882, the Small Cause Court has jurisdiction to try suits of a civil nature, where the cause of action has arisen either wholly or in part within the [243] local limits of the jurisdiction of the Small Cause Court, or if any of the defendants at the time of the institution of the suit actually and voluntarily resides or carries on business or personally works for gain within such local limits provided the leave of the Court has been given or the defendants acquiesce in such institution.

Section 6 of Act XV of 1882 enacts that the Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court, and the High Court shall have in respect of it the same powers as it has under 24 and 25 Vict., cap. 104, Section 15. That Act gives power to the High Court to make and issue general rules for regulating the practice and

(1) 16 A. 136.

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proceedings of such Courts, provided that such rules be not inconsistent with the provisions of any law Section 652 of the Code of Civil Procedure gives the High Court power to make rules consistent with the Code to regulate any matter connected with the procedure of Civil Courts subject to its superintendence It is argued by counsel for the plaintiff that either under 24 and 25 Vict., cap. 104 or Section 652, Code of Civil Procedure, the High Court had power to make the rule in question It would be enough to say that the rule does not purport to be made under the Act or under Section 652, but under the powers conferred by Section 33 of Act XV of 1882—but I am of opinion that neither under the Act nor under Section 652 has the High Court the power contended for

Under Section 18 of Act XV of 1882, it is enacted that the leave of the Court must be given—the High Court by the rule has set aside that provision of law and has said that the leave of the Registrar is sufficient, it is impossible to say that a Registrar is a Court for such a purpose as this—the duties and powers of a Registrar are strictly defined and limited It is also impossible in my opinion to say that granting leave to sue a defendant out of the jurisdiction under Section 18, Clauses (*a*) and (*b*) was a non-judicial or *quasi*-judicial act which the Code of Civil Procedure as applied by that act requires to be done by a Judge

For these reasons, therefore, I hold that the Registrar's order granting leave to sue is not a valid leave within the meaning of Section 18 of Act XV of 1882 and that the rule of the High Court of the 23rd November 1885 is *ultra vires*

SHEPHARD, J —The question raised by this reference is whether leave given by the Registrar in cases in which the leave of the Court is required by the 18th section of Act XV of 1882 is [244] a valid and lawful leave within the meaning of that section In 1885, a rule was passed by the High Court purporting to declare under the 33rd section of the Act certain acts to be non-judicial or *quasi*-judicial Among such acts is that of "granting leave to sue defendant out of the jurisdiction under "Section 18, Clauses (*a*) and (*c*) of the Act" If the particular act of granting leave had been one which the Code of Civil Procedure as adopted by the Presidency Small Cause Courts Act required to be done by a Judge, then there is no doubt that such act being declared by the High Court to be a *quasi*-judicial act might be done by the Registrar of the Small Cause Court But the Section of the Code requiring leave to be given before institution of a suit is not one of the sections made applicable to the Presidency Small Cause Court by the 33rd section of the Act It was unnecessary to make it applicable, because the matter is provided for in the 18th section of the Act itself

The 33rd section makes no reference to matters regulated by the Act itself and therefore any declaration or rule made under it cannot affect the provisions of the 18th section The rule of the High Court must be *ultra vires*, unless justification for it can be found in some other enactment The power to make rules for regulating the procedure of Courts subject to the appellate jurisdiction or under the superintendence of the High Court is vested in the High Court by the Statute 24 and 25 Vict cap 104, Section 15, and also by the 652nd section of the Civil Procedure Code By the 6th section of the Presidency Small Cause Courts Act, the Small Cause Court is declared to be a Court subject to the superintendence of the High Court within the meaning of the Civil Procedure Code It is further declared that the High Court may exercise in respect of the Small Cause Court the same powers as it has under the 15th

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section of the Statute in respect of Courts subject to its appellate jurisdiction. Either under this section of the Statute or under the 652nd section of the Code, the High Court has power to make rules regulating the procedure of the Small Cause Court. I do not agree with the opinion which has been expressed that the exclusion of the 652nd section from the second schedule annexed to the Act XV of 1882 shows that it was not intended that the powers of the High Court under that section should be exercised in respect of the Presidency Small Cause Courts. That opinion, as it appears to me, ignores the plain [245] words of the 6th section of the Act which make the latter Court subordinate to the High Court within the meaning of the Civil Procedure Code. It has to be seen whether this particular rule of November 1885 is a rule which it was competent to the High Court to pass under either of the above enactments, either under the Statute or under the Code. The power given in the former enactment is "to make and issue general rules for regulating the practice and proceedings of such ourts;" in the latter enactment "to make rules "consistent with the Code to regulate any matter connected with the "procedure of the Courts subject to its superintendence." Now it is a recognized principle of law that the rules made in pursuance of a delegated authority to that effect must be consistent with the Statute under which they came to be made. The authority is given to the end that the provisions of the Statute may be the better carried into effect, and not with the view of neutralizing or contradicting those provisions. The case of *Whetherfield* v. *Nelson* (1) illustrates the manner in which the principle is applied. In the present case, there is a distinct provision of the Act requiring in certain cases that leave of the Court shall be given before the institution of a suit. Under Clause (*a*) of the 18th section "the leave of the Court for reasons recorded in writing" has to be given. The effect of the rule is to dispense with the leave of the Court and substitute the leave of the Registrar. In my opinion, the rule is manifestly inconsistent with the section. It is a rule which has the effect of neutralizing the section, not of carrying it into effect. It is impossible to say that the Court and the Registrar are one and the same person.

Any doubt which might otherwise exist seems to me to be removed by a consideration of the 33rd section. That section and the similar section in Chapter XLVIII of the Code of Civil Procedure would be superflous if the matter provided for in these sections were one with which the High Court could deal under its general powers of making rules. It is precisely because it was desired to give the High Court a dispensing power, a power to delegate to the Registrar acts which according to the law needed to be done by the Court, that the special Section 637 was required. It may be by oversight that the 33rd section was not extended [246] to acts regulated by the Act itself; but as the section stands it appears to me strongly to indicate that in cases not within the scope of the section the High Court has no power to make such rules as under the section it may make.

For these reasons, I have come to the conclusion that the rule is *ultra vires* and I must therefore hold that the leave given by the Registrar is not a valid leave within the meaning of the 18th section of the Act.

BEST, J.—I concur.

SUBRAMANYA AYYAR, J.—The question for determination is whether under Section 33 of Act XV of 1882, or Section 652 of the Code of Civil Procedure or the Statute 24 and 25 Vict., cap. 104, Section 15, it was

(1) L. R. 4 C.P. 571.

1895 MARCH 27. FULL BENCH. 18 M. 236 (F.B.) = 5 M.L.J. 114.

competent to the High Court to declare that the power which a Judge of the Court of Small Causes has under Clauses (a) and (c) of Section 18 of Act XV of 1882 to grant leave to sue a defendant out of the jurisdiction is one which the Registrar also of the Small Cause Court may exercise.

I am of opinion that the High Court had no authority to make such a declaration under any of the said provisions of law

Now, it is quite clear that the first of these provisions, *viz*, Section 33 has no application to the present case For that section only provides, (*i*) that the Registrar of the Small Cause Court may do any non-judicial or *quasi*-judicial act which the Court itself is empowered to do under any of the sections of the Civil Procedure Code extended to the Small Cause Court by Act XV of 1882; (*ii*) that the High Court may by rule declare what shall be deemed to be non-judicial and *quasi*-judicial acts within the meaning of the Section 33 The portions of the Civil Procedure Code extended by Act XV of 1882 to the Presidency Small Cause Courts are specified in the second schedule of the Act. But none of these portions relate to the granting of leave to sue defendants out of the jurisdiction It follows, therefore, that under Section 33 the Registrar has no power to grant leave to sue a defendant out of the jurisdiction, and consequently the High Court has no authority to make the declaration under the latter part of the said section. Whether the omission to include the power to grant leave to the defendant out of the jurisdiction among those powers which the Registrar may exercise under Section 33 was due to a mere oversight on the part of the legislature or not, it is unnecessary to consider It is sufficient to say that as Section 33 stands the High [247] Court is not empowered under it to make the declaration in question

It is next contended that since Section 6 of Act XV of 1882 makes the Presidency Small Cause Courts subject to the superintendence of the High Court within the meaning of Section 652 of the Civil Procedure Code, and the Statute 24 and 25 Vict, cap 104, Section 15, the declaration in question is valid No doubt under the former, *viz*, Section 652, the High Court may, from time to time, make rules consistent with the Code to "regulate any matter connected with the procedure" of the Courts of Civil Judicature subject to its superintendence and under the latter, *viz*, the Statute 24 and 25 Vict, cap 104, Section 15, the High Court "may make and issue general rules for regulating the practice and proceedings" of such Courts But in my opinion, the High Court is not entitled under either of the last-mentioned sections to make a declaration by rule on the matter of granting leave to sue defendants out of the jurisdiction. I arrive at this conclusion notwithstanding the wide construction put upon the words "practice" and "procedure" by the Court of Appeal in *Poyser* v *Minors* (1), where Lush, L J, explains that those words in their larger sense denote "the mode of proceeding by which a legal right is "enforced, as distinguished from the law which gives or defines the right, "and which by means of the proceeding the Court is to administer the "machinery as distinguished from its product." It seems to me that the declaration made by the High Court is altogether outside the scope of the regulation of "practice" and "procedure" contemplated by Section 652 of the Code of Civil Procedure and the Statute 24 and 25 Vict, cap. 104, Section 15 The declaration is in my view a clear delegation of what is undoubtedly judicial power, exercisable by the Court itself, to the Registrar who is not constituted a Judge as to the matter of granting leave

(1) L R. 7 Q.B.D. 329 (333).

1895 MARCH 27. — FULL BENCH. — 18 M. 236 (F.B) = 5 M.L.J. 114.

under Clauses (a) and (c), Section 18 of Act XV of 1882, while he is in regard to some others (see Section 14 of the Act). Such a delegation of judicial authority, I should think, cannot take place except under express and specific statutory provisions such as are contained in Section 33 of Act XV of 1882. But, as has been already shown, that section does not cover the case under consideration.

[248] For the reasons stated above I hold that the declaration made by the High Court in 1885 that granting leave to sue a defendant out of the jurisdiction under Clauses (a) and (c) of Section 18 of the Presidency Small Cause Courts Act, 1882, is one of the acts which may be done by the Registrar of the Small Cause Court under Section 33 of the Act is *ultra vires*, and the leave given by the Registrar in the case under reference is not a valid leave within the meaning of the said Act.

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18 M. 248=4 M.L.J. 265.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt, Chief Justice, and Mr. Justice Parker.

RAMA REDDI (*Plaintiff No.* 1), *Appellant v.* APPAJI REDDI AND OTHERS (*Defendants*), *Respondents.** [10th and 28th August, 1894.]

Interest Act—Act XXXII of 1839—*Transfer of Property Act—Act IV of* 1882, *Section* 88—*Mortgage—Interest* 'post diem.'

The plaintiff sued in December 1891 upon a registered mortgage dated 1875, in which it was provided that interest should be paid at the rate therein mentioned, and that the principal should be repaid on 10th April 1880, but in which there was no provision for payment of interest *post diem*:

Held, that interest *post diem* should be awarded under the Interest Act, 1839, at a reasonable rate:

Semble: the amount so awarded would constitute a charge on the mortgage premises.

[**R.**, 24 C. 699 (706); 18 M. 331 (332); 12 C.P.L R. 18 (22); **D.**, 22 B. 107.]

SECOND appeal against the decree of W. F. Grahame, District Judge of South Arcot, in appeal suit No. 36 of 1893, affirming the decree of P. S. Gurumurti, District Munsif of Cuddalore, in original suit No. 1 of 1892.

Suit instituted on 18th December 1891 to recover principal and interest due on a mortgage, dated 19th June 1875. The principal sum was repayable under the terms of the instrument on 10th April 1880. With reference to the plaintiff's claim for interest, and also to a plea of limitation raised by the defendant, the Dis-[249]trict Munsif said:—"As regards interest, plaintiffs have claimed Rs. 1,583 under this head "from 19th June 1875 to the date of suit. Under the bond (Exhibit I) "the interest is payable at ¾ per cent. per mensem on the 30th Ani (12th "July) of each year, while the principal is made payable on 30th Panguni, "Paramathi (10th April 1880), and in default, the obligor agreed to pay "interest at one per cent. per mensem from the date of the bond. No "payment was made under Exhibit I, and though Lakshmana Reddi died "in November 1877, third plaintiff, as a major, could have sued for the "interest at once, and both the principal and interest could have been "claimed when the principal fell due. The suit having been filed on 18th

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* Second Appeal No. 1546 of 1893.

1894 Aug 28. — Appellate Civil. — 18 M. 248 = 4 M.L.J. 265.

"December 1891, the interest due under Exhibit 1 prior to twelve years "before this date is barred by limitation, and plaintiff cannot claim "interest after 10th April 1880, the date fixed for payment of the principal "of Exhibit I, as there is no provision there for such payment and more "than six years have elapsed between the said date and the date of suit "Even if compensation be intended to be paid in lieu of interest as ruled "in *Mansab Ali* v *Gulab Chand* (1), *Bhagwant Singh* v *Daryao Singh* (2), "*Gudri Koer* v *Bhubaneswari Coomar Singh* (3), the higher rate, i e, "one per cent in lieu of ¾ per cent per mensem, claimed from the date of "the bond, cannot be viewed as penal and disallowed, in view of the "ruling of the Madras High Court in *Basavayya* v *Subbarazu* (4) I "therefore allow Rs 30 only towards interest"

The District Munsif accordingly passed a decree for the principal due on the mortgage, together with Rs 30 only by way of interest

The District Judge affirmed this decree, dismissing the appeal preferred against it under Civil Procedure Code, Section 551, agreeing in the view that the mortgage sued upon, on its right construction, contained no provision for payment of interest *post diem*

The plaintiff preferred this second appeal

Subramanya Ayyar and *Ranga Ramanujachariar*, for appellant

Bhashyam Ayyangar and *Krishnasami Ayyar*, for respondents Nos 6, 7 and 8

JUDGMENT

[250] The District Judge has dismissed the appeal under Section 551, Civil Procedure Code, on the ground that *post diem* interest cannot be given The terms of Exhibit 1 are not very clear, and it is possible that they may mean only that 12 per cent interest is chargeable instead of 9 per cent from the date of the bond to the date fixed for the repayment of the principal, and that in case of default the mortgagee should at once proceed to recover the principal and interest at the enhanced rate

But, though we are not able to hold that the interpretation put upon the bond, Exhibit I, by the Courts below is incorrect, we may point out that under the Interest Act XXXII of 1839, the Court has power to give interest upon mortgage money, as it is money payable at a certain time and under a written instrument Interest *post diem* may, therefore, be awarded at such rate as is reasonable, if not always at the rate mentioned in the contract. The joint effect of the Interest Act and of Section 86 of the Transfer of Property Act is in favour of the award of interest *post diem* as interest till date of payment, at a reasonable rate and as a charge upon the mortgaged property—*Bikramjit Tewari* v *Durga Dyal Tewari* (5).

As the District Judge has disposed of the appeal upon this point only, and without hearing the respondents, we must reverse the decree and remand the appeal for disposal The costs in this appeal will abide and follow the result.

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(1) 10 A 85 (2) 11 A 416. (3) 19 C 19
(4) 11 M 294 (5) 21 C 274.

1894 DEC. 20.
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APPEL-LATE CIVIL.
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18 M. 250=5 M. L. J. 89.

18 M. 250=5 M.L.J. 89.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

BRAHMANNA (*Defendant*), *Appellant v.* RAMAKRISHNAMA AND OTHERS (*Plaintiff's heirs*), *Respondent.**
[7th August and 20th December, 1894.]

Defamation—Imputation on a wife—Suit by husband.

In a suit for damages for defamation, it appeared that the words complained of were spoken by the defendant to the plaintiff in the presence of a third party and [251] were to the effect that the plaintiff's wife had committed adultery with a pariah and that her children had been born to the pariah:

Held, that the suit was not maintainable by the plaintiff.

[**R.**, 32 C 1060 (1067)=2 C.L.J. 396=9 C.W.N 847 (851); **D.**, 32 C. 425 (426)=8 C.W.N. 515.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 1335 of 1892, affirming the decree of Ramasami Sastri, District Munsif of Gudivada, in original suit No. 37 of 1892.

Suit for damages for defamation. The plaintiff averred and proved that the defendant had said to him, in the presence of a constable, "your "wife has committed adultery with Mala Murti and your three children "are Murti's issue," or words to that effect which constituted the defamation complained of.

The District Munsif passed a decree for Rs. 200 which was affirmed on appeal by the District Judge.

The defendant preferred this second appeal.

Venkatarama Sarma, for appellant.

Naraina Rau, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—I do not think that this is a case in which we should depart from the rule that it is the person who is slandered that ought to sue. The plaintiff's wife is *sui juris* and she may sue for the slander. No other person is permitted to sue, because however closely he may be related to the person slandered and whatever pain of mind he may suffer from the slander of his relation, the injury caused to him is mediate or remote and not immediate or proximate. If the rule were otherwise, the defamer might be liable for as many actions as there are near relations of the persons defamed. It is said that the defamer's object was to vilify the plaintiff. But the slanderous words spoken do not impute any personal misconduct to him. They do not state that the plaintiff knew of his wife's want of chastity, and with that knowledge lived with her. The language used is consistent with plaintiff's belief in his wife's chastity. The object was no doubt to cause intense pain of mind to the plaintiff, and to insult him in the heat of altercation, but it was part of that object to do it only by slandering his wife and children.

Suppose the wife brought an action against defendant, would it be a good defence to say that though she was the person slandered, it was intended only to insult her husband? If not, the rule that a slanderer should

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* Second Appeal No. 107 of 1894.

1894. Dec. 20. — Appellate Civil. — 18 M. 250 = 5 M. L. J. 89.

not be liable to as many actions as there are relations would be violated I would follow the [252] principle laid down in *Subbaiyar* v. *Kristnaiyar* (1), *Luckumsey Rowji* v *Hurbun Nursey* (2), and *Daya* v. *Param Sukh* (3). Setting aside the decrees of the Lower Courts, I dismiss the suit; but, under the circumstances, there will be no order as to costs throughout

BEST, J —Though most unwilling to disturb the decrees of the Courts below in this case, I am constrained to come to the conclusion that the authorities cited leave us no option and that the plaintiff's suit must fail I concur, therefore, in the decree proposed by my learned colleague

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18 M. 252.

APPELLATE CIVIL

Before Sir Arthur J H. Collins, Kt., Chief Justice, and Mr. Justice Parker

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KRISHNA AYYAN AND OTHERS (*Defendants Nos* 1, 3 *to* 7, 11 *and* 12), *Appellants* v VYTHIANATHA AYYAN (*Plaintiffs*), *Respondents* *
[17th and 27th September, 1894]

Hindu law—Stridhanam—Gift, construction of—Provincial Small Cause Courts Act—Act IX of 1887, *Schedule II, Article* 18—*Suit relating to a trust*

A Hindu executed in favour of his daughter an instrument in the following terms —" I have hereby given to you to be enjoyed as stridhanam after my death "2,320 fanams out of 6,000 fanams which remain as kanom on the land T "The proportionate rent on 2,320 fanams is 365 paras This quantity of paddy " shall be enjoyed by you and your sons and grandsons hereditarily "by receiving the same from my sons." After certain clauses restricting the mode of enjoyment and the power of alienation the instrument proceeded, " in "the event of the said kanom being paid, that money shall be received by my sons "and shall be invested on some other property, which may be approved of by "you and your sons and by my sons, and from that property you may receive "income yearly and enjoy the same" In a suit by a grandson of the donee to recover his share of the income:

Held, (1) that the suit "related to a trust" within the meaning of Provincial Small Cause Courts Act, Schedule II, Article 18;

(2) that the instrument was not invalid under Hindu law and that the plaintiff was entitled to a decree

[253] SECOND appeal against the decree of E K Krishnan, Subordinate Judge of South Malabar (Palghat), in appeal suit No. 842 of 1892, affirming the decree of V Kelu Eradi, District Munsif of Palghat, in original suit No 53 of 1892

Plaintiff was the great-grandson and the defendants also were descendants of one Subramania Sastri, and this suit was brought to recover the plaintiff's share of the income derived from certain funds comprised in an instrument executed in September 1841 by Subramania Sastri in favour of his eldest daughter Shalakshi, who was the plaintiff's paternal grandmother The instrument was as follows.—

" I have hereby given to you to be enjoyed as stridhanam after my " death 2,320 fanams out of 6,000 fanams which rest as kanom exclusive " of further charge on the land Tottakara Out of the puttom (rent) of

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* Second Appeal No. 577 of 1894

(1) 1 M 383. (2) 5 B 580 (3) 11 A 104.

1894. SEP. 27. — APPELLATE CIVIL. — 18 M. 252.

" 950 paras, deducting nigudi and micharam, arising out of the said " property, the proportionate puttom on 2,820 fanams is 365 paras. This " quality of paddy shall be paid to you by my sons to be enjoyed here- " ditarily by you and your sons and grandsons. The said puttom of 365 " paras of paddy shall be enjoyed by you and your sons and grandsons " hereditarily by receiving the same from my sons. On the security of " the said property, no debt shall be contracted by you or by your hus- " band or by your children or by my children. If debt is so contracted, " it shall not be valid. In the event of the said kanom being paid (by " the mortgagor), that money shall be received by my sons and shall " be invested on some other property which may be approved of by you " and your sons and by my sons, and from that property you may re- " ceive (income) yearly and enjoy the same. Let your family be a support " to my family."

It appeared that the plaintiff's share of the income of the funds in question had been paid to him up to 1887-88.

The District Munsif passed a decree for the plaintiff, and it was affirmed on appeal by the Subordinate Judge.

Certain of the defendants preferred this second appeal.

Sundara Ayyar, for appellants.

Subramanya Sastri, for respondent.

JUDGMENT.

We agree with Courts below that the suit is one relating to a trust. and is therefore one over which a Small Cause Court has no jurisdiction.

[254] It is next urged that the gift is invalid, since it is not one known to the Hindu law as stridhanam and since it lays down a course of descent inconsistent with the descent of stridhanam property. It is admitted that the Transfer of Property Act does not apply, but we are referred to the Tagore case (*Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1), *Chundi Churn Barua* v. *Sidheswari Debi* (2), and *Kristoromoni Dasi* v. *Narendro Krishna Bahadur* (3)).

We are of opinion that although the term stridhanam is used in Exhibit A as describing the gift, it is used in its primary sense of property given to a woman under coverture. We must look to the terms of the instrument to discover the intention of the donor. Though the donor intended that, after the lifetime of his daughter, the property should succeed in the line of sons and grandsons, it cannot be said that such a course of succession is unknown to Hindu law. The words, however, are words of inheritance and not of limitation, and may be used in connection with grants to females as well as to males.

Nor again can we hold that the gift is void, because it is in favour of persons not born The intention of the donor appears to have been not to convey the property to his sons upon trust for his daughter and her descendants for ever, but that the latter should take an absolute interest from the date of his (the donor's) death. The testator, no doubt, intended that the money should not be handed over to Shalakshi at the date of the gift; the capital was out on kanom, and it was provided that, in the event of the kanom being paid off, the money was to be re-invested in the same manner by the donor's sons and with the approval of Shalakshi and her sons. But the donor could not have contemplated that Shalakshi would live for ever, and as the conveyance was absolute to

(1) 9 B.L.R. 377. (2) 16 C. 71. (3) 16 C 383.

Shalakshi and her sons after the donor's death, the estate must have vested, and plaintiff, as the descendant of the original donees, will be entitled by inheritance to his share The restrictions on the mode of enjoyment and the power to alienate would be simply inoperative; but they would not avoid the gift.

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It appears from Exhibit B that when the kanom was paid off, the capital was not re-invested by defendants, but, on the contrary, they spent it and came to an agreement with the plaintiff's family [255] to pay 300 paras of paddy annually to Shalakshi's heirs The plaintiff is entitled to his share in this income, and on this ground the decrees of the Courts below can be supported

The second appeal is dismissed with costs

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18 M. 255.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt , Chief Justice, and Mr Justice Parker

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BALAMBAL AMMAL (*Plaintiff*), *Appellant v* ARUNACHALA CHETTI (*Defendant*), *Respondent* * [13th, and 21st December, 1894.]

Registration Act—Act III of 1877, Section 77—Compulsory registration—Execution of document admitted—Cancellation pleaded

On 26th January 1892 the defendant executed a conveyance of certain land to the plaintiff On 26th May 1892 the plaintiff presented the conveyance for registration, but registration was refused The plaintiff now sued for a decree directing that the conveyance be registered under Registration Act, 1877, Section 77 The defendant pleaded that the conveyance had been cancelled.

Held, (without determining the question of cancellation), that the plaintiff was entitled to the decree prayed for.

[F., 14 C W N 12 (14)=5 Ind Cas 20, Appr., 24 C 668 (671)=1 C W N 444, 11 P R 1903=84 P L R 1903, 13 P R 1904=78 P L R 1904]

SECOND appeal against the decree of W F Grahame, District Judge of South Arcot, in appeal suit No 184 of 1893, affirming the decree of K. Rangamannar Ayyangar, District Munsif of Villupuram, in original suit No 369 of 1892

The plaintiff alleged that the defendant had sold her certain land and executed conveyance thereof, dated 26th January 1892, and had received the purchase-money, and she brought this suit to compel the defendant to register the conveyance and deliver the land to her The prayer for possession of the land was withdrawn The defendant admitted the execution of the conveyance, but pleaded that it had been since cancelled The conveyance had been presented for registration on 26th May 1892 when the registrar refused to register it

The District Munsif dismissed the suit and his decree was affirmed on appeal by the District Judge

[256] The plaintiff preferred this second appeal

Ranga Ramanujachariar, for appellant.

Krishnasami Ayyar, for respondent

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* Second Appeal No. 540 of 1894.

1894
DEC. 21.

APPELLATE CIVIL.

18 M. 255

JUDGMENT.

The plaintiff sued to compel the defendant to register a conveyance executed by him to her on 26th January 1892 and to recover possession of the property comprised therein. In consequence of objections raised to the frame of the suit the plaintiff withdrew the prayer for delivery of possession and the sole point tried was whether the plaintiff was entitled to a decree that the deed should be registered. The instrument was presented for registration on 26th May 1892.

The District Munsif dismissed the suit on the ground that the contract of sale was cancelled after execution of the instrument and the earnest money returned. On appeal the District Judge confirmed the decision on a different ground, which he allowed to be argued though it does not appear to have been taken before the District Munsif or in the grounds of appeal. The Judge held that the question of the cancellation of the contract of sale was immaterial in the suit; that the only question was whether plaintiff had observed the formalities entitling her to registration of the instrument; but that, as she had taken no steps to compel defendant to appear at the registration office, she was not entitled to have the document registered, and that her suit was rightly dismissed.

As the prayer for the performance of the contract, *viz.*, the delivery of the property, was withdrawn, we agree with the District Judge that the only question was whether, under the provisions of the Registration Act, the plaintiff was entitled to demand that an instrument, the execution of which was admitted, should be registered. The document was presented in time, and it has been held in *Hasanalli Khan Bahadur* v *Ekambaram* (1) that the question to be considered in a suit under Section 77 of the Registration Act is limited to the *factum* of execution. No time is fixed by law within which the registration of an instrument presented and accepted within four months of its execution must be completed (*Sah Makhun Lall Panday* v. *Sah Koondun Lall* (2), *Shama Charan Das* v. *Joyenoolah* (3), *Satcourie Pyne* v. *Luckey Narain Khettry* (4), *and In re Shaik Abdul Aziz* (5)).

[257] We must reverse the decrees of the Courts belong and give plaintiff a decree directing the document to be registered under Section 77 of the Registration Act. The plaintiff is entitled to her costs in this Court and in the Lower Appellate Court, but we direct that each party pay her and his own costs in the Court of First Instance since this point was not there taken.

(1) Second Appeal No. 1541 of 1893 (unreported). (2) 2 I.A. 210.
(3) 11 C. 750. (4) 15 C. 538. (5) 11 B. 691.

18 M. 257.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1892 March 23.

Appellate Civil.

18 M. 257.

BADI BIBI SAHIBAL AND OTHERS, *Defendants* (*Nos.* 1, 3, 5, 6, 7, 15, 16, 18, 39, *and* 49), *Appellants v.* SAMI PILLAI (*Plaintiff*), *Respondent*.* [18th, 21st, 22nd and 23rd March, 1892.]

Civil Procedure Code—Act XIV *of* 1882, *Sections* 13, 43—Res judicata—*Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principal—Second suit for principal and interest subsequently accrued—Limitation Act—Act XV of* 1877, *Schedule* II, *Article* 116—*Mortgage—Interest* post diem *in absence of covenant—Muhammadan Law—Sharer of males and females in subject of* altumga *grant—Hypothecation by gosha women—Rule as to proof of* bona fides.

Certain Muhammadans hypothecated to the plaintiff to secure repayment of a debt, their interest in lands which had been enfranchised as a personal inam—a claim that the lands constitued the endowment of certain mosques having been rejected at the inam enquiry. The hypothecation deed was executed in 1875 and registered, and it contained the following terms with regard to interest and the repayment of the debt:—"We (the obligors) shall pay interest at 7 per cent. per "annum before the 30th October of each year, we shall pay in full the principal "amount on 30th October 1878 after clearing off the interest and redeem this deed: "should we fail to pay the interest regularly according to the instalment, we shall "at once pay the principal together with the amount of interest." Default was made in the payment of interest in 1876; and in 1877 the plaintiff sued in a District Munsif's Court for the interest then due, expressly stating in the plaint that he agreed to accept payment of the principal and the subsequent years' interest at the times fixed in the deed, and he obtained a decree as prayed. The plaintiff in 1888 now sued the executants of the above instrument and their heirs and [258] representatives to recover the principal, together with interest up to date. The Court of First Instance held that the claim for a personal decree was barred by limitation, but passed a decree directing the sale of the hypothecated land in default of payment of the principal, together with interest up to date. On appeal:

Held, (1) that this suit was not barred by Civil Procedure Code, Section 43, although the creditor's election not to seek a decree for the full amount in the suit of 1877, had not been communicated to the debtors before that suit;

(2) that since the instrument did not provide for interest *post diem* any claim in the nature of a claim for such interest could be allowed by way of damages only and was not a charge on the land, and in the present case such claim was barred by limitation;

(3) that under the circumstances of the case the rule as to the equality of the shares of males and females in the subject of an *altumga* grant was inapplicable;

(4) that those of the defendants, against whom the District Munsif had wrongly passed a decree in 1877, were not precluded from the right to have their shares in the land exonerated in the present suit;

(5) that two gosha women, who had executed the instrument in conjunction with their son and brother, respectively, were not, under the circumstances, entitled to have their shares exonerated, for want of proof that the transaction had been explained to them. *Ashgar Ali* v. *Delroos Banoo Begum*, 3 C. 324, distinguished.

[R., 18 M. 331 (333); 12 C.L.J. 115 (122)=3 Ind. Cas. 330; 12 C.L.J. 357 (365)=7 Ind. Cas. 166; 8 Ind. Cas. 510=9 M.L.T. 36=(1911) 1 M.W.N. 79 (82); D., 22 B. 107 (109); 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907.]

APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in original suit No. 5 of 1888.

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* Appeal No. 88 of 1891.

1892 MARCH 28. — APPELLATE CIVIL. — 18 M. 257.

Suit to recover principal and interest due on a hypothecation bond, dated 30 October 1875, and executed by defendants Nos. 1 to 11 and the ancestors and predecessors in title of the other defendant to the plaintiff to secure a loan of Rs. 19,000. The principal, together with interest calculated at the contract rate up to the date of suit, and a small sum claimed as having been paid by the plaintiff for kist in respect of the land hypothecated, amounted to Rs. 33,541-6-0. The bond (Exhibit A) after the description of the land and the words of hypothecation recited that the principal was borrowed to pay off certain judgment debts, &c., and proceeded as follows:—

"Since we have received this sum of rupees nineteen thousand as "detailed above, we shall pay interest accruing on the said sum at 7 per "cent. per annum from this date within the 30th October of each year "and endorse payment on this. We, or those who are entitled to our "assets and liabilities, shall pay in full the principal amount stated above "on the 30th October 1878 after clearing off the interest, and redeem this "deed and the hypotheca. Should we fail to pay the interest regularly "according to the [259] instalments, we shall at once pay in ready money "the principal, together with the amount of interest accruing, irrespective "of the subsequent instalments for payment of the principal amount."

The defendants put the plaintiff to the proof of the bond and of their liability thereunder: and among other defences they pleaded that the lands in question, having been the subject of a religious endowment, were incapable of being hypothecated: the District Judge, finding that they were enfranchised inams, overruled this defence.

They also pleaded limitation, and the District Judge held with regard to this plea, that the claim for a personal decree was barred by limitation.

A question was also raised under Civil Procedure Code, Section 43. It appeared that the obligors had made default in the payment of interest on 30th October 1876; in the following year the plaintiff instituted original suit No. 845 of 1877 on the file of the District Munsif of Trichinopoly to recover the amount due on account of interest at that date and obtained a decree. The plaint in that suit contained the following clause:—

"Although it is mentioned in the said document that, if default be "made in the payment of interest even in one year, the whole amount "shall be recovered irrespective of the subsequent instalment, yet as the "plaintiff has agreed to receive every year the interest payable in that "year and the principal within the period stipulated therefor, this suit "has been brought only for the interest of the past one year. Plaintiff "has agreed to receive the subsequent interest and the principal accord-"ing to the instalment"

Among the defendants, against whom that decree was passed, were the present defendants Nos. 15 and 16, who now pleaded that their shares in the land were not affected by the hypothecation. It was further pleaded on behalf of defendants Nos. 1 and 5, who were gosha women, that their shares were not validly hypothecated, as they did not understand the nature of the transaction when they executed the instrument in suit. The District Judge overruled the last-mentioned pleas also and in the result passed a decree for Rs. 31,381-6-0 with further interest from the date of the plaint to be recovered from the shares of certain of the defendants (exonerating those of others of the defendants) and dismissed the claim for a personal decree.

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[260] Defendants Nos 1, 3, 5, 6, 7, 15, 16, 18, 39 and 49 preferred this appeal to the High Court, and the plaintiff filed a memorandum of objections.

Bhashyam Ayyangar, for appellants

Subramanya Ayyar, *Ramachandra Ayyar* and *Rajagopala Ayyar*, for respondent

JUDGMENT

This is an appeal against the decree of the District Judge of Trichinopoly, by some of the defendants Nos 1, 3, 5, to 7, 15, 16, 18, 39 and 49 The suit was brought by the respondent on the hypothecation bond, Exhibit A, dated 30th October 1875, executed to the plaintiff by defendants Nos 1 to 11 and four others to recover Rs 33,541-6-0 made up of Rs 19,000 principal, due under Exhibit A, and Rs 14,934-12-8 interest thereon, together with Rs 94-8-4, amount of kist paid by the plaintiff in December 1886 and interest thereon The plaintiff asked for a decree for the above amount on the responsibility of the hypothecated property and also that defendants be held personally liable

The Judge held the personal remedy to be barred, but passed a decree in plaintiff's favour for Rs 31,381-6-0 with interest thereon at 7 per cent per annum from date of plaint to date of payment, *plus* Rs 94-8-4 and interest thereon at the same rate from December 1886, and directed the sale of the hypothecated property (with certain exceptions) in default of payment

The first objection argued before us is that the suit was barred by Section 43 of the Code of Civil Procedure by reason of original suit No. 845 of 1877, instituted by plaintiff to recover the first year's interest due under the document A The document provides that interest accruing on the principal sum of Rs 19,000 at 7 per cent per annum shall be paid by the 30th October of each year, that the principal itself shall be repaid on the 30th October 1878, and that, in default of payment regularly each year, the plaintiff shall be at liberty at once to claim payment of the principal and interest in arrears The first year's interest not having been paid on the 30th October 1876, the suit No 845 was brought on the 29th October 1877 The plaint therein stated (paragraph 3) that plaintiff had agreed to receive yearly the interest due for each year and the principal at the stipulated time, and that he would accordingly receive the interest for 1877 and 1878 and the principal at the time, stipulated in the [261] document The Judge held that the plaintiff having expressly waived his right to claim the principal and interest at once at the date of the former suit had no cause of action to sue for more than the interest then due, and that Section 43 of the Code of Civil Procedure was no bar to the present suit

It is argued before us that no evidence has been adduced to show that plaintiff had, prior to the date of the plaint in the former suit, waived the right he had to sue for the principal as well as the interest, and that the statement in the then plaint, that he was willing to accept the principal and subsequent years' interest at the times originally fixed in Exhibit A did not amount to a waiver within the meaning of Section 43

We are unable to accede to this contention The alternative provision in Exhibit A is one that was inserted for the exclusive benefit of the plaintiff He had, therefore, an option to sue either for the first year's interest only or for the same, together with the principal amount It was only necessary that he should manifest his intention of waiver by some

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overt act which could not be recalled. This he did by instituting the suit of 1877, and obtaining the decree for the first year's interest alone, expressly stating in the plaint in that suit that he exercised the option. We are unable to accept the argument for the appellants that in order to save Section 43, it was incumbent on the plaintiff to have previously communicated to the defendants the election made by him. The real test appears to us to be not whether the option was exercised with the privity of the defendants, but whether it was so exercised as to determine the plaintiff's *locus pœnitentiæ*. The first contention must, therefore, be overruled.

It is next contended that the Judge was in error in awarding interest on the principal amount subsequent to the 30th October 1878, as Exhibit A does not provide for interest *post diem*. We are of opinion that this contention must prevail. The document contains no provision for the payment of interest after the 30th October 1878. We cannot, therefore, treat the interest claimed for the period subsequent to that date as a charge on the hypothecated property. As observed by Lord Cairns in *Cook* v. *Fowler* (1), "any claim in the nature of a claim for interest after the date "up to which interest was stipulated for would be a claim really not "**[262]** for a stipulated sum and interest but for damages, and then it "would be for the tribunal before which that claim was asserted to con- "sider the position of the claimant, and the sum which, properly and "under all the circumstances, should be awarded for damages." As was also stated by Lord Selborne in the same case interest is given *post diem* "on the principle not of contract but of damages for the breach of contract." This principle has been followed by the High Courts of Calcutta and Allahabad. *Gudri Koer* v. *Bhubnesweri Coomar Singh* (2) and *Munsab Ali* v. *Gulab Chand* (3). Treating the claim as a claim for damages for failure to pay the principal on the 30th October 1878, we must hold it to be barred under Article 116 of Schedule II of the Limitation Act.

It is next urged that defendants Nos. 1 and 5 were gosha women, and that there is no evidence to show that the transaction under A was explained to them. Both these defendants admitted the execution of A, and first defendant did not deny her knowledge of its contents. Although they are gosha ladies, they executed the document, the former in conjunction with her son and the latter in conjunction with her brother. We do not, therefore, think that the present case falls within the scope of the Privy Council's decision in this case of *Ashgar Ali* v. *Delroos Banoo Begum* (4). Moreover, we observe that this objection was not taken in the former suit of 1877.

Another contention is that fifth defendant was a minor at the date of Exhibit A. She does not appear to have pleaded minority in her written statement or applied for an issue with regard to it. Neither did she appear in the former suit and take this objection. The contention appears to be an attempt to take advantage of a statement made by the plaintiff's second witness in his cross-examination. The witness was called merely to prove his father's signature in the document A, and we are not prepared to attach much importance to the indefinite statement made by him as to fifth defendant's age twelve years prior to this suit. We must, therefore, overrule this objection also.

The next contention is that in computing the shares of thirty-ninth and forty-ninth defendants the Judge has made a mistake. This objection

(1) L. R. 7 H. L. 27. (2) 19 C. 19. (3) 10 A. 85. (4) 3 C. 324.

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appears to be well founded The share of thirty-ninth defendant is $\frac{7}{480}$ and that of forty-ninth defendant $\frac{7}{960}$ [263] making together $\frac{21}{960}$ or $\frac{7}{320}$. The contention that as the grant was *altumga*, no distinction ought to be made between males and females in computing their shares, is found to be untenable on referring to the passage in MacNaghten (page 329) on which appellants rely. It is clear from that passage that the rule relied on is applicable in the award of shares to persons entitled to participate in the benefit of an endowment of which the profits alone can be divided, the endowment itself being impartible.

It is clear from Exhibit III that though the village was claimed at the inam enquiry as jointly endowed for two mosques, the claim was rejected and the defendant's family enfranchised the village as a personal inam This contention, therefore, also fails

The next objection is that the shares of defendants Nos 15 and 16, who are the brothers of defendants Nos 39 and 49, should also be exempted from liability for the plaint debts The mere fact of defendants Nos 15 and 16 having been parties to the former suit, does not estop them from claiming the exemption in this suit, which the District Munsif had no jurisdiction to entertain We must, therefore, exonerate their shares which amount to $\frac{28}{960}$ or $\frac{7}{240}$.

It is next urged that the Judge is in error in omitting to exclude the share of the eighteenth defendant from liability for the debt It is not denied that eighteenth defendant is in possession, and in the absence of proof that he inherited the share in his possession from those who executed the document A, such share ought not to have been made liable for the debt This share $\frac{7}{240}$ must, therefore, be exempted.

The next contention is that under the lease E the plaintiff received more than what was sufficient to cover the interest for the two years 1876 to 1878, and that the Judge was in error in not ascertaining the actual amount received and giving defendants credit for the excess There is no evidence to show that the receipts were in excess of the interest Moreover, the document E does not contemplate any such excess It is admitted that the first year's receipts were not sufficient to cover the interest for that year, and it appears, from the remark made by the Judge in paragraph 67 of his judgment, that defendants abstained from calling evidence on the point on the understanding that the claim for those two years' interest was to be set off against the receipts This objection, therefore, also fails

[264] It is next urged that defendants are entitled to be credited with two sums,—Rs. 1,000 and Rs 300—received by the plaintiff As regards the Rs 1,000, there is nothing to contradict the plaintiff's evidence that it was received by him prior to the date of Exhibit A, and that the amount was deducted in 1873, when a previous bond was executed As regards the Rs. 300, plaintiff has accounted for only Rs 200, and for the remaining Rs 100, credit must be given to the defendants

The decree of the Lower Court will be modified to the extent indicated above, and the costs of the appeal assessed proportionately.

As regards the memorandum of objections filed by the respondent, it is first argued that there is no reason for exempting the shares of defendants Nos 39 and 49 Although they intervened in the suit, it is not denied that their relationship to the owners of the village entitles them to shares This being the case, we cannot allow the objection in the absence of evidence of their having forfeited their shares.

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The objection with regard to the revenue sales is not pressed, as the purchasers are not parties to this appeal.

With regard to the remaining objection, it is conceded by defendants' pleader that the kudivaram right of the three persons named in Document A in items Nos. 2 to 10 of the plaint schedule was included in the property hypothecated. We shall, therefore, direct that the kudivaram right of the first, third and sixth defendants in the said items be also held liable for the plaint debt.

There will be no order as to the costs of this memorandum of objections.

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18 M. 265.

[265] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt, Chief Justice, and Mr. Justice Shephard.

MUNISAMI REDDI (*Plaintiff*), *Appellant v.* ARUNACHALA REDDI AND OTHERS (*Defendants*), *Respondents.**
[10th December, 1894.]

Limitation Act—Act XV of 1877, Schedule II, Article 11—Civil Procedure Code—Act XIV of 1882, Sections 278, 281—Disallowance of claim to property under attachment—Subsequent suit.

In 1879 the plaintiff purchased at a court sale the first defendant's interest in certain land, but did not obtain possession. In 1888 the same property was purchased by the fourth defendant in execution of another decree against the same judgment-debtor It appeared that the plaintiff raised an objection by petition in the course of the proceedings in execution of the last-mentioned decree, but his petition was dismissed on his vakil stating that he was not in possession. The plaintiff now sued in 1891 for the property purchased by him·

Held, that no order had been passed under Civil Procedure Code, Section 281, and that the suit was not barred under Limitation Act, Schedule II, Article 11.

[**F.**, 87 P.R. 1904=119 P.L.R. 1904; **R.**, 9 M.L.J. 175 (176); **D.**, 29 M. 225=16 M. L.J. 136.]

SECOND appeal against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 126 of 1891, affirming the decree of V. Cuppusami Ayyar, District Munsif of Sholinghur, in original suit No. 1 of 1891.

Suit in 1891 for possession of the first defendant's share in certain land. A decree having been passed against the present first defendant in original suit No. 604 of 1875, his share in the land now in question was sold in execution and bought by the present plaintiff in 1879, who, however, failed to obtain possession. Subsequently the same property was attached in execution of another decree passed against the same defendant in original suit No. 747 of 1875 and was purchased by the present fourth defendant. The plaintiff raised an objection by petition which was however in effect abandoned on 23rd June 1888, on which date the following order was made:—" Petitioner's vakil states that the petitioner is not at present in " possession of the property. The petition is accordingly dismissed as " he can recover his rights in a suit."

[266] The Lower Courts both held that the present suit was barred under Limitation Act, Schedule II, Article 11, as having been instituted more than one year from the last-mentioned date.

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* Second Appeal No. 808 of 1894.

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APPELLATE CIVIL.

18 M. 265.

The plaintiff preferred this appeal

Jivaji, for appellant

Krishnamachariar, for respondent No 4

JUDGMENT

The question is whether there was any order under Section 281 of the Code When a claim is preferred under Section 278 and duly prosecuted, it is incumbent on the Court after investigation of the fact to satisfy itself either that the facts are as stated in Section 280 or as stated in Section 281 Without being satisfied either way, no order can properly be passed (*Chandra Bhusan Gangopadhya* v *Ram Kanth Banerji* (1)) In this case the claim was practically withdrawn and there was no investigation

There being no order within the meaning of Section 281, the one year's rule does not apply

We reverse the decree and remand the suit for trial by the District Munsif. The respondents must pay costs of this appeal, others costs to be provided for in the revised decree

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18 M. 266=4 M L.J. 223

APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best.

SATHIANAMA BHARATI (*Plaintiff No. 2*), *Appellant* v SARAVANABAGI AMMAL AND OTHERS (*Defendants*), *Respondents* *

[5th September, 1893 and 1st May, 1894]

Religious endowments—Gosami mutt—Grant by the head of the mutt to his brother for his maintenance—Suit by a successor to recover the land—Limitation Act—Act XV of 1877, Section 10—Evidence—Yadasts from revenue officials

In 1544 a village was granted to the head of a Gosami mutt to be enjoyed from generation to genaration and the deed of grant provided that the grantee was "to improve the mutt, maintain the charity and be happy" The office of head of the mutt was hereditary in the grantee's family In 1866 an inam title-deed was issued to the then head of the mutt, whereby the village was confirmed to him and [267] his successors tax-free, to be held without interference so long as the conditions of the grant are duly fulfilled Yadasts addressed by Tahsildars to the then head of the mutt in 1872 and 1882 were put in evidence to show what the object of the grant was It was found regard being had to usage, that the trusts of the institution were the upkeep of the mutt, the feeding of pilgrims, the performance of worship, the maintenance of a water-shed and the support of the descendants of the grantee From before 1840 it had been usual for the head of the mutt for the time being to make grants to his brothers, or younger sons for their maintenance In 1842 the father of the present plaintiff being then the head of the mutt granted certain lands in the village above referred to to his younger brother, the deed of grant being in terms absolute The grantee died about thirty years before the suit and the lands in question came into the possession of his widow (defendant No 1) and a mortgagee from her (defendant No 2) respectively In 1863 the plaintiff's father placed certain other lands in possession of defendant No 3 who paid rent therefor and received pattas for some years from the plaintiff In a suit by the plaintiff for possession of the lands in the possession of the defendants it was pleaded, *inter alia,* that the grant of 1843 was binding on him and that defendant No 3, had a right of permanent occupancy

Held, (1) that the suit was not barred by limitation,

(2) that the yadasts above referred to were admissible as indicating the general consciousness as to the nature of the grant of the village,

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* Appeal No. 109 of 1892

(1) 12 C 108.

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(3) that the grant was an endowment in trust for the mutt and the charities connected therewith, and not merely a grant of property to the original grantee, on which certain trusts were engrafted so as to impose on him an obligation to apply a portion of the income of the village to those trusts;

(4) that the grant of 1843 was valid for the lifetime of defendant No. 1 (who had become by marriage part of the family of a descendant of the original grantee) but that the property comprised therein was liable to revert to the representative of the mutt on her death.

(5) that the plaintiff, although he had issued pattas, was entitled to recover possession of the lands occupied by defendant No. 3 and not to receive rent from him merely.

[F., 6 M.L.J. (270) (272); R. 15 Bom L.R 266 (272).]

APPEAL against the decree of P. Dorasami Ayyar, Subordinate Judge of Tinnevelly, in original suit No. 46 of 1886.

The first plaintiff claimed to be the chief of a mutt situated in the village of Mantithope and he sued to recover possession of certain lands and houses as the property of the mutt. The second plaintiff was his son and the third plaintiff his brother. The first plaintiff died during the pendency of the suit and the proceedings were prosecuted by the second plaintiff

It was admitted that the property in question originally formed part of the endowment of the mutt, but the defendants claimed title from a previous head of the mutt. The original grant, which comprised the village where the property in question was situated, was dated 1544, and it provided that the grantee was "to improve the mutt and maintain the charity and be happy," but [268] otherwise it was absolute in its terms By an inam title-deed, dated 1866, the village was confirmed to the then manager and his successors to be held as long as the conditions of the grant are duly fulfilled. Certain yadasts, subsequent in date to the last-mentioned document, addressed by Tahsildars to the father of the plaintiff, then the head of the mutt, were put in evidence together with other exhibits to show what the object of the grant was. The Subordinate Judge overruled an objection taken to the admissibility of these yadasts; and he recorded the findings, which are summarized by the High Court, as to the objects of the grant.

The first and second defendants claimed title to the land in question under Exhibit XIV, which was an instrument described as a kararnama, dated the 22nd of May 1842, and executed in favour of the plaintiff's father therein described as "by hereditary right the successor and chief of the mutt," by his younger brother who was the husband (since deceased without male issue) of defendant No. 1. The instrument was in the following terms:—

"In accordance with the practice of our adinam, agreements were executed by one Rama Bharati Gosamiyar and (another) Visvanatha Bharati Gosamiyar in favour of their elder brother Bheema Bharati Swamiyar who was our father; also my elder brother Visvantha Bharati Gosamiyar Avergal has executed a kararnama in favour of you, which you have (thus) obtained from (him). In accordance with these agreements, I have executed now in your favour this kararnama, and the particulars whereof is as follows:—" As I have accepted from your hands six varaikkottais of nanjai land, six kayarus of karisal punjai, three kayarus of several punjai, ten pons (in cash), one garden, nine (?) oxen for ploughing, and thirty pons for the price of sheep, &c., you shall hold this itself as my receipt in respect of them all. Moreover, as no house has yet been built and given to me, and as I am yet unmarried, and as no jewels, utensils,

&c., have been given to me for the present, I shall soon after I am married and am provided with a house, take from you the jewels, utensils, cows, &c , as stated above, and which were (as in my case) settled upon Visvanatha Bharati Gosamiyar, my elder brother I shall (thenceforwards) continue to enjoy the aforesaid properties from generation to generation, and for ever shall conduct myself in accordance with your wishes and orders You shall hold this stamped document itself as a kararnama or written agreement from me, also as a [269] declaration on my part that I shall have no disputes whatever with you in regard to this settlement, and as a receipt from me for the properties which I have accepted from you To this effect this agreement has been executed to Sivaprakasa Bharati Gosamiyar the head of the mutt by his younger brother Nataraja Bharati Gosami "

Defendant No 2 held the land on a mortgage from defendant No 1 Defendant No 3 claimed title under a conveyance for value from the plaintiff's father said to have been since ratified by the plaintiff. The plaintiff's case was that the land had been granted to his uncle merely for his maintenance in consideration of his performing certain services in the mutt on the understanding that the land should revert to the mutt on the event of his failure to perform the services or on his death without male issue Defendant No 1, on the other hand, pleaded that the land had passed to her husband as his share on a partition of ancestral property She also pleaded, *inter alia*, that the suit was barred by limitation

In the first instance the Subordinate Court dismissed the suit, but a re-trial having been ordered, a decree was passed declaring the plaintiff's right of collecting the rents of the lands in suit under the provisions of the Rent Recovery Act, 1865, for the benefit of the mutt and charitable and religious institutions thereto attached, the claim for ejectment being refused

The plaintiff preferred this appeal and the defendants took objection to the decree appealed against so far as it was prejudicial to their interests

Bhashyam Ayyangar, for appellant

Krishnasami Ayyar, for respondent No 1

Anandacharlu and *Varadayya*, for respondent No 2

JUDGMENT

This was a suit to recover with mesne profits possession of the properties specified in the plaint from the defendants The ground of claim is that they are comprised in the endowment of a Gosami mutt and that they are improperly alienated to, or retained by, the defendants The plaintiff was the chief or representative of the institution, and upon his demise the second plaintiff was brought in as legal representative

The mutt is situated at the village of Mantithope, in the Ottappidaram taluk, of the district of Tinnevelly After its founder [270] it is known by the name of Srimat Sankara Bharati Swami Adinam In the village of Mantithope there are about twenty families of Gosamis, who claim to be descendants of the original grantee and several of them are in possession of small portions of the endowments The entire village was granted free of assessment to Sankara Bharati according to the plaintiff for the support of the matam and its charities A Gosami is not a religious ascetic like a Sunniyasi or Tambiran who abjures the world and its pleasures and lives a life of celibacy, but a married man who is considered to live a pious life affording religious instruction to those who seek it from him, performing religious charities and delivering lectures on religious subjects and

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on the duty of man to God and to his fellow creatures. The specific trusts, to which the income of the village is applicable according to the usage of the institution, are found by the Subordinate Judge to consist (i) in the distribution of sadavarthi (rice and condiments were supplied in lieu of cooked food) in the mutt to Gosayi and other pilgrims who pass through Mantithope; (ii) in the maintaining of puja or worship in the temple called Sankara Bharati Swami kovil (iii) in supporting a watershed or pandal at a place near the village called Ellandope, and (iv) in providing maintenance to the descendants of the grantee. The eldest male representative of the eldest son of the grantee succeeds to the dignity of the chief of the mutt, and holds the village save such portions of it as have been alienated to others.

The properties forming the subject of this litigation are those parts of the matam endowment which have passed into the possession of the defendants. The first defendant's husband, Nataraja Bharati Gosamiar, was the brother of the first plaintiff's father Sivaprakasa Bharati Gosami and on the 22nd May 1842, the latter executed in favour of the former the agreement, Exhibit XIV, by way of making a provision for him and his family. The document purports to have been executed in accordance with the practice of our ' Adinam.' It gives first defendant's husband certain lands and promises to give him a house and some jewels, utensils and cows, &c., soon after he is married In return for this settlement, the first defendant's husband covenants to the following effect: " I shall continue to enjoy the aforesaid properties from generation to generation and for ever shall conduct [271] myself in accordance with your wishes and orders." After marrying the first defendant her husband left the village about thirty years ago and has not since been heard of, and the land granted by Exhibit XIV passed into her possession. On the 4th September 1885, she mortgaged it for Rs. 1,200 to the second defendant Anandanada Pillai, a stranger to the families of the descendants of the original grantee. As regards this land, the plaintiff's case is that the agreement, Exhibit XIV, is invalid that the land was granted in consideration of certain services which the first defendant's husband was to render in the mutt and on the understanding that it was to revert to the mutt either in case he failed to render those services or died without male issue. On the other hand, the first defendant's contention is that the grant was not a service grant, that Exhibit XIV granted an absolute estate, and that the plaintiff's claim was barred by limitation. The second defendant's contention was to the same effect, except that he also set up against the plaintiff the mortgage in his favour.

As regards items of lands Nos. 1, 2, 15 to 17 and 19 to 21, the plaintiff's case was that the third defendant obtained them from the first plaintiff's father on a patta for cultivation about nine years ago, and that he was bound to give them up on demand. But the third defendant alleged that the original first plaintiff's father granted the lands in perpetuity for valuable consideration, and that the first plaintiff ratified that grant by issuing pattas for the same for Andus 1053, 1054 and 1055 or the years 1863 to 1865.

Five issues were originally framed in this case. On the first issue, a former Subordinate Judge found that the lands in dispute belonged to the matam. On the second issue, he held that the land, which passed into the possession of the first defendant's husband, was not held by him on service tenure. On the third issue, he was of opinion that the claim was barred by limitation. On the fifth issue, he found that the settlement

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made by the first plaintiff's father was binding on his successors, and upon those findings he dismissed the suit with costs

On appeal, however, this Court set aside the decree, on the ground that the investigation was defective, and remanded the case for re-trial With reference to the order of remand, four more issues were framed, and the defects in the original enquiry [272] remedied On the sixth issue the Subordinate Judge found that the specific trusts of the Gosami mutt were as already mentioned On the seventh issue, he held differing from his predecessor, that the maintenance of the descendants of the original grantee was a legitimate charge only on the income of the endowment, and that the allotment of land made over to the first defendant's husband was not valid. On the eighth issue, he was of opinion that document XIV was genuine, but that it was not valid so far as it related to allotment of land He found, however, that the head of the mutt was entitled to the rent, but not to possession of the lands sued for As for the ninth issue which related to the occupancy right set up by the third defendant, the Subordinate Judge found in his favour. In the result he passed a decree declaring that the head of the mutt possessed only the right of collecting rents due on the lands sued for under the provisions of the Rent Recovery Act for the benefit of the mutt and the charitable institutions attached thereto, and dismissing the rest of the plaintiff's claim, he directed the plaintiff to pay the costs of the third defendant and first and second defendants and plaintiff to bear his own costs Against this decree the plaintiff has appealed, and the first and second defendants have objected to it under Section 561, Civil Procedure Code, in so far as it is against them

The first objection taken in appeal is that the suit is barred by limitation, and that Section 10 of the Limitation Act is not applicable to a suit brought by a person succeeding to the office of trustee Reliance is placed on 3 and 4 William IV, cap 27, Section 25 Section 10 of the Indian Act of Limitations specifies as exempt from its operation suits against a person, in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns not being assigns for valuable consideration, for the purpose of following in his or their hands such property Unlike the provision of the English Act, Section 10 does not state that the plaintiff ought to be a beneficiary or beneficiaries whilst, according to Section 437 of the Code of Civil Procedure, a trustee represents the persons beneficially interested when the suit is concerning property vested in a trustee and the contention is between the persons beneficially interested and a third party It must be remembered that the plaintiff is not the alienor, and as the present manager of the mutt, he is [273] entitled to sue the assigns of his predecessor in office, on the ground that the assignment was in violation of his trust This view is in accordance with the decisions in *Mahomed* v *Ganapati* (1) and *Jamal Saheb* v *Murgaya Swami* (2). It is next urged, on appellant's behalf, that the Subordinate Judge is in error in holding that appellant was only entitled to rent and not to actual possession of the land-in- dispute The Subordinate Judge considers that if pattas are issued under Act VIII of 1865, land-holders are not entitled to eject their tenants, but can only claim rent He appears to have misconstrued Section 12, which regulates the mode of ejectment and provides that the land-holders specified in Section 3 are not empowered to eject their tenants from their lands except

(1) 13 M. 277, (280) (2) 10 B. 34.

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by a decree of Court or under Section 10 or 41 of the Act. On the true construction of Section 12, the issue of a patta is clearly not intended to do more than prevent arbitrary ejectment of tenants or to give them a right of permanent occupancy, though the grant or contract, under which their possession commenced, creates either a limited estate or a terminable holding. The Subordinate Judge refers in paragraph 31 of his judgment to an admission by plaintiff that third defendant has been in possession under a lease granted by first plaintiff's father for nine years, but this circumstance is not sufficient to support the finding that the former has a permanent right of occupancy. In our judgment the appellant's contention must prevail.

The real question, then, is whether having regard to the grant or contract under which the defendant's possession commenced, they are entitled to continue in possession and can legally resist plaintiff's claim to eject them.

Exhibit XIV is the kararnama on which first defendant's title rests, and we agree with the Subordinate Judge that that document is genuine. There is no doubt that it is not a mere maintenance grant, but a grant of an absolute estate as alleged by first and second defendants. The words "from generation to generation" and the absence of any clause prohibitive of alienation are consistent only with the view that the intention was to create an absolute estate, not a limited one merely. That this is the proper construction to be put on the document XIV is confirmed by the terms of similar grants made by some of the plaintiff's predecessors to their [274] brothers. As recited in document XIV it appears to have been customary in the adinam for the head of the mutt, for the time being, to make a provision for his younger brother by grant of land to him and his heirs. This brings under our consideration the contention on respondent's behalf that the original grant of the village of Mantithope was not a grant of an endowment in trust for the mutt and the charities connected therewith, but a grant of property to the original grantee on which certain trusts were engrafted, so as to impose on him an obligation to apply a portion of the income of the village to those trusts. We do not consider that this contention is tenable. The Subordinate Judge discusses the evidence on the subject under the first issue and decides that issue in plaintiff's favour. But the first and second respondents' pleader draws our attention to Exhibits W, R, T, Q, 27, 31, 32, 14, 17, 28, 29 and 30; to Exhibits 15, 16, 18, 19, 20, 21, 25 and 26, and to the oral evidence of plaintiff's witnesses 1, 2, 7, 10 and 4 and of defendant's witnesses 2, 3, 8, 9 and 10. Exhibit W is the original grant, dated Andu 719 (1544) and purports to be a grant of the village of Mantithope made by Visvanatha Nayak's Dewan Tiruvengadanadha Naicker to Sankara Bharati Tambiran to be held and enjoyed free of assessment so long as the sun and moon endure from generation to generation. It says that the grantee is thus "to improve the mutt, maintain the charity and be happy." There is no allusion in the inscription to maintenance, and the grant contemplates the improvement of the mutt and the maintenance of the charity as its primary object. Stress is laid on the words "from generation to generation" and on Sankara Bharati instead of the mutt being named as the grantee. But this is not conclusive. The subsequent usage of the institution and several other exhibits in evidence are inconsistent with this contention, and show that Sankara Bharati was probably named as the grantee because the mutt was his mutt.

Exhibit R is the inam title-deed, dated 1st February 1866 It was issued to the manager, for the time being, of Sankara Bharati Tambiran mutt by the Inam Commissioner on behalf of the Governor-in-Council It confirms the village to the manager and his successors tax-free to be held without interference "so long as the conditions of the grant are duly fulfilled" It is not possible to reconcile this document with the respondent's contention. Exhibit B is the register of inams prepared by the Inam Commissioner. [275] In that it is recorded that the grant was made for the support of the Gosai matam at Mantithope and that the matam is well kept up Exhibit C is the inam statement put in by the first plaintiff's father and the grant is described in it as made by the former Government for the maintenance of the charities conducted in Sankara Bharati Tambiran's matam.

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Exhibits T and Q are yadasts addressed by Tahsildars to plaintiff's father, which tend to show that the object of the grant was as found by the Subordinate Judge They are dated, respectively, in 1872 and 1882 It is contended, on behalf of first defendant, that they are not evidence against her They are admissible, however, as indicating the general consciousness as to the nature of the grant

Exhibit 27 is the yakat account of 1808 in which the village of Mantithope is entered as "Sudda maniam village belonging to Gosamiars" There is nothing to indicate that the object with which it was prepared was to show the precise nature of the grant and it is not safe to attach weight to it.

Exhibits 31 and 32 only show that it was customary for the chief of the mutt for the time being to allot lands for the maintenance of his junior sons when he has several sons and to his brothers, and that this practice was followed in 1879 and 1877.

Exhibit XIV under date May 1842 which is the grant relied on by first and second defendants shows that prior to it there had been similar grants

Exhibit XXVIII is a jamabundy account and gives no useful information

Exhibit XVII, which was a grant for maintenance made in 1888, describes the usage of the mutt as regards such grants in the following terms —"As among the hereditary descendants of our adinam, be the number of brothers what it may in each generation, when the eldest of them who is the heir apparent to the dignity comes to be the head of the mutt, it has been the practice with such eldest brother to allot to his younger brothers for their maintenance certain lands, maniyams, houses and grounds and such other properties as may be sufficient therefor and thus to separate them after obtaining from them written agreements for the same."

Exhibits XXIX and XXX are the razinamah in original suit No 381 of 1861 and the written statement in original suit No [276] 139 of 1860 They also show that maintenance grants were usually made and no partition was allowed.

The other exhibits to which respondent's pleader has drawn our attention are hypothecation bonds and mortgages executed by those to whom lands were granted for maintenance

The effect of the oral evidence is sufficiently stated by the Subordinate Judge and it is unnecessary to recapitulate it

Neither the oral nor the documentary evidence proves the respondent's case, that the village was originally granted as private property and not as an endowment. The evidence, taken as a whole, points to the conclusion that the village was granted as an endowment for the mutt and

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the charities connected therewith. Having regard to the usage of the institution the specific trusts are (1) the up-keep of the mutt, (2) the distribution of sadavarti to Gosayi pilgrims, (3) the performance of puja in Sankara Bharati Swami kovil, (4) the maintenance of watershed at Ellandope, and (5) the support of the descendants of the grantee. The evidence does not show that at each generation the village was divided subject to the obligation of contributing to the cost of maintaining the charities, or that any portion of the village was specially set apart as trust property and the rest as partible property as would ordinarily be the case if the villages were granted for the personal benefit of the grantee and his heirs, subject to the fulfilment of certain trusts annexed to the grant. The conclusion to which we come is that the village was granted as an endowment for the mutt and the charities connected with it, and that what might remain after the due execution of those trusts was intended to be applied to the maintenance of the grantee or his descendants. It has, no doubt, been usual from before 1840 for the head of the mutt for the time being to make provision for his brother or junior sons, but such grants would be valid, only if they were real maintenance grants. The Subordinate Judge considers that only money payments should have been made and that no lands ought to have been allotted. We do not concur in this opinion; whether maintenance is provided by an assignment of land or paid in cash from time to time there is no difference in principle, provided that the allotment is purely by way of providing maintenance. That which vitiates the allotment is its character as an absolute grant and the grant is bad to that extent only. The first defendant [277] being by marriage part of the family of a defendant of the grantee, the grant should be declared to be valid during her life and liable to revert to the representatives of the matam on her death The decree of the Subordinate Judge must, therefore, be set aside so far as it declares that the plaintiff is entitled to rent and a decree be passed, declaring him entitled to hold the lands on and after the demise of the first defendant.

Each party will bear his or her own costs.

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Before Mr. Justice Shephard and Mr. Justice Best.

ANNAPURNI NACHIAR (*Defendant No.* 2) *Appellant v.* COLLECTOR OF TINNEVELLY AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.** [11th and 12th March and 10th April, 1895.]

Hindu law—Inheritance—Impartible estate—Adoption by a zemindar in conjunction with one of his two wives—Right to succeed to adoptive son.

The holder of the impartible Zemindari of Uthumalai, who married two wives, subsequently made an adoption in conjunction with his junior wife. The zemindar died in August 1891, and the adopted son died an infant without issue in December of the same year:

Held, that the junior wife having taken part in the adoption was entitled to the impartible estate in preference to her co-wife.

APPEAL against the decree of F. H. Hamnett, Acting District Judge of Tinnevelly, in original suit No. 15 of 1892.

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This was an interpleader suit relating to the rival claims of defendants Nos 1 and 2 to succeed to the impartible estate the property of the infant adoptive son of their late husband The facts of the case was stated sufficiently for the purposes of this report in the judgment of Best, J

The Advocate-General (Hon. Mr *Spring Branson*), *Ramachandra Rau Saheb*, *Gopalasami Ayyangar* and *Ranga Ramanujachariar*, for appellant

[278] *Bhashyam Ayyangar*, *Krishnasami Ayyar*, *Ramakrishna Ayyar*, *Desikachariar*, *Seshachariar*, *Natesa Ayyar* and *Subramania Ayyar*, for respondent No 2

JUDGMENT

Best, J —The question for decision in this appeal is whether the appellant (second defendant) or the second respondent (first defendant) is entitled to possession of the impartible Zemindari of Uthumalai in the Tinnevelly district The first respondent is the Collector of the district, by whom the suit was instituted for the purpose of obtaining a decision as to which of the rival claimants was entitled to the zemindari, of which possession had been taken by him as Agent of the Court of Wards on behalf of a minor named Navanita Krishna Marudappa Tevar as adopted son of the Zemindar Irudalaya Marudappa Tevar, who died on 12th August 1891 The minor also died on 16th December 1891.

The fact and validity of the adoption of the boy Navanita Krishna by the late Zemindar Irudalaya, whose widows both appellant and the second respondent claim to be, were denied by the appellant and formed the subject of several issues (5 to 8) settled for trial in the suit These issues are considered by the Judge in paragraphs 60 to 71 of his judgment, and the conclusions arrived at by him are stated in paragraph 72, namely, that there was in fact an adoption and that no reason appears for holding it to be other than valid

The correctness of the finding is not disputed at the hearing of the appeal, and the evidence on record amply supports the conclusions arrived at by the Judge as to the fact of the adoption

Another fact that is not disputed is the marriage of the appellant with the late Zemindar Irudalaya. But the fact of second respondent being also a wife was denied and formed the subject of the first issue The Judge has found on the issue in favour of second respondent, and his finding as to the fact of second respondent being a wife of the late zemindar is supported by Exhibit UUU—a statement filed by appellant's own father and brothers in criminal proceedings against the zemindar, in which second respondent, is expressly spoken of as the second wife of the zemindar, and also by Exhibit F which contains an admission of the fact by appellant herself In the face of this evidence the learned Advocate-General, who appeared for the appellant, has been unable to contend that second respondent was merely a concubine and not a wife of the late zemindar He has contended, however, [279] that the Judge is not warranted by the evidence in finding that second respondent's marriage took place at the same time as that of appellant at the latter's village of Kurukalpatti This was clearly not the second respondent's case—the whole of whose evidence on the point is directed to showing that second respondent's marriage took place at Virakeralampudur, some 14 miles from Kurukalpatti The story told by second respondent's witnesses is that, after the marriage of the zemindar with second respondent in the morning at Virakeralampudur, the zemindar started off on horseback accompanied by a couple of servants on

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foot and proceeded to Kurukalpatti to marry appellant, then a girl aged six or seven years. On hearing of which his mother followed him in a palanquin; and on her arrival a Kurukalpatti the zemindar hastily left, not however till after the marriage with appellant had been performed, and returning to Virakeralampudur went on with the ceremonies of the marriage with second respondent on the next and following days. The Judge has assigned sufficient reasons for disbelieving this story of second respondent's witnesses.

The Judge's reason for finding that the marriage of second respondent must have taken place at Kurukalpatti is the statement by the zemindar in his petition, Exhibit DDD, that he married both appellant and second respondent at "one and the same time." But in the same petition the zemindar has stated that he had divorced appellant, which is found by the Judge to be not true. There is thus no good reason for accepting as true the statement that the two marriages took place "at one and the same time," especially when that statement is opposed to the evidence of second respondent's own witnesses and of second respondent herself.

It being found that second respondent's marriage did not take place on the same day as that of appellant, and it not being pretended on behalf of second respondent that it took place on any previous day, the only possible conclusion is that it must have taken place on a subsequent day. From the finding that the marriage did not take place at Virakeralampudur at the time alleged by second respondent and her witnesses, it follows that there is an entire absence of evidence as to where and when it took place, and were it not for the admission contained in Exhibits UUU and F, there would be no reliable evidence of second respondent being in fact a wife of the zemindar, for the statements made by [280] the zemindar himself in the description of second respondent as a wife in official reports pending the dispute between the appellant and the zemindar are clearly not sufficient to place the matter beyond doubt. But the statement in Exhibit UUU by appellant's father and her brothers and in Exhibit F by appellant herself seem to justify the finding that second respondent was also a wife of the zemindar, but only a junior wife, *i.e.*, a subsequently married wife.

The alleged divorce of appellant is found to be untrue not only by the Judge in the present suit, but also by the Subordinate Judge in original suit No. 17 of 1889—a suit filed by the late zemindar against appellant and which is the subject of appeal suit No. 152 of 1891, which is also now before us for decision.

The evidence as to the alleged divorce has been carefully considered by the District Judge in paragraphs 46 to 49 of his judgment, and there is no reason for holding that he has come to a wrong conclusion.

As already stated, the Advocate-General no longer contests the fact or the validity of the adoption of Navanita Krishna Marudappa by the late Zemindar Irudalaya with the second respondent.

The real question for decision, therefore, is whether second respondent as the receiving mother is entitled to succeed to the estate as heir of the boy Navanita Krishna in preference to appellant, though the latter is the first married wife of Irudalaya. It is first contended on behalf of second respondent that she has a preferential right to succeed to the zemindari on the admitted fact of her seniority in age to the appellant. But as has been contended on behalf of appellant, seniority in the family of the husband must be calculated from the date of the entry of each wife into that family by marriage and so calculated the appellant is clearly the senior wife—the

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Dharmapatni—the wife married from a sense of duty—see 2, Colebrooke's *Digest*, page 124, and Strange's Hindu Law, page 137, *cf.* also *Padajirav* v *Ramrav* (1) However, the question here is not as to the succession of wives to a husband, but of the mother to an adopted son

The Judge has found that second respondent as the receiving mother is entitled to succeed in preference to the appellant In support of this finding he has cited the case of *Kasheeshuree Debia* v *Greesh Chunder Lahoree* (2), also a dictum in *Teencowree Chat-*[**281**]*terjee* v *Dinonath Banerjee* (3), and the opinion of Sir Francis MacNaghten at page 171 of his Hindu law where he says, " the boy could not be received by three widows jointly He must be received by one of them and would then be considered as the son of the widow by whom he had been received " See also the answer of a Pandit in the appendix to the same book, which says, " The widow adopting will be called the mother and the others the step-mothers " So also West and Buhler in Vol I, page 1132 (third edition) of their Hindu law say, " The importance of the right to adopt as between two or more widows becomes evident when it is borne in mind that the one taking the place of mother succeeds first to her son on his death without child or widow " No doubt the writers above referred to have cited no authority for the views expressed by them, and the rule enunciated in *Dattaka Mimamsa*, VI, V 50, and *Dattaka Chandrika*, III, V 17, to the effect that the " forefathers of the adoptive mother only are also the maternal grandsires of the sons given " differentiates between the adoptive and natural mothers, and not between an adoptive mother who actually joins in the ceremony of adoption and her co-wives But if it is allowable to a Hindu to authorise one of several wives to take a child in adoption after his death, and in such case the widow so appointed can alone exercise the power as admitted by Mr W H MacNaghten (see page 12 of his introduction), it is difficult to understand why he should have no discretion in selecting one of his wives to join with him in making an adoption during his lifetime

The only authority cited in support of appellant's contention is the passage at page 12 of the introduction to Mr W H MacNaghten's Book on Hindu Law, but he expressly states that his remarks have reference only to the rights and privileges accruing to the adopting widow " from the simple fact of her having made the adoption, independently of any intention expressed or implied by the deceased, that such widow alone should be considered as the mother of the adopted child," and adds " if he declared this explicitly, the case would be different, or if such may be reasonably gathered to have been his intention, from some unequivocal indication of his will that his other wives should have no concern with the adoption."

[**282**] In the present case there can be no doubt as to the fact of the adoption of the boy Navanita Krshna Marudappa having been made by the late zamindar in association with second respondent alone She was the wife with whom he had lived since 1866 at least, whereas (as has been rightly found by the Judge) the appellant never lived with her husband, for there can be no doubt that the evidence adduced by appellant to prove that she ever cohabited with her husband or even went to the palace prior to March 1889 has been rightly disbelieved by the Judge, see paragraphs 50 to 54 of his judgment It is equally beyond doubt that the deceased's intention was that second respondent and not appellant should occupy the

(1) 13 B. 160. (2) W R. (1864), 71 (3) 3 W. R. 49

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position of mother to the boy adopted, and second respondent, and not appellant, was the 'receiving' mother, which is the literal meaning of the word 'pratigrahitri' which is translated 'adoptive' in *Dattaka Mimamsa* VI, 50, *Dattaka Chandrika*, III, 17. The fact that adoptions under the Hindu law are for the benefit of the man and can be made independently of any wife, does not appear to be a circumstance from which it can be inferred that the man is not at liberty to select one of several wives to be the receiving mother of the boy to be adopted; and as to *Manu*, Chapter IX, V. 183, it certainly does not prove the appellant's contention, for notwithstanding the statement there made that if among all the wives of the same husband, one bring forth a male child, they are all declared, by means of that son, to be mothers of male issue: nevertheless the actual mother succeeds to the son in preference to her co-wives. There is, therefore, no reason why the mere fact of all the wives being considered as mothers of an adopted son should preclude the wife who is actually associated in the adoption from being considered as the mother, and the other wives merely co-wife mothers (Sapatnimata).

The preponderance of authority clearly supports the Judge's finding that where only one of several wives is associated with the husband in making an adoption, she is the preferential heir to the boy.

I would therefore dismiss this appeal with costs.

SHEPHARD, J.—I concur with Mr Justice BEST in his conclusion on the facts of this case

It being assumed then that the late zemindar died, leaving him surviving two widows and a son adopted by him in conjunc-[283] tion with one of them, namely, Meenakshisundra, and that son having since died, the question to be decided is whether the widow Meenakshisundara or the other widow Annapurni has a preferential right to the zemindari, which being impartible can only be enjoyed by one of them

Meenakshisundra's claim is based on the ground that she took part in the adoption and that in point of age—whether or not she was first married—she is the eldest of the two widows. On the other hand the contention on behalf of the appellant Annapurni Nachiar is that she was the elder wife in the sense of having been first married, and that her rights in that capacity were not affected by the action of the zemindar in preferring to associate his other wife in the ceremony of adoption.

The question which arises is what is the precise relation between the co-wives of a Hindu who adopts a son and that adopted son? Are they all to be regarded as mothers of the son or does one of them only, and, if so, which of them stand in that relation?

It was conceded by Mr. Bhashyam Ayyangar, and there can be no doubt that the act of adoption inasmuch as it concerns the husband alone may be performed independently of his wife. Her consent is unnecessary. Nevertheless she, if she is the only wife, undoubtedly comes to be regarded as mother of the adopted son, and her parents come to be regarded as his maternal grandparents. (*Dattaka Mimamsa*, Section VI, V, 50). To those parents of the adoptive mother he presents oblations. Generally, his position in the family is assimilated to that of a natural born son. In the case supposed, that of an adoptive father with one wife, the law itself designates the adoptive mother and no difficulty arises. Where, however, there are several wives it is said that the husband is at liberty to designate the one who shall take the place of mother, and that by this means the anomaly of assigning several mothers to the adopted son may be avoided. Otherwise, the adopted son having several mothers would

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have as many sets of maternal grand-parents from whom he might inherit and to whom he must offer oblations The two chief authorities on the law of adoption throw no distinct light on the question The expression 'adoptive mother' used in the verses cited from the *Dattaka Chandrika* and *Dattaka Mimamsa* is not used in reference to the case of several mothers, and evidently no distinction is intended to be drawn between the wife who has taken part in [284] receiving the child and any other wife It would appear however that these texts have been treated as supporting the proposition that where there are more wives than one, she who has received the boy should be regarded as his mother In a case cited by Sir F MacNaghten in his considerations (page 171), published in 1824, the point is treated as beyond dispute Authority had been given by the husband to his three wives to adopt a son, and if they could not agree he directed that a boy should be chosen by his first and second widows, or if they could not agree by his second and third widows The widows not having agreed, the mother to whom the matter was referred selected one Taracoinai, who had been nominated by the second widow The question then arose which of the three had a right to receive him "The law is clear and was undisputed," says the author, "the boy could not be received by the three widows jointly He must be received by *one* of them, and would then be considered as the son of Luckinarain and the widow by whom he had been received, about this there was not, because there could not be, any dispute"

In 1864 the question was raised in Bengal in a case where, as in the present case, a claim was made by one of two widows whose husband had adopted a boy who had subsequently died It was found as a fact that the deceased Kalee Kant had adopted the boy not as the son of the plaintiffs, but as son of his second wife Mon Mohinee It was held that the latter was as adoptive mother the heir of the adopted son, *Kasheeshuree Debia* v *Greesh Chunder Lahoree* (1)

In another Bengal case decided in the following year, it seems to have been assumed by the High Court that the co-wife would stand in the relation of step-mother to one adopted as the son of another wife The point, it is true, did not arise for decision, and the remark upon it is only an *obiter dictum* (*Teencowree Chatterjee* v *Dinonath Banerjee* (2))

The opinion thus expressed in Bengal, while it does not appear to have been questioned in subsequent cases, has been adopted by commentators, (*Vyavastha Chandrika*, page 161, V, 348, West and Buhler, 113)

[285] The rule cited by West and Buhler, "The adopted son succeeds to all his step-mothers," is not at variance with the notion that one wife only is regarded as his mother They cite however a passage from Colebrooke's Digest, which favours the opposite contention In that passage (page 394) it is said that "if a son be adopted by a man married to two wives, he would have two maternal grandfathers and would claim as maternal ancestry both their lines of forefathers" The writer goes on to speak of this as a seeming difficulty and to suggest a mode of dealing with it Having regard to the way in which the point is raised and the absence of authority cited, I do not think that this pronouncement of Jagannatha can be allowed to weigh against the authorities already cited Another and more distinct authority, on which the Advocate-General relies, is to be

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(1) W R (1864) 71 (2) 3 W R 49 (50).

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found in the preliminary remarks forming an introduction to W. MacNaghten's *Principles of Hindu Law*. Dealing with the case of a husband leaving three widows, to one of whom he has given authority to adopt, he says the three widows of the same man are held to be in a legal point of view one and the same individual. The widow to whom the permission was given may indeed have the privilege of selecting the boy to be adopted, but the adoption being once made, he necessarily holds the same relation to all the three widows of the adopting father. He goes on however to say that the case would be different, if the husband declared his intention that the other wives should have no concern with the adoption, see page XII This latter observation supports the view advocated by Mr. Bhashyam Ayyangar. The proposition that the three widows, alike the one who has been commissioned to adopt and the other two, stand in the same relation to the adopted son is in direct contradiction of the statement made by Sr F. MacNaghten. The author does not refer to this statement, nor indeed in the body of his work does he discuss the question.

It is contended that the opinion of the Bengal lawyers in favour of allowing a husband to constitute one of his wives the mother of his adopted son, is in some way connected with the notion entertained by Sir F. MacNaghten and others that plural adoptions were permissible. I fail to see however how the weight of his opinion expressed with reference to a case where one adoption was in question is lessened by this circumstance. And seeing that the Judicial Committee pronounced against plurality of [286] adoptions as early as 1846, the contention clearly does not touch the case decided by the High Court of Bengal in 1864. Moreover, the liberty of the husband to make a second adoption was not founded on any right or interest supposed to be possessed by the wife, but on the absence of authority to the contrary and on the principle that many sons are to be desired. See *Rungama* v. *Atchama* (1).

In my opinion there is no inconsistency between the recognized principles of the law with regard to adoption, and the position that one of several wives may be selected as the adoptive mother. The maintenance of this position does not militate against, but is rather in consonance with the principle that the adoption is made solely for the benefit of the husband. It is a mistake to assume that the husband in thus selecting one of two wives necessarily intends to give her any material benefit. Ordinarily it might be expected that the adopted son would survive both the wives, and the fact that, in the other event, the favoured wife would succeed on the son's death would not be taken into account. What may be supposed to be contemplated is that the son will succeed on the death of that wife. It cannot be denied that a Hindu having two wives may confer on one of them an authority to take a child in adoption after his death, nor can it be doubted that the selected widow would alone and to the exclusion of her co-widows have discretion in the matter (2, Strange's Hindu Law, page 91). What would be the relation between the co-widow and the son adopted by the other widow under the authority so given does not appear to have been decided except in the case cited by Sir F. MacNaghten. Indeed the question is not distinguishable from that raised in the present case. But it certainly would seem reasonable to hold that the widow, who being duly authorized, has taken a boy in adoption, and without whose act the adoption could never have taken place, is the mother of the boy

(1) 4 M.I.A. 1 (67-95).

rather than the others who had no concern in the matter. At any rate the case of a husband giving one of his two wives authority to adopt is an instance in which he, for his own purposes, is at liberty to give preference to one of them and thus enable her to defeat the expectations of the others.

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18 M. 277=5 M.L.J. 121.

The proposition that both wives or both widows together constitute the mother of the adopted son, notwithstanding any declara-[287]tion of the husband to the contrary gives an importance to the wives in the matter of adoption for which there is no justification. The institution of adoption requires that the son adopted should be deemed the son of the person who has taken him. It is only consistent with this theory that the wife of the adoptive father, if there happen to be one, should also be deemed the mother of the boy. But, in the case of several wives, the theory does not require that they all should be deemed to be his mothers.

To hold this rather than to hold that his relation is that of step-son to the co-wives other than the one who has been associated in the act of adoption is to introduce a quite unnecessary fiction.

We are invited to consider the case in which a husband has made an adoption independently of both his wives and to answer the question which would then arise. The case is not one which is likely to happen, and it seems to me sufficient to say that, because a certain mode of designating the adoptive mother fails, it does not follow that no other exists.

In the present case it is sufficient to hold that where the husband has associated one wife with him in adopting a child, that wife is to be deemed mother of the child. This conclusion appears to me to be justified as well by principle as by authority.

It follows that the appeal must be dismissed with costs.

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18 M. 287=5 M.L.J. 168.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SIVASUBRAMANIA NAICKER AND OTHERS (*Plaintiffs Nos. 1 and 3 to 12*), *Appellants* v. KRISHNAMMAL AND OTHERS (*Defendants Nos. 2 to 9*), *Respondents*.*

[2nd, 4th and 5th October and 14th December, 1894.]

Hindu law—Impartible raj—Custom of inalienability, evidence of—Dayadi Pattam.

The holder of the impartible palayam of Ammayanayakanur transferred his estate to his wife by a deed of gift. The transferor had besides a son numerous dayadis, and some of the latter now sued for a declaration that the gift was not [288] binding on them. The law of succession admittedly applicable to this palayam was the rule of dayadi pattam, according to which the person entitled to succeed on the death of a palayagar is the senior in age of his daydis descended from one of three brothers, who originally formed a joint family together and were the founders of three lines in the family. The person entitled under this rule to inherit on the death of the transferor was one of the plaintiffs in the suit. It was contended that the palayagar had no proprietary right in the estate, but held the office of manager merely, but *this contention was overruled*.

It was further contended that the estate admittedly impartible was by custom inalienable also.

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* Appeal No. 29 of 1894.

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Held, on the oral and other evidence adduced in the case, and with reference to admissions made by the transferor and to his conduct, and on its appearing that eight out of the nine predecessors of the transferor had left either sons or widows, but nevertheless that for three centuries there had been no sale or gift, that the custom of inalienability was established, and that the gift in question was accordingly invalid as against the plaintiffs. *Sartaj Kuari* v *Deoraj Kuari* (I.L.R., 10 All., 272) discussed and explained.

[R, 20 M. 167; 20 M 207, 30 M. 255=17 M.L.J. 201=2 M.L.T. 167; 8 Ind. Cas. 332; 24 M.L J. 592 (604)=13 M L.T. 409=(1913) M.W.N. 453.]

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura, West in original suit No. 30 of 1892.

Plaintiffs were the dayadis of the palayagar of Ammayanayakanur, the first defendant, who on the 30th November 1891, had transferred his palayam to his wife by way of gift. The prayer of the plaint was for a decree that that alienation was void. The other defendants were the wife and an infant son of the palayagar and other members of his family. The first defendant died during the pendency of the proceedings. The Subordinate Judge held that the alienation in question was not invalid and passed a decree dismissing the suit

The plaintiffs preferred this appeal.

Subramanya Ayyar, *Bhashyam Ayyangar* and *Gopalasami Ayyangar*, for appellants.

The Advocate-General (Hon. Mr. *Spring Branson*) and *Parthasaradhi Ayyangar*, for respondent No. 1.

Sundara Ayyar, for respondents Nos. 3 to 8.

JUDGMENTS.

MUTTUSAMI AYYAR, J.—The contest in this appeal is as to alienability of the palayam of Ammayanayakanur in the district of Madura. The first defendant, Bommachi Nayak, now deceased, was the last palayagar; the second defendant is his widow, and the third defendant is their minor son aged three years. On the 30th November 1891, the first defendant transferred to his wife, the second defendant, by an instrument of gift marked as Exhibit VIII the estate of Ammayanayakanur with all its appurtenances. [289] The question which we have to determine is whether the palayagar was competent so to alienate the palayapat.

Admittedly Ammayanayakanur is an ancient impartible estate, and it appears from Exhibit D that Visvanada Nayak, the founder of the Nayak dynasty of Madura, granted it Since the grant, it has been in the enjoyment of appellants' family for a period of about 386 years. In Nelson's *Manual of the District of Madura* it is mentioned as " one of the " 24 palayams of the Dindigal group. Though it is assessed with a " peishcush, no sannad seems to have been granted; hence it is spoken of " as one of the unsettled palayams."

It is also an undisputed fact that a peculiar custom called ' dayadi pattam ' regulates the succession to this palayam. On the demise of the palayagar for the time being, the estate devolves not on his heir according to the Mitakshara law, which in the absence of a special custom, governs this part of Southern India, not on the eldest son according to the rule of primogeniture, which obtains in the other palayams in the district owned by persons of the Kamblar caste, but on the dayadi or cousin of the deceased palayagar who is senior in age and who is descended from one of the three brothers who originally formed a joint Hindu family. These three brothers were named, (1) Petala Nayak, (2) Chakala Nayak, and (3) Chinnalu Nayak, and of the three branches springing from them,

the second is now extinct. Thus, the class of kindred in which the heir has to be found is that of the descendants of the two branches, and the person to be selected as palayagar from that class is the one who is the oldest or senior in years.

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There are a few special facts relating to this estate, which it is desirable to remember in connection with this appeal

(i) The first is a statement made by the playagar of 1822, that in his family the estate originally descended from father to son, but that owing to the curse of some person, that mode of succession was found not to prosper and that the present peculiar custom was established to regulate devolution of property Exhibit D contains that statement, but it gives no information as to when this change was made Whether this family tradition is true, or whether the custom is the mere expression of the notion that in a coparcenary family the senior co-parcener in age ought in times of turbulence, to take the impartible estate, cannot now [290] be ascertained. However this may be, the fact remains that the custom of dayadi pattam has furnished the recognized rule of succession in the family from time immemorial

(ii) Another fact is that the palayagar for the time being is known as the 'periya' or senior Nayak, the next in the line of succession is called the 'siru' or junior Nayak, and the one who is next to the heir-apparent is designated 'talakarta Nayak' or commander of the forces Exhibit JJ, which is copy of a judgment of the Zillah Court, dated 1819, shows that the Siru Nayak had then some land attached to his rank or status and that he was entitled to hold it so long as he had that status

(iii) The third fact is that there are now 18 members in the family and that the first plaintiff who is 57 years old is the senior in age Apart from the palayapat which is considered to be common to all dayadis for purposes of succession, each has separate property which is partible among his sons and descends in accordance with the Mitakshara law as applied to ordinary Hindu property

(iv) The next special fact is that, since 1800, there have been 10 palayagars including the first defendant and there have been nine cases of succession as shown in the pedigree, Exhibit BB It appears that in five cases the deceased palayagar left sons and in three left widows, but in all the senior dayadi took the estate to their exclusion It appears further that when the son who is superseded becomes in his turn a senior coparcener, he succeeds in that capacity The pedigree, Exhibit BB, shows how each of the 10 palayagars was related to one another and to the first defendant and to which of the two branches he belonged

The substantial question in this appeal is whether the estate of Ammayanayakanur is alienable as alleged by the second defendant The Subordinate Judge, who tried the suit, has upheld her contention and rested his decision on the ground that the decision of the Privy Council in *Sartaj Kuari* v *Deoraj Kuari* (1) governed this case, no family custom being in his opinion proved in support of inalienability It was part of the appellants' case that each palayagar succeeded simply to the management of the estate, that he had no proprietary interest therein, and that he was in the position of an office-bearer with the net income of the [291] zemindari attached to that office as emolument during his incumbency. The Subordinate Judge has declined to adopt this theory of the zamindar's status and held that Ammayanayakanur is a proprietary

(1) 10 A. 272

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impartible estate devolving in accordance with the special custom of dayadi pattam. In the result, he dismissed the suit with costs; hence this appeal.

The first question argued before us is as to the palayagar having no proprietary interest in the palayapat and as to his succeeding merely to the office of manager for the time being. Appellants' pleader is unable to refer us to any positive evidence in proof of his contention, save Exhibit A which lends no support to it. That exhibit is a report made in 1822 to the Collector by an amin who was deputed to attach the house of the then palayagar for arrears of kist. It states that the heir-apparent executed a kararnama promising to pay the arrears in certain instalments, that he prayed that orders might be issued for him to 'manage the affairs,' as he was entitled to the 'zemindar's kariyam' after the then palayagar, and that his prayer was in accordance with custom. I fail to see how this document negatives any proprietary interest in the palayapat. It does not contemplate a case of inheritance, but at the best it implies that the then palayagar might be superseded in management according to the custom of the family as such management was found ineffcient. The words 'next entitled to the zemindar's affair or kariyam' signify nothing more than next entitled to exercise the functions of the zemindar or to his position. An attempt is next made to compare the position of the palayagar with that of the managing co-parcener of a joint Hindu family, but in doing so, the learned pleader for appellants overlooks the fact that the managing co-parcener has no separate property in the income of the family estate, whereas the palayagar takes the income of the palayapat as beneficial owner for the time being. Again the correspondence which took place on the demise of each palayagar from the commencement of this century treats the case as one of inheritance to an ancestral estate by virtue of a peculiar family custom. It is not explained whether according to the theory that the palayagar, for the time being, is a mere office-bearer, the estate vests in any one, and whether if it vests in the coparcenary family constituted by all the dayadis, why it does not vest in the senior co-parcener for the time being as the sole representative capable accoording to the family custom of [292] enjoying it as an impartible estate. If this contention were to prevail, it would equally apply to every zemindari in this presidency belonging to a joint Hindu family in which the zemindar's power of alienation is restricted by the custom of the family. I agree with the Subordinate Judge in thinking that the contention is one which cannot be upheld.

The second question argued in this appeal is as to the law applicable to the case. The Subordinate Judge has held that inalienability cannot be inferred from impartibility and it must be proved by family custom. In support of his opinion he relies on the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kurai* (1). Appellant's pleader contends that the law to be applied to this case is that contained in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (2) and that the decision of the Privy Council is not applicable, because the question of inalienabillty was there considered as between a Hindu father and his son, whereas the controversy in this case is between cousins or co-parceners. There is no doubt that this distinction exists, but when regard is had to the principle on which the Judicial Committee decided the Allahabad case and to the opinion of the High Court at Allahabad which their Lordships overruled, I am unable to accede to this contention. The law as administered both at

(1) 10 A. 272. (2) 4 M. 250.

Allahabad and in Madras prior to that decision was that when an impartible estate belongs to a joint Hindu family consisting of father and son, the latter acquired a co-parcenary right therein by birth, and that though, in consequence of the estate being impartible and capable of enjoyment but by one member of the family at a time, there was no joint enjoyment, yet the co-parcenary right was not extinct but lay dormant, and generated a right of survivorship in the son on the death of the father and that the co-ownership which is of the essence of a coparcenary right existed in the case of impartible estates belonging to a joint Hindu family in the form of a right of survivorship. The grounds on which the Lords of the Judicial Committee rest their decision are that, in order to prevent alienation by the father, there must be co-ownership in the son, that the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is in their opinion so connected with the right to a partition that it does not exist where there is no right to a par-[293] tition, and that though an impartible estate may for some purposes be joint family property, the co-parcenary in it, which under the Mitakshara law is created by birth, does not exist. Thus the *ratio decidendi* of the Privy Council decision is that there is no co-parcenary right so as to generate co-ownership in the form of a right of survivorship and in the absence of co-ownership there can be no restraint on alienation. It is then said that, though such may be the law as between father and son, it is not so as between brother and brother. This view does not seem to me to be tenable. When the impartible estate is paternal, the co-parcenary in contemplation is referable as regards its origin to the date of the son's birth, when the impartible estate belongs to the paternal grandfather, the co-parcenary is referable to the date of the father's birth and when the estate belongs to a remoter ancestor, the co-parcenary is referable to the date of the birth of a son to that ancestor. Whether the co-parcenary is referable to the first generation or to the second or third, it is alike no cause of co-ownership on which the power to restrain alienation depends for its existence. The effect of the Privy Council decision is that inalienability is, like impartibility or a peculiar mode of succession, a special independent incident which lies outside the ordinary Hindu law and can only attach to an impartible estate by family custom and cannot be deduced from a theory of dormant co-ownership.

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If the contention of the appellant's pleader were to prevail, the following anomaly would be the result. Take for instance an impartible estate belonging to a co-parcenary family and descending in accordance with the rule of primogeniture and the co-parcenary family to consist of a father, his sons and brothers. If a suit were brought against an alienee by the son, we should have to hold that there is no restraint on alienation, but if the same suit were brought by the brother we should then hold there is no unrestricted power of alienation, though in both cases the impartible estate and the person alienating it are one and the same.

The next question argued in this appeal has reference to the evidence adduced in proof of family custom. Three objections are urged on appellants' behalf against the decision of the Subordinate Judge, *viz.*, (1) due effect has not been given to absence of alienation for several centuries, (2) no due effect is given to several documents which prove a consciousness in the family that by custom its alienation is forbidden except for necessity or for [294] purposes binding on all the dayadis; (3) in determining the weight to oral evidence due regard is not had to the probabilities of the case and to the admissions of the first defendant.

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As regards the first ground, there is no doubt that throughout the history of the palayapat, there had been no instance of sale or gift of any portion of the zemindari prior to the gift in dispute. The Subordinate Judge has apparently attached no value to it, as it is only negative evidence. But it is a settled rule of law that though mere absence of alienation is of itself no proof of inalienability, yet such absence when it is coupled with special facts that would render alienation probable is relevant evidence, though its probative value may depend on the special circumstances of each case.

Eight of the nine zemindars who held the estate prior to the first defendant either left sons or widows for whom they would ordinarily desire to make some provision, and the peculiar custom which is shown to prevail in regard to succession must have imparted to that desire more than its ordinary strength as an inducement to alienation. Notwithstanding this, there has been no sale or gift for more than three centuries, and I am of opinion that this fact is relevant evidence and ought to be considered together with such other evidence of inalienability as there is on record.

The second objection taken on appeal is as to the weight attached by the Subordinate Judge to the documentary evidence in this case and it appears to me to be entitled to weight. In paragraph 14 of his judgment, the Subordinate Judge refers to four important Exhibits, *viz.*, R, T, U and Z and refuses to give effect to them on the ground that the admissions they contain, *viz.*, that the palayapat was common property for purposes of alienation, were made under an erroneous impression as to the law applicable to alienability and could not, therefore, operate as an estoppel. There is nothing in the documents themselves to show that the admissions were made with reference to the law as laid down in any particular case.

The Subordinate Judge considers that all the decisions of the Indian Courts prior to the recent decision of the Privy Council were erroneous that all that was said or done in a family concerning an impartible estate was said or done under the influence of those decisions, and that as evidence of consciousness in the family that the estate is inalienable, they have no probative value. The [296] flaw in this reasoning is this that, if evidence of consciousness in the family that an estate is impartible or inalienable is thus to be explained away, there can be no proof of any custom either as regards impartibility or inalienability. But their Lordships of the Privy Council observe that the estate may be shown to be inalienable by custom. All that they say in *Sartaj Kuari* v. *Deoraj Kuari* (1) is that inalienability is not to be inferred as an incident of coparcenary right on the ground that an impartible estate belongs to a joint family for purposes of succession. They do not say that the practice or custom of the family as evidenced by its acts or declarations is to be assumed to be due to error of law and to be rejected. The Subordinate Judge should have considered each exhibit and tried to see how far it discloses a consciousness in the family that the estate is inalienable by custom. Several documents are relied upon on appellants' behalf as showing that the estate is inalienable and I proceed to consider them. The first document to which our attention is drawn is Exhibit JJ, which is a copy of the judgment of the Zillah Court of Madura, dated 1817. It shows that some land was attached to the status of the Siru Nayak who

(1) 10 A. 272.

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enjoyed it only so long as he retained that status Hence it is argued that the land being attached to the status of Siru Nayak, it could not be alienated, and its inalienability renders it probable that the palayapat is likewise inalienable It is not unfrequently the case that a principal estate is alienable whilst subsidiary estates carved out of it for special purposes such as maintenance are inalienable I am therefore not prepared to accede to the appellants' contention The second document on which appellant relies is Exhibit P, which is copy of an explanation furnished in 1868 by the then Zemindar Kamala Nayak with reference to a complaint addressed to the Government against his management of the zemindari by the heir-apparent Kamala Nayak is the seventh zemindar named in the pedigree, Exhibit BB, and he succeeded to the estate in 1827 and died in 1871 after administering it for a period of forty-four years It is clear from Exhibit N that his management began hardly with any debts at all, and ended with a debt amounting to a lakh and-a-half of rupees, though his rent roll gradually rose from Rs 15,000 to Rs 50,000 It appears that Kamala Nayak's [296] growing indebtedness alarmed the heir-apparent Muthuchinnama Nayak, who complained to the Government of maladministration on the part of the zemindar and prayed for the appointment of a commission, and that the zemindar entered into an elaborate explanation in vindication of his management As argued by appellant's pleader, this document discloses a belief in the zemindar of 1868 and his heir-apparent that the former was not at liberty to contract unnecessary debts so as to imperil the succession

The next document is Exhibit IV, which is a copy of the judgment of the District Court in original suit No 4 of 1876 It shows that, in March 1870, Kamala Nayak agreed to grant a lease of the zemindari in view to clear his debts to two persons named Venkatasami Nayak and Adimulam Pillai and that the dayadis attested that agreement in token of their consent This suggests the inference that there was no necessity for their consent if the zemindar could alone alienate his estate at his pleasure. It appears further that, in adjudicating, on the validity of the agreement, the Judge considered the circumstances under which Kalama Nayak contracted the debts which it was desired to liquidate by the lease and came to the conclusion that they were not binding on the palayapat This again indicates a belief in 1870 that the palayagar could only bind his estate by debts contracted for purposes binding on his dayadis

The fourth document upon which appellants' pleader lays stress is Exhibit R, dated 24th March 1870, and all the adult dayadis were parties to it, save the heir-apparent Muthuchinnama Nayak, whose relations with the palayagar were not cordial and who declined then to recognize Kamala Nayak's debts as family debts This document evidences a family arrangement made in view to discharge the existing debts and to ensure efficient future administration of the estate The provisions which it contains distinctly negative the theory that the zemindari is alienable at the pleasure of the zemindar for the time being and treat it as common property for all purposes It is however open to the observation that it is tainted with an attempt to make it appear that Muthuchinnama Nayak, the real heir-apparent, who was reluctant to acknowledge Kamala Nayak's debt as binding on the dayadis and to subscribe to the lease for thirty years, was not the heir-apparent and that the one next to him in the line of dayadis was his senior Though there is this taint in the document, yet it [297] does not appear to touch its probative value as a family arrangement evidencing inalienability of the estate.

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Another document to which we are referred is Exhibit Z, which is a copy of a claim petition, dated 1868. Eight villages forming part of the zemindari were then attached in execution of the decree passed against the Zemindar Kamala Nayak in appeal suit No. 1 of 1867 and were advertised for sale. By the claim petition the first defendant and the first plaintiff asserted that the zemindari was their joint property and that of the other dayadis though impartible and was not therefore liable to be sold for the personal debts of the palayagar.

The next document relied on is Exhibit T, which is a bond executed in May 1883 by the first defendant who was the zemindar, by the first plaintiff and four other dayadis for Rs. 43,000 and odd. The document was executed in order to avert the attachment of the zemindari and the appointment of a receiver in execution of the decree in original suit No. 4 of 1876. It provides for repayment of the debt by certain instalments and for the creditor proceeding on default against the 16 villages of the zemindari, for the benefit of which the debt is said to have been contracted. This shows that the zemindari was treated as common property for the purpose of the palayagar contracting debts, and that the family arrangement contained in Exhibit R was acted upon.

Three other documents are referred to as containing admissions by the first defendant that the zemindari is inalienable. Exhibit N is copy of a deposition made by the first defendant in calendar case No. 309 of 1890. Exhibit W is copy of another deposition made in calendar case No. 178 of 1887, and Exhibit G is copy of another deposition made in session case No. 107 of 1879. He stated in Exhibit N that the zemin property was common, that it was under the belief that succeeding claimants had equal rights in the estate, that they had to join in executing the bond, Exhibit T, that among the dayadis then living the first plaintiff had the preferential right to the pattam and that the first defendant has been paying money to the first plaintiff as *per* the family arrangement, Exhibit R, and that the kists had been remitted to the heirs. These admissions by the first defendant warrant the contention that the zemindari was not self-acquired property at the disposal of the zemindar.

[298] Our attention is next drawn to two other documents (Exhibits CC and VIII), and on comparing them and Exhibit DD in the light of oral evidence, it appears that the provision which the zemindar first intended to make for his wife and children on the 4th June 1890 was to settle upon them his self-acquired properties and to leave the zemindari to devolve on the dayadis according to custom, that in November 1891 he changed his intention and cancelled Exhibit CC on pretext of fraud on the part of the person who drew it up and made a gift of the zemindari in supersession of the prior deed of settlement in favour of his wife at the expense of his heirs and that this change was probably due to the advice he obtained from vakils and agents as to the effect of the decision of the Privy Council.

The foregoing is the material portion of the documentary evidence on both sides. It is clear that throughout the history of the palayam, there was no instance in which any palayagar alienated any portion of the zemin by sale or gift to the prejudice of the dayadis entitled to succeed to it, that from 1868 there is clear evidence of consciousness in the family that the property is not alienable at the pleasure of the palayagar. The contention that the practice of the family is the result of a mistaken view of the Hindu Law which prevailed in India before it was corrected by the Privy Council is one to which I cannot accede. There is no evidence that it was

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the result of any such mistake and not of family custom founded on the character of the estate as an ancient palayapat Why should not a similar mistake be set up in regard to impartibility? The argument, if it were to prevail, would unsettle rights of property founded upon the usage of centuries At all events, there is no presumption that when the evidence discloses a long-standing practice, it is founded upon a mistake and in the absence of clear evidence to that effect, the conclusion ought to be that it is the custom of the family having a legal origin As I read the decision of the Privy Council, I am unable to conclude that this proved custom of the family is intended to be precluded by their Lordships as evidence of inalienability

Turning to the oral evidence, 10 witnesses give evidence for the plaintiffs on this point

The second witness is one Muttusami Jotala Nayak, and he is the Zemindar of Jotalanayakanur and the son-in-law of the first defendant His evidence is that "it is not usual to alienate the [299] zemin by gift or otherwise, there has been no such instances of gift" He states that the same is the case with the Kambala palayapats in the district of Maudra and with his own palayapat The witness is aged 63 years, and there is no reason to think that he is either not acquainted with the usage or that his evidence is not *bona fide*

The third witness is Balamukunda Adivalusami Nayak He owned a village named Sukkampatti which was annexed by the Government and he is now in receipt of a money allowance He is related to the first defendant and plaintiffs by marriage and he is 42 years old He deposes that "in the Ammayanayakanur Zemindari, the zemindar cannot alienate the zemin even when the eldest son should succeed to it" He adds, in cross-examination, that no zemindar can alienate, because the zemin is the common property of the family and that first defendant and his predecessor told him that the Zemindari of Ammayanayakanur was common to the family

The fourth witness is one Arumugasami Nayak, aged 45 years He is related to first defendant His evidence is that it is not the custom in the Kambala Zemindaris in Madura to alienate their zemins and that the Zemindar of Ammayanayakanur cannot alienate his zemin

The fifth witness Tirumala Muthu Veera Tiruvengadasawmi Nayakkar, the Zemindar of Malur, one of the Kambala palayapats, was the first defendant's agent for some time and is related to the first plaintiff He deposes that the zemindari is inalienable by custom and that the first defendant told him of it

The seventh witness Thataya Nayak is a village munsif in the zemindari He deposes that no Kambala Zemindar can alienate the zemindari by gift, whilst there are dayadis and that he knows the custom of Ammayanayakanur and of three other palayapats

The eighth witness is a raiyat attached to the Zemindari of Ammayanayakanur, and he knows the practice prevailing in it from the time of Kamala Nayak's predecessor His evidence is that the zemindari is the common property of the dayadis, that it is custom not to alienate the zemin whilst there are dayadis and that nobody has done so

The eleventh witness is a raiyat aged 85 years, and he was for some time the vakil or agent of the Zemindar Kamala Nayak, and [300] he deposes that no zemindar has alienated the zemin by gift or otherwise and that Kamala Nayak told him that the zemindari was common to all the dayadis.

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The twelfth witness is related to the parties, and he also states that Ammayanakanur is common to all the dayadis and that no zemindar has alienated any portion of it.

The thirteenth witness also states that the zemindari cannot be alienated.

The foregoing is the oral evidence adduced for the plaintiff. There is also oral evidence for the defence, witnesses Nos. 3, 8, 9, 10, 11, 12, 13 and 15. They all depose that the zemindar can alienate the zemindari at his pleasure, that the dayadis have no right to it, that, as he is the Istimirar Zemindar, he is the sole owner, that he pays no portion of his income to dayadis, that he does not remit kists due on their separate property, that they should also obtain licenses to cut wood in the palayagar's forests, that the palayagar has granted cowles of waste land, and that if there has been no gift or sale hitherto, there has been no occasion for it.

Thus, the oral evidence is conflicting. But on comparing it, I find that there are some palayagars among plaintiff's witnesses and that the witnesses for the defence depose to several matters which are inconsistent with documentary evidence which has been set out and with undisputed facts of the case. On the other hand the oral evidence for the plaintiffs receives an accession of strength from its agreement with the documentary evidence.

For these reasons, I am of opinion that the custom of inalienability is proved and that the decree of the Subordinate Judge should be reversed and that claim decreed with costs.

SHEPHARD, J.—The Subordinate Judge has dismissed the plaintiffs' suit on the ground that it was competent to the late Zemindar Bommachi to make, and that he did make, a kift of the zemindari in favour of his wife. At the time when the suit was filed, the plaintiff, a cousin of the late zemindar, was, in virtue of the custom admittedly prevailing in the family, entitled to succeed on his death, and now that Bommachi has died since the decree, he is the person entitled to actual possession if the gift in question is invalid.

The sole contention on the hearing of this appeal before us was that the judge's ruling as to the powers of disposition possessed by the late zemindar was wrong, for the reason that the decision [301] of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (1) was inapplicable in the circumstances of the case. In that case, as in the present, the donor whose alienation was challenged was the holder of an impartible estate and belonged to a family governed by the Mitakshara law. The alienation was challenged by the son who, by the custom of primogeniture, was entitled to succeed on the donor's death. The decision in that case appears to me to amount to this. The proprietary or co-parcenary right ordinarily possessed by the son under the Mitakshara law does not exist except in conjunction with the right to partition; the existence of the proprietary right is the cause of the restriction on the father's powers of alienation; therefore in the absence of a right to partition there is no restriction on the father's powers of alienation. While it is allowed that an impartible estate held by one member of the family may, in a sense, be said to be the common property of the family and that for purposes of succession the estate may so be treated, the proposition that the withdrawal of the right of partition is consistent with the maintenance of a restraint upon alienation is denied. The Judicial Committee, as I read the judgment, disapprove

(1) 10 A. 272.

the doctrine stated in the passage from the judgment of the High Court quoted on page 287 (*Cf* statement in *Naraganti Achammagaru* v *Venkatachalapati Nayaniva ru* (1)) In conclusion their Lordships observe that " it the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom which must be proved or, it may be in some cases, upon the nature of the tenure "

The contention of the appellants' vakil with regard to this decision was rested on certain features in the present case, which it is argued take it altogether out of the range of the authority, and secondly was directed to the evidence relied on in proof of the custom of inalienability alleged to prevail in the family to which the parties belong It was said and this is a point strongly insisted upon, it would seem, in the Court below, that the zemindar for the time being was nothing more than a manager not possessed of any proprietary interest in the zemindari I fully agree with the Subordinate Judge in his conclusion on this point There is [302] really no evidence in support of it except a doubtful phrase used by an amin in a report of some statement said to have been made by the claimant to the succession in 1816 (Exhibit A) Then it is said that the decision of the Judicial Committee must be taken as confined to the case of father and son, and that it does not follow from it that a brother entitled according to custom to succeed in virtue of seniority, is devoid of a right to control alienations made by the zemindar for the time being. It appears to me, however that, while allowing the importance of the peculiar mode of succession in this case, we cannot put such a narrow construction on the judgment of the Judicial Committee The reasoning of the judgment indicates no intention to distinguish between the right of a brother and those of a son Otherwise the case of *Periasami* v *Periasami* (2) could hardly have been cited as it is in the judgment (see page 285) It would certainly seem to be an anomaly to hold that the owner of an impartible zemindari having one son and a brother might make a free grant of his estate according to his pleasure and so defeat the son's right of succession, but that on his son's death the power of disposition became subject to the control of his brother No doubt the son is under certain circumstances in a less favourable position than the brother; but this is due to the operation of a peculiar rule of Hindu Law under which the father is empowered to alienate property in order to satisfy debts which his son is equally bound to discharge In the case supposed, that rule clearly would not apply, and the brother's possession of a right to restrain alienations, uncontrollable by the son would be unaccounted for

It remains to deal with the question whether a custom of impartibility is proved by the evidence The evidence clearly shows that for many years the zemindari, which is an ancient one, has descended not to the eldest son of the last holder, but to the eldest member of the family. What is called ' dayadi pattam ' has prevailed (see especially Exhibit D). A pedigree was put in evidence, the accuracy of which is not disputed According to it the defendant Bommachi, who succeeded in 1875, was the eighth zemindar in succession to the fisal zemindar who died in 1814. It is obvious that with this peculiar descent the reigning zemindar is under great temptation to provide for his wife or [303] children

(1) 4 M. 250, (266)

(2) 5 I A, 61

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by gifts out of the zemindari property. The fisal zemindar himself left no son, only a widow and a daughter, but his successor left sons as also did the third in succession and the sixth and the eighth. The fourth and fifth left widows. There is no evidence of any alienation by any of these zemindars either in favour of sons, wives or daughters (see the evidence in Exhibit XX of third witness for defendants, page 197). The zemindari remains now as it was originally constituted. Not only is it shown that no alienations (except for temporary purposes) have been made, but there is also proof of circumstances rendering it likely that alienations would, in the absence of a restricting custom, have been made. The appellants' vakil relies on this evidence as satisfying the test laid down by the Judicial Committee. In 1870, and for some years previously, Kamala Nayak, who had held the zemindari since 1827, was in pecuniary difficulties. Loans had been raised, the zemindari had been leased out, and a sale had been threatened, In February 1870, the defendant Bommachi intervened to protest against an impending sale. His petition describes the zemindari as belonging to the dayadis in common (Exhibit Z). On the 24th March 1870, an agreement was entered into between Kamala Nayak, Bommachi, the defendant, and six other members of the family. Ponni Chainnama, who in fact succeeded Kamala, was not a party to the agreement. His right to succeed had been denied (see Exhibit P), but was established in the suit brought against him by the defendant Bommachi. The Subordinate Judge remarks that the agreement of 1870 does not recite any custom and was an arrangement "brought about for the first time and for a particular purpose." The expressions about the zemindari in this and subsequent documents are referred by the Judge to the idea commonly prevalent at the time that the zemindar, for the time being, had only a life interest. The evidence of the witnesses called to prove the custom of alienability he treats in the same way. If, however, the conduct of the members of the family shows that they were under the belief that the zemindar, for the time being, was not competent to alienate the family property, that is clearly evidence in support of the alleged custom. Evidence showing that they guided themselves by a certain rule is evidence of their consciousness that this rule was obligatory. In this view the agreement of 1870 is of the greatest importance. [304] Six days previously Kamala had, with the concurrence of his kinsmen who attested the document, executed a lease in favour of Adimulam Pillai and another. The agreement recites this fact and proceeds to make provision to guard the zemindari against danger in the future. It declares that none of the executants are for the next thirty years, the period of the lease, to pledge the zemindari property, that bonds and other documents executed by any zemindar are to be attested by the adult members entitled to succeed, and it provides that the dayadis shall, according to the original custom and mode of enjoyment of the zemindari, obtain the title of zemindar and exercise all powers one after the other according to seniority of age. The zemindari is described as common property. It is natural that Adimulam should, for his own security, have required the attestation of his lease by Kamala's immediate successors. But the execution of this agreement was not required to protect Adimulam (see evidence of the twentieth witness for the defendant). It is not alleged that there was any fraud practised either upon Kamala or Bommachi in the execution of this agreement. (See Exhibit AA, deposition of Bommachi.) The object of it was clearly to protect the

zemindari by restricting the powers of the reigning zemindar The acquiescence of Kamala Nayak and of his probable successors in such an arrangement is inconsistent with belief on their part that the zemindar, for the time being, might dispose of the zemindari as he pleased. Unless it was believed that the zemindar was not possessed of absolute powers of alienation, it is not intelligible why care should have been taken to say that the admitted debts were binding on the zemindari or why Kamala and Bommachi as his intended successor should have consented to have their hands tied The object of this evidence is not impaired by the subsequent proceedings As already stated Bommachi Nayak succeeded Kamala on his death in 1871 and died in 1875 In 1876 the lessees brought a suit against Bommachi and the other members of the family As far as the lease was concerned the lessees failed, but they obtained a decree for a larger sum found to be due to the plaintiffs The judgment in that suit assumes that the Zemindar Kamala was not competent to make a valid alienation of the estate save for debts binding on the estate according to ordinary Hindu Law It was Bommachi's case that Kamala could not lawfully deal with anything but his life interest [305] in the property For payment of this sum provision was afterwards made by the execution of an instrument, dated May 1883, in favour of Arunachella who had taken an assignment of the decree In this instrument the zemindari is described as " belonging to us " and the transaction is said to be entered into " for the welfare of ourselves and of our zemindari " The instrument is executed by Bommachi and five members of the family In addition to this evidence of the conduct of the family, there is the evidence of several witnesses including the plaintiffs themselves and other neighbouring zemindars who speak to the custom said to obtain among the Kambala Zemindars This evidence cannot be disregarded The Judge does not say he disbelieves the witnesses, but he appears to think the task of proving the custom a hopeless one He seems to have been greatly influenced by a passage in Mayne's Hindu Law, § 315 Against this evidence in support of the alleged custom really no evidence is adduced by the defendant The defendant Bommachi was not called, although a deposition made by him on previous occasions, which required explanation, was put in There is no explanation of his conduct with regard to the agreement in 1870, or of his action in 1890 and 1891 in first making a gift in favour of his wife and daughter dealing with the self-acquired property only, then revoking it eight months later, and finally in November 1891 making a gift of the zemindari in favour of his wife (Exhibit VIII) It would appear from the issues framed and the judgment of the Subordinate Judge that, although the custom of inalienability was set up and insisted upon, more prominence was given to the contention that the zemindar, for the time being, was a mere manager and perhaps to other contentions which have now been abandoned This circumstance, coupled with the erroneous idea entertained by the Judge as to the possibility of proving the alleged custom, may account for the cursory notice which the judgment gives of the evidence bearing on the question of custom In my opinion there is a body of evidence pointing to the conclusion that the zemindari has, for a long course of years, been treated as inalienable at the mere will of the reigning zemindar There is the peculiar mode of succession, and the fact that although occasions were frequent on which alienations might have been expected, no absolute alienation of any part of the estate is proved to have been made before 1890 There are admissions of the defendant Bommachi wholly [306] unexplained There is his conduct and

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the conduct of the other members of the family with reference to the agreement of 1870 and to the suit of 1876 brought by Adimulam Pillai. Again there is his conduct immediately preceding the gift now impugned. Added to all this, there is a mass of evidence given by witnesses who are in a position to know the facts and who, with the exception of those belonging to the family, are not said to be interested or untrustworthy. I think that the custom has been sufficiently proved and that the appeal ought, therefore, to be allowed.

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18 M. 306 (F.B.).

APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker and Mr. Justice Subramania Ayyar.

ESHOOR DOSS (*Plaintiff*), *Appellant* v. VENKATASUBBA RAU (*Defendant*), *Respondent* * [11th and 25th March, 1895.]

Contract Act—Act IX of 1872, Section 30—Wagering contract—Contract for differences.

A on various occasions, agreed to sell to B certain amounts of Government of India promissory notes, amounting in all to the nominal value of four and a quarter lakhs, for delivery on the following 30th of November. On the 28th of November, B agreed to sell to A Government of India promissory notes of the nominal value of four and a quarter lakhs for delivery on the 30th of November. A did not perform his contract to sell, and B now sued to recover, by way of damages, the difference between the prices at which A had agreed to buy and sell It appeared that it had been the intention of both plaintiff and defendant that no delivery should be made under the agreements, but that the differences only should be paid:

Held, that the plaintiff was not entitled to recover, for the reason that the agreement sued on was void under Contract Act, Section 30, as being a gambling transaction

[R., 30 B 83=7 Bom L R 385]

APPEAL under Letters Patent, Section 15, against the decree of the High Court in the case of *Eshoor Doss* v. *Venkatasubba Rau* already reported (1).

[307] Mr *R. F Grant*, for appellant.

Mr. *E. Norton*, for respondent

JUDGMENT.

COLLINS, C. J.—The only question to be decided in this appeal is what was the intention of the parties when they entered into the transaction in question. The appeal from the decision of Mr. Justice Davies was originally heard by the late Sir T. Muttusami Ayyar and Mr. Justice Best, and there was a difference of opinion between the two learned Judges as to the intention of the parties at the time the contract was entered into The plaintiff, a sowcar, alleges that he entered into a contract with the defendant to buy from him Government 4 per cent. paper, that it was an honest commercial transaction, and that he expected the defendant to deliver to him the amount he bought, *viz.*, Rs. 4,25,000 on the date named in the contract, and he would have been ready to pay for the same. The defendant, a retired vakil, on the other hand contends

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* Letters Patent Appeal No. 60 of 1894.

(1) 17 M. 480.

that it was a gambling transaction, that neither he nor the plaintiff intended that any paper should be delivered, but that the differences only should be paid. The law on this subject appears to be clear that agreements between buyers and sellers of shares and stocks, to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions, and in India are void under Section 30 of the Contract Act

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The plaintiff Raja Eswara Doss was called on his own behalf and deposed that he in October and November 1891, through a broker, had bought the Government paper from the defendant to be delivered on the 30th November 1891, that he also sold the defendant on the 28th November Rs 4,25,000, and that therefore he claimed the difference in the price of the Government paper, the value of the paper being higher on the day he sold than it was in October when he bought

The plaintiff's second witness was a Mr Berry, who described himself a stock-broker, he has had dealings in Government paper with both plaintiff and defendant, but he does not say that he ever delivered any paper to either of them, he says there is a settling day for completing transactions on the principle of a banking clearing house, he admits there are many transactions in Government paper in which no paper changes hands, and native dealers generally meet their contracts by asking the purchasers to take delivery from somebody else, and paying or receiving the [308] difference or by selling back—that is their custom The plaintiff's third witness was Venkatachella Chetti, a dealer in Government paper and a shopkeeper, he is largely indebted to plaintiff, he had dealings with the defendant in Government paper and tried to obtain his differences; he describes the methods employed in these transactions, he says there is no intention at the time of purchase that Government notes should be actually delivered or money paid, but at the time of settlement a letter is given authorizing the vendor to deliver to the purchaser and the purchaser to take from the vendor, he says he has bundles of such letters, he also says that, when plaintiff went to defendant's place on the 30th November, he did not ask for delivery of the paper, but only for differences It is worthy of remark that the plaintiff, who deals in many lakhs of Government paper, gives no instance in which he either delivered or received Government paper, except on one single occasion just before he brought this suit

The defendant's evidence was to the effect that the differences were only to be paid and no paper was to be delivered, the plaintiff's broker said plaintiff was a good man and would pay the differences, and he said the plaintiff had made similar enquiry about defendant

The defendant's second and third witnesses are brokers, and the third negotiated some of the plaintiff's sales, and it appears from their evidence that gambling in Government paper is very common in Madras, one witness says it has been going on for twelve years, the entry in the contract of a date for delivery is merely nominal and differences only are paid and received

The evidence satisfies me that both plaintiff and defendant intended that differences only should be paid, and were perfectly aware that they were entering into a gambling transaction

I would dismiss this appeal and with costs

PARKER, J —The judgments of the learned Judges proceed on the basis that the intention must be mutual, and the only point on which they differ in opinion, is as to whether, at the time of making the contract,

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the plaintiff regarded and intended it as a contract for the payment of differences only. That this was the intention of the defendant is not disputed, but it is urged that the plaintiff fully intended and was prepared to accept and deliver the Government paper if necessary.

[309] It is contended that this case is exactly similar to *Tod* v. *Lakhmidas Purshotamdas* (1). In that case as in this the contracts were in the usual mercantile form and were made through brokers, the principals not being brought into contact with each other at the time the contract was made. In the Bombay case, however, it was found that, though the transactions were highly speculative and usually cancelled one another, it was not proved to be the intention of both the contracting parties, under no circumstances, to call for and give delivery from or to each other.

In the present case it is observable that the same broker acted for both parties and that, though they were not brought into contact at the time defendant contracted to sell Government paper to plaintiff, each had made enquiry beforehand of the broker, not whether the other would be able to deliver Government paper, but whether he would be able to pay differences. When, on November 28th, it was rumoured that defendant was in difficulties, plaintiff with others, who had bought paper from defendant, went to his office and asked not whether the paper would be forthcoming, but whether differences would be paid. This was before the execution by plaintiff to defendant of a sale note for the amount bought. The evidence as to this conversation shows that it was never even suggested that defendant should perform his contract by the delivery of paper. The sole question discussed was the payment of differences. Defendant offered 8 annas premium, which plaintiff would not accept, and finally it was arranged by Vencatachella for plaintiff that the full amount of differences should be paid, but that six months' time should be given.

Though plaintiff has been engaged in these transactions for a considerable time, there is evidence that he only passed paper on one single occasion. This was in 1892 about two months before the present suit was brought and after defendant had, by Exhibit B on 3rd December 1891, repudiated his legal liability to pay the differences. In 1892 the plaintiff must of course have realized the importance of being able to show that paper did sometimes change hands at settling day in settlement of these transactions.

I agree in the conclusion of the late Mr. Justice Muttusami Ayyar that plaintiff fully understood the contract was for the payment of differences only. I would dismiss this appeal with costs.

[310] Subramania Ayyar, J.—I also agree in the conclusion that the plaintiff fully understood that the contract was for the payment of differences only. I have nothing to add to the reasons for this conclusion so fully stated by the late Mr. Justice Muttusami Ayyar or to the observations of Parker, J., in his judgment. The appeal fails and should be dismissed with costs.

Branson & Branson, attorneys for appellant.

Wilson & King, attorneys for respondent.

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(1) 16 B. 441.

18 M. 310.

APPELLATE CIVIL.

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr. Justice Best

1895 APRIL 19.

APPELLATE CIVIL.

18 M. 310

EDWARD CLARKE (*Defendant*), *Appellant* v THE CHAIRMAN, OOTACAMUND MUNICIPAL COUNCIL (*Plaintiff*), *Respondent* *

[1st, 2nd and 19th April, 1895]

District Municipalities Act (Madras)—Act IV of 1884, *Sections* 47, 63—*Land tax—Land unappropriated to buildings.*

A Municipal Council under the Madras District Municipalities Act has no power to levy a tax on any land exceeding seven and-a-half per cent on the annual value of such land

The meaning of the term "lands unappropriated to any building" in Madras District Municipalities Act, Section 63, Clause (2) considered

SECOND appeal against the decree of T Wier, District Judge of Coimbatore, in appeal suit No 33 of 1894, reversing the decree of A F Elliot, Acting Subordinate Judge of Nilgiris, Ootacamund, in original suit No 67 of 1893

The plaintiff, who was the Ootacamund Municipal Council, sued by its Chairman to recover Rs 559-14-0 alleged to be due from the defendant, in respect of three half years ending the 30th September 1893, on account of a tax imposed under the Madras District Municipalities Act, Section 63, Clause (2) The defendant denied that the land in question was unappropriated to any [311] building, and claimed that he was only liable to assessment in respect of his land under Sections 47 and 50.

The Subordinate Judge held that the lands in question were not unappropriated to any building within the meaning of the Act and dismissed the suit

The District Judge reversed the decree of the Court of first instance and passed a decree as prayed, holding that the lands in question were unappropriated to any building, and that the imposition of the tax was not *ultra vires* As to the first point he expressed the opinion that the expression "appropriated to buildings" signified "set apart for the use and enjoyment of the building."

The defendant preferred this second appeal

Mr *G P Johnstone*, for appellant

Mr. *J. G. Smith*, for respondent.

JUDGMENT

COLLINS, C J.—This is an appeal from a decree passed by the District Judge of Coimbatore reversing a decree of the Acting Subordinate Judge (Mr Elliot) of Ootacamund.

The suit was brought by the Chairman of the Municipal Council of Ootacamund against Mr. Edward Clarke, the owner of certain lands within the municipal limits, called Bishopsdown and Belmont, for certain taxes levied under the authority of the Madras Act IV of 1884

The municipal council on the 3rd of March 1892 resolved that a tax on all lands unappropriated to buildings be imposed according to area under Section 63, Clause (2) of the above Act, and that it be fixed for 1892-93 at Rs. 1-8-0 per acre or 4·76 pies per 80 square yards. The

* Second Appeal No. 1738 of 1894.

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council allege that about 248·83 acres of the defendant's holding comes within the definition of land unappropriated to any building and therefore becomes subject to the tax of Rs. 1-8-0 per acre.

Two questions arise:—(1) Has the Municipal Council power to levy a tax on any land exceeding 7½ per cent. on the annual value of such land? (2) Is the defendant's 248·83 acres unappropriated land within the meaning of Section 63, Clause (2)?

The first question depends upon the construction of Act IV of 1884, Sections 47 and 63, Clause (2).

Chapter III is headed " taxes and tolls, and mode of realizing them," and Section 47 enacts that " the taxes and tolls to be levied, for the " purposes of this Act, shall be as follows ":—Clause (ii).—" A yearly tax " on lands and buildings, not exceeding [312] 7½ per centum on the " annual value of such lands and buildings." Section 48 authorizes the council to raise funds with the approval of the Governor in Council from any of the sources mentioned in Section 47 at a rate or rates not exceeding those specified in Section 47.

Section 50 enacts that, when the municipal council shall have determined, with the approval of the Governor in Council, to levy any tax or tolls, it shall be notified in a particular manner and such tax or tolls shall be levied in the manner hereinafter provided. Section 63 is the section declaring how such tax or tolls shall be levied; it enacts that if the municipal council notify, under Section 50, that an annual tax shall be levied on buildings and lands, the chairman shall impose such tax at the rate specified in such notification on all buildings and lands, with certain exceptions immaterial to this case.

Clause (2) states that " in the case of any lands unappropriated to " any building, or occupied by native huts, the chairman may, subject to " the approval of the municipal council, imposes such tax at an annual " rate, not exceeding annas four for every eighty square yards, of such " lands, in lieu of the rate specified in the said notification."

It is contended by the plaintiff that Clause (2) authorizes the chairman to impose a tax of annas four for every 80 square yards amounting, it is said, to over Rs. 15 per acre on all lands unappropriated to any building, or occupied by native huts, even though the sum levied be far in excess of the sum to be levied under the authority of Section 47, Clause (ii).

I think this contention cannot be supported. Section 47 limits the yearly tax on lands and buildings to 7½ per centum on the annual value of such lands and buildings. No land, therefore, can be taxed beyond 7½ per cent. on the annual value of such land.

In Section 63, Clause (i), the tax is to be levied on buildings and lands (the words used in Section 47 are lands and buildings) and such tax shall be imposed at the rate specified in the notification under Section 50.

Sub-section (2) deals with lands unappropriated to any building, or occupied by native huts, but the words in Section 47 are large enough to include all land in the municipality. It may be that sub-section (2) was drafted for the purpose of enabling the municipality to deal with the waste land in the municipality in the [313] occupation of persons not being owners thereof, and the words " or occupied by native huts " lend some colour to the suggestion; it is to be observed, that Section 64 enacts that the tax imposed under Section 63 shall be payable by the owners of

such "buildings and lands" using the words in Section 63, Clause (1), and omitting the description in Clause (2) 1895 APRIL 19.

It would be unreasonable to hold that it was the intention of the legislature, after enacting that a tax should be levied on lands and buildings not exceeding 7½ per cent on their annual value, to allow the chairman of the municipality to tax lands at a rate greatly exceeding the amount provided for in Section 47 If the chairman taxes what is termed "lands "unappropriated to any building, or occupied by native huts" he is controlled by Section 47 and in whatever sum he assesses the amount of the tax, such tax must not exceed the amount specified in Section 47 APPELLATE CIVIL. 18 M. 310

It was stated at the bar that Clause (2) of Section 63 remained a dead letter as far as the Ootacamund Municipality was concerned for many years and it would seem that former chairmen exercised a wise discretion in forbearing to put in force a section which undoubtedly is very difficult to construe consistently with the plain intention of the legislature as evidenced by Section 47

I am of opinion that the action of the municipality in taxing the lands of the defendant in the manner described in the plaint was *ultra vires*

This finding is sufficient to dispose of the appeal and renders it unnecessary to consider the second ground, but I must not be taken to agree with the District Judge in his construction of the words "lands unappropriated to any building"

This appeal must be allowed and the decree of the District Judge set aside and that of the Subordinate Judge restored and the respondent must pay the appellant his costs in this and the Lower Appellate Court

BEST, J —The question for decision in this appeal is whether the District Judge of Coimbatore is right in holding the lands in question to be "unappropriated to any building" and consequently liable to be taxed under Clause (2) of Section 63 of the District Municipalities Act No IV of 1884 (Madras)

Section 47 of the Act states what "the taxes and tolls to be levied, "for the purposes of this Act, shall be" and among them is (Clause (ii)) "a yearly tax on lands and buildings not exceeding [314] 7½ per centum "on the annual value of such lands and buildings" Section 48 authorizes the municipal council "with the approval of the Governor in Council" to raise funds for the purposes of the Act from all or any one or more of the sources before mentioned, at a rate or rates not exceeding those specified in the last preceding section Section 50 provides for notification of the rates at which such taxes or tolls are to be levied, and also directs that they "shall be levied in the manner hereinafter provided," *i.e.*, in Section 63, Clause (1), which is as follows:—"If the municipal "council notify, under Section 50, that an annual tax shall be levied on "buildings and lands in the municipality, the chairman shall impose such "tax at the rate specified in such notification, on all buildings and lands, "excepting lighthouses, public fires, wharps, "jetties," and certain other buildings and places set apart for charitable or religious purposes with which the present appeal is in no way concerned.

Clause (2) of the same section is as follows —"In the case of any "lands unappropriated to any building, or occupied by native huts, the "chairman may, subject to the approval of the municipal council, impose "such tax at an annual rate, not exceeding annas four for every eighty "square yards of such lands, in lieu of the rate specified in such notifica-"tion."

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No doubt, as observed by the Judge, the tax to be imposed under this last clause is directed to be in lieu of the rate to be specified in the notification issued under Section 50, but that circumstance does not warrant the conclusion that it may be in excess of the 7½ per centum on the annual value which is the maximum fixed by Clause (ii) of Section 47.

Clause (2) of Section 63 appears to have been intended for mitigation of the tax on small holdings. It gives power to the chairman, with the approval of the municipal council, to impose on lands "unappropriated to any building, or occupied by native huts," a tax at a rate different from that sanctioned by Government as the ordinary rate to be charged on lands and buildings within the municipal limits. In this connection it is to be remarked that the remaining Clause (3) of the same section directs that "the chairman shall exempt from tax under this section any "building or land, the annual value whereof is less than rupees six if it be "the owner's sole property liable to tax under this Act."

[315] It is unreasonable to suppose that it was intended to confer on the chairman and councillors without the sanction of Government (such sanction not being provided for in Clause (2) of Section 63) the power of assessing lands at a higher rate than that sanctioned by the Governor in Council under Section 48 which happens in the case of the Ootacamund Municipality, the respondent in the present case to be the maximum rate chargeable under the Act, namely, 7½ per cent.

If the above view of Clause (2) of Section 63 is correct, as I think it is, it is not very material for the purposes of taxation under the Act whether the plaint lands are held to be, or not to be, "appropriated" to the houses to which they respectively belong; for, under Clause (1) of the same section, both buildings and lands are chargeable with the tax at the rate notified under Section 50, which, as already observed, is in this particular municipality the highest possible under the Act. But in my opinion, the land which forms the compound of a house and is let with the house when the house is let, is appropriated to that house, and the mere fact of the owner obtaining profit therefrom by selling laterite and granite quarried from such land, or the milk of cattle grazed thereon, or firewood obtained from trees grown on the land, does not render the land unappropriated to the building; nor will the fact of a portion of the land being planted with tea necessarily make it land unappropriated to the house. In the present case, however, it is admitted that 15 acres of the Belmont property, which is cultivated with tea are reserved when the house is let; and of the Bishopsdown property, some 5 acres are admittedly leased to tenants separately. These portions may be held to be no longer appropriated to the buildings called respectively 'Belmont' and 'Bishopsdown,' but the other lands cannot be so considered merely because, instead of using them as pleasure grounds, the owner utilizes them for the purpose of grazing cattle, &c., with a view to pecuniary profit. If, in consequence of the profit thus derived, the annual value of the lands is enhanced, it is open to the municipality to assess the land at such enhanced value, but that is no reason for taxing it under Clause (2) of Section 63 at a rate higher than is permissible under the Act.

I would therefore allow this appeal, and, setting aside the decree of the Lower Appellate Court, restore that of the Court of [316] First Instance, and direct the plaintiff to pay defendant's costs throughout.

Barclay, Morgan & Orr, Attorneys for respondent.

18 M. 316=5 M.L.J. 148.

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APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

PULLAMMA (*Defendant No* 6), *Appellant v*
PRADOSHAM AND OTHERS (*Plaintiff's Heirs and Defendants Nos* 7, 8 *and* 9), *Respondents* *
[14th and 19th February, 1895.]

Civil Procedure Code—Act XIV *of* 1882, *Sections* 280 *to* 283—*Limitation Act—Act* XV *of* 1877, *Schedule II, Article* 11—*Mortgage*

Land having been granted to several persons jointly, disputes arose among them with reference to its allotment The disputes having been settled by arbitration, one of the grantees sold his share to the plaintiff Before the arbitration, another of the grantees mortgaged 7 acres of the land to A, who did not become a party to the arbitration A subsequently obtained a decree on his mortgage and proceeded to execute it by attachment The plaintiff intervened in execution, but in 1884 the Court passed an order stating that the plaintiff's land was not attached, and in fact his possession then remained undisturbed A subsequently executed his decree and purchased the land brought to sale by the Court The plaintiff's possession was disturbed under colour of this purchase, and he now sued in 1889 to recover the land sold to him

Held, (1) that the order of the 1st of March 1884 was not an order within the meaning of Civil Procedure Code, Section 283, and accordingly that the suit was not barred by the one year's rule of limitation,

(2) that the plaintiff's vendor had, after the arbitration, a good title against both A and his mortgagor, and that the plaintiff was entitled to recover.

[D., 29 M 225=16 M L J 136.]

SECOND appeal against the decree of G T. Mackenzie, District Judge of Kistna, in appeal suit No 546 of 1891, affirming the decree of O V Nanjundayya, District Munsif of Masulipatam, in original suit No. 685 of 1889

Suit to recover certain land Certain persons, including the plaintiff's vendor and defendant No 5, had certain lands allotted to them and disputes arose among them with regard to the allotment. During the continuance of these disputes defendant [317] No 5 mortgaged 7 acres and 76 cents to defendant No 7 After the disputes had been composed and a settlement made by arbitration between the allottees, one of them sold to the plaintiff his share including the land in question in this suit Subsequently defendant No 7 obtained a decree on his mortgage and proceeded to execute it by attachment The plaintiff intervened claiming that the property attached belonged to him, and the Court, thereupon, made an order, dated 1st March 1884, filed in the suit as Exhibit I, stating that the land of the plaintiff was not attached; and the possession of the plaintiff was not disturbed Subsequently, however, defendant No 7 brought certain lands to sale in execution of his decree, became himself the purchaser, and sold the lands purchased by him to defendants Nos. 8 and 9 These persons together with defendant No 6 alleged to be their tenant ousted the plaintiff inducing his tenants to take part against him.

The District Munsif passed a decree for the plaintiff and his decree was affirmed by the District Judge

Defendant No 6 preferred this second appeal

Narayana Rau, for appellant

Pattabhirama Ayyar, for respondents Nos 4 and 5

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* Second Appeal No. 799 of 1893.

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JUDGMENT.

Burra Surya Narayana, the fifth defendant, one Thamma Narasimman and certain others jointly applied to the revenue authorities and obtained from them some waste lands which belonged to the Government. They proceeded to make a division of the property. But disputes having arisen among them they submitted their differences to the arbitration of Mr. Koralla Subrayudu, a Deputy Collector. According to the settlement made by this officer, the lands in question, 7·76 acres, were allotted (with other lands) to the share of the said Thamma Narasimman, who sold the share thus obtained by him to the plaintiff. The plaintiff, however, failed to get possession. He brought a suit in 1882 against the fifth defendant and others, got a decree in his favour, obtained possession of the lands and leased them to first and second defendants.

The fifth defendant, under whom the other defendants claim, as will presently appear, had, however, mortgaged to the seventh defendant the lands in question before the submission to arbitration referred to above, and the seventh defendant was not a party either to the settlement by the Deputy Collector or to the suit of 1882 just alluded to.

[318] In 1883 the seventh defendant sued the fifth defendant upon his mortgage, got a decree and caused the lands in dispute to be sold for his decree debt and himself purchased them at that sale, and subsequently sold them to eighth and ninth defendants. The sixth defendant, claiming through the eighth and ninth defendants, ousted the plaintiff from the lands in collusion with first and second defendants. Hence this suit.

It should be observed that no attempt is made by the defendants to impeach the partition made under the Deputy Collector's award on the ground of any fraud or collusion to the prejudice of the mortgagee, the seventh defendant, or any other party.

The Lower Appellate Court gave plaintiff a decree holding in substance, that the seventh defendant had no right to proceed against the property, in question, since it was allotted on partition to the plaintiff's vendor, Thamma Narasimman. The sixth defendant appeals, and it has been argued before us on his behalf that the decision of the Courts below is wrong. *But we are unable to accept this contention.

At the time the fifth defendant mortgaged the 7·76 acres in question he had no specific or exclusive right to them. He then possessed but an undivided interest in the whole of the lands granted to him and others jointly, including those in dispute and the mortgage made by him was clearly subject to the conditions and liabilities which at the date of the transaction affected his undivided interest in the property mortgaged.

It is quite clear that each and every one of the persons, who held such undivided interest, was entitled to claim a division and obtain his share of the common property free from any incumbrances created by any of the other co-owners, provided, of course, no fraud was committed in obtaining the share. The general principles applicable to the question under consideration are thus stated in Domat's Civil Law, Section 1671, cited by Dr. Rash Behari Ghose in his work on mortgages. "If in an "estate belonging in common, without any division or partition, to two "or more persons, such as co-partners, co-heirs or others, one of them "has mortgaged to his creditor, either all his estate or the right which "he had to that estate, this creditor will have his mortgage upon the

"undivided portion of his debtor as long as the estate shall remain "in common But after the partition, the right of this debtor being limited "to the portion that has fallen to his lot, the mortgage of his creditor "[319] will be also limited to the same. For, although before the partition, the whole estate was subject to the mortgage for the undivided "portion of the debtor, and though a right which is acquired cannot be "diminished, yet seeing the debtor had not a simple and immutable right "of enjoying his share of the estate always undivided, but that his right "implied the condition of a liberty to all the proprietors to come to a "partition in order to assign to every one a portion that might be wholly "and entirely his own, the mortgage which was only an accessory to the "debtor's right, implied likewise the same condition and affected only "that which should fall to the debtor's share, the portions of the others "remaining free to them But, if in the partition there was any fraud "committed, the creditor might procure a redress of what has been done "to his prejudice."

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This is the view adopted by the Privy Council in *Byjnath Lall* v. *Ramoodeen Chowdry* (1) and followed by Macpherson and Beverley, JJ., in *Hem Chunder Ghose* v *Thako Moni Debi* (2), a case very similar to the present The Lower Courts were therefore right in holding that the plaintiff's vendor, by the partition made under the settlement of the Deputy Collector, obtained a good and valid title to the lands in question not only against the fifth defendant but also against the seventh defendant, his mortgagee

Another point raised by the appellant is that the plaintiff is precluded from maintaining this suit by reason of the order (Exhibit I) of the District Munsif, dated the 1st March 1884, passed on a claim petition filed by the plaintiff on an attachment made in execution of the decree obtained by seventh defendant against fifth defendant in original suit No 1027 of 1883 This contention also is unsustainable The findings of the Lower Appellate Court in the present litigation are no doubt that the disputed lands were in fact attached and sold in execution of that decree The order relied on by appellant merely says " there is nothing to show that the petitioner's lands have been attached " It does not appear to have been an order passed after investigation as required by Section 278 of the Code of Civil Procedure Consequently, it is not an order within the meaning of Section 283 to which the limitation of one year is applicable *Cf* —*Chandra Bhusan Gangopadhya* v *Ram Kanth Banerji* (3)

[320] It was next argued that the plaintiff's vendor Thamma Narasimman stood by and allowed the fifth defendant to deal with the lands in question as his own exclusive property and that plaintiff is consequently estopped from questioning the mortgage to the seventh defendant or the proceedings taken to enforce it This point is taken for the first time in the argument in second appeal and without any materials whatsoever on the record to support it Under these circumstances we cannot permit such a contention to be taken at this stage.

We dismiss this appeal with costs.

(1) 1 I.A 106 (2) 20 C. 533 (3) 12 C. 108

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18 M. 320=4 M.L.J. 248.

APPELLATE CIVIL.

Before Mr. Justice Shepherd and Mr. Justice Best.

ORR AND OTHERS (*Plaintiffs*), *Appellants v.* RAMAN CHETTI AND OTHERS (*Defendants*), *Respondents.** [20th, 23rd and 24th October, 1893 and 4th May and 6th November, 1894 and 1st May, 1895.]

Easement by custom—Water rights—Landlord and tenant.

The plaintiffs were lessees from a zemindar of his entire zemindari and were in occupation of lands depending for irrigation on a tank into which a natural stream emptied itself. The defendants were tenants in the zemindari, holding (under a lease prior to that of the plaintiffs) land supplied with water by an irrigation channel from the stream. The defendants erected a dam across the stream when it was low, and this had the effect of diverting all the water into the irrigation channel supplying their land. In a suit for an injunction that the dam be removed, the Lower Appellate Court upheld a plea by the defendants that the dam had been erected in exercise of an established customary right of easement:

Held, that the customary easement asserted by the defendants was not unreasonable, and was enforceable by them against the lessees of the zemindar.

SECOND appeal against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura, West, in appeal suit No. 337 of 1891, reversing the decree of S. Dorasami Ayyangar, District Munsif of Sivaganga, in original suit No. 15 of 1890

Suit by the plaintiffs for the removal of a dam placed by the defendants across the Palar river. This river rises in the Karan- [321] damalai hills, and, after flowing through certain Government villages, enters the Sivaganga zemindari, and ultimately empties itself into the tank of the village of Tirupatore, an ayan village in the zemindari. The defendants were in possession under a lease from the zemindar of the village of Surakudi, which did not abut on the river, but was irrigated by a channel from it, and claimed to be entitled by right of customary easement to erect the dam complained of. The plaintiffs were the lessees of the entire zemindari under a lease subsequent in date to that last mentioned, and they complained that the defendants' dam interfered with their supply of water.

The District Munsif passed a decree as prayed. On appeal the Subordinate Judge reversed this decree and dismissed the suit. With reference to the objection that as tenants of the zemindar, the defendants were not entitled to set up a right of easement as against either him or his representatives the Subordinate Judge in paragraph 11 of his judgment, which is referred to by the High Court, made the following observations:—

"The next question is, whether this is also a customary easement, "This is one of those customary rights of easement which the villagers of "Surakudi have acquired under Section 18 of the Easements Act. The "District Munsif is wrong in considering that this is unreasonable user. "It is reasonable with reference to the evidence in the case. He has quoted "*Mathura Naikin* v. *Esu Naikin* (1). That case refers to adoptions by "dancing girls. It was dissented from in *Venku* v. *Mahalinga* (2). Neither "case is applicable, in my opinion, to this suit. This easement refers

* Second Appeal No. 1471 of 1892.

(1) 4 B. 545. (2) 11 M. 393.

"not only to the parties but also to the raiyats of the village. The right "to the enjoyment does not vest exclusively between the zemindar and "the lessees The District Munsif is not correct in saying so There are "the raiyats of the village who are permanent occupancy tenants, and who "are entitled to the soil subject to payment of tirwa Their right to the "tank channel and the flow of water is co-extensive with that of the "zemindar, and there is no unity of interest in him (*Madras Railway Co* "v *Zemindar of Carvatenagarum* (1) In *Kristna Ayyan* v *Vencatachella* "*Mudali* (2), the interest of the tenant in insisting [322] upon the condi-"tion of the supply of irrigation, as it had existed before, was confirmed"

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The plaintiff preferred his second appeal.

Mr. K *Brown* and *Tiruvenkatachariar*, for appellants.

Subramania, Ayyar, for respondents

JUDGMENT

Appellants are the lessees of the zemindari of Sivaganga in the district of Madura and respondents are the prior lessees of a village in that zemindari called Surakudi There is a river called Palar, which rises in the Karandamalai hills in the district and runs, first, through a number of Government villages and feeds the tanks situated therein. It then enters the zemindari and, after feeding a number of tanks through supply-channels, empties itself into the tank of the Tirupatore village

Appellants represent the villages which depend for their irrigation on the Tirupatore tank, and respondents represent the Surakudi village In November 1888, respondents put up a sand dam across the river, 94 yards in length, 1 yard in width and ¾ yard in height at the spot E in the plan and thereby diverted all the water flowing down the river Palar into their supply-channel C, diminishing thereby the quantity which would otherwise be available for the Tirupatore tank

Hence this litigation The appellants' case is that respondents have no right to put up a sand dam across the river, that they are entitled to take into their channel C only so much water as naturally flows into it from the river, and that there is a masonry calingula at the head of the channel C to regulate the supply from the river

Appellants prayed in their plaint that respondents might be directed to remove the sand dam at their own cost, and further to pay to plaintiffs Rs 1,143, with interest thereon, as compensation for the loss sustained by them in fasli 1298 and subsequent mesne profits

For respondents it is contended (i) that they have a right to put up the sand dam in question, and that such right is their natural right, they urge further (ii) that it is customary for owners of channels supplied by the river Palar and other rivers in the district to put up dams whenever the rivers run low and to divert the water into their channels; (iii) that, otherwise, no water will flow into those channels; (iv) that they used to put up such dams across the river Palar for more than twenty years and [323] divert the water into their channel; (v) that the dimensions of the dam are not correctly stated in the plaint, and (vi) that appellants have sustained no damage as alleged

Six issues were tried in this case, the first three as to the right to put up the dam at E in the plan and to divert the river water into channel C, the fourth relating to the dimensions of the dam, and the fifth and sixth referring to the damages alleged to have been sustained by appellants

(1) 1 I.A 364 (385). (2) 7 M H C R 60.

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The District Munsif considered that, as lower riparian owners, appellants had the natural right to the flow of the stream from the Palar into the Tirupatore tank without diminution, and that respondents had no right by custom or prescription to throw up a dam at E and divert the water into channel C when the river was low. He found that the damages sustained by appellants amounted to Rs. 150 and accordingly decreed payment of that amount by respondents. He also directed respondents to remove the dam.

Respondents appealed from this decision. On appeal the Subordinate Judge came to the conclusion that by custom and user as of right for more than twenty years, respondents had acquired a right to put up a dam of the kind mentioned in the plaint, and, reversing the decree of the District Munsif, dismissed appellants' suit with costs.

From this decree appellants (plaintiffs) have preferred this second appeal.

The first objection taken to the decree of the Lower Appellate Court is that the Subordinate Judge has virtually resettled the issues and has omitted to come to a finding on the first issue. That issue raises the question whether the river Palar empties itself into the Tirupatore tank and whether plaintiffs have a right to the uninterrupted flow of the water of the said river into their tank. Referring to the undisputed fact that the river falls into the Tirupatore tank and flows over lands in Tirupatore, and to the rule of law as to the natural right of a lower riparian owner, the District Munsif determined the issue in the affirmative. In noting the points for determination on appeal in paragraph 5 of his judgment, the Subordinate Judge did not allude to the natural right of riparian owners. He evidently presumed that the river is a natural stream, and that the decision must depend mainly on the customary and prescriptive right set up by respondents. There [324] is sufficient ground for the presumption. The plaint does not describe the river as being an artificial water course. A natural stream is one which has a natural source and flows in a natural channel; such is the case of the Palar. It has its source in a hill and flows down in a defined natural channel till it falls into the Tirupatore tank. There is no suggestion in the plaint that any person had anything to do either with the creation of the supply of water at its source or with its flow in a defined channel. On the other hand, there is an admission in the plaint that respondents are entitled to so much of the river water as may naturally flow into their supply-channel C. In *Miner* v. *Gilmour* (1), Lord Kingsdown has explained the law on this point in these terms:—"By the general law applicable to running "streams, every riparian proprietor has a right to what may be called "the ordinary use of the water flowing past his land; for instance, to "the reasonable use of the water for his domestic purposes and for his "cattle, and this without regard to the effect which such use may have "in case of a deficiency upon proprietors lower down the stream. But, "further, he has a right to the use of it for any purpose or what may "be deemed the extraordinary use of it, provided that he does not thereby "interfere with rights of other proprietors either above or below him. "Subject to this condition, he may dam up the stream for the purpose "of a mill, or divert the water for the purpose of irrigation; but he has "no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts

(1) 12 Moor. P.C. 131.

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"upon them a sensible injury." As to what is a reasonable, though extraordinary use, Lord Cairns propounded the law on the subject in *Swindon Waterworks Company* v. *Wills and Berks Canal Navigation Company* (1) "Undoubtedly the lower riparian owner is entitled to the "accustomed flow of the water for the ordinary purposes for which he can "use the water, that is quite consistent with the right of the upper "owner to use the water for all ordinary purposes, namely, as has been "said *ad lavandum et ad potandum*, whatever portion of the water may "thereby be exhausted and may cease to come down by reason of that "use But, further, there are uses no doubt to which the water may be "put by the upper owner, namely, uses connected with the tenement "[325] of the upper owner Under certain circumstances, and provided "no material injury is done, the water may be used and may be diverted "for a time by the upper owner for the purpose of irrigation "Whether such a use is a reasonable use would depend, at all events, "in some degree, on the magnitude of the stream from which the deduc-"tion was made for this purpose over and above the ordinary use of the "water"

We see no reason to think that the Subordinate Judge intended not to adopt the finding of the District Munsif on the first issue The substantial question, therefore, is that raised by the second and third issues, *viz*, whether the customary right and the easement set up by respondents are established

As regards the second issue, the Subordinate Judge explains it as raising for determination two subsidiary questions *viz*, (i) whether there has been a usage of throwing a temporary sand dam across the river Palar, so as to divert the river water into the channel C as alleged by respondents, and (ii) whether there has been a similar usage with reference to other channels above and below the channel irrigating Surakudi

We see no reason to think that, as argued on appellants' behalf, the framing of the issue is substantially defective It sufficiently directs the attention of the parties to the question of usage as the foundation of a right of easement controlling the natural right of a lower riparian owner

We are of opinion that due regard was had to the distinction between custom as the source of an easement, and an easement as a distinct right in itself An easement is a right existing in a particular individual, in respect of his land, whilst custom is a usage attached to a locality Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who for the time being own land in the locality to which the right attaches The distinction is explained in *Mounsey* v *Ismay* (2), and the rule of law is that if a custom is shown to exist under which individuals of a class may obtain independent rights in respect of their land which would be easements if acquired by grant or prescription, those rights are nevertheless easements, though acquired by reason of the custom.

[326] On the question of custom or usage, the District Munsif found that it was not proved, but the Subordinate Judge, after discussing the evidence, both oral and documentary, relied on by both sides, comes to the conclusion that it is well established His finding is that the usage is proved to have existed in respondents' village from before 1838, and that a similar usage has been proved to prevail in regard to thirty channels having dams across the Palar river, permanent or temporary, for

(1) L R 7 H L 697 (2) 3 H & C 486

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irrigating lands in some thirty villages This is a finding of fact which we must accept in second appeal. Several objections are urged against the finding on appellants' behalf, and we proceed to consider them.

The first objection is that the lands in Surakudi do not abut on the river Palar, and are not, therefore, riparian lands. The Subordinate Judge does not rest his decision on natural rights, which respondents, as riparian owners, possess, but on the right of easement founded on custom and user for more than twenty years.

The second objection is that the custom found by the Subordinate Judge is unreasonable, since the right claimed is a right to obstruct the whole stream. It is not unusual in this country for each of those who own lands adjacent to streams depending upon them for irrigation to take water by turns either for a certain number of days or hours. The Subordinate Judge observes that the evidence shows that even when the dam is put up, water oozes through it and flows down the stream beyond the dam to the height of half a yard, and that the user is reasonable with reference to the evidence in this case. Even assuming that such user is not an incident of the natural right of a riparian owner, it cannot be treated as unreasonable as an incident of the right of easement based on custom and long user. It is quite possible that the villages depending for irrigation on the river Palar came under cultivation in times past subject to the custom.

The remark of the Subordinate Judge that there are two calingulas across the river so as to obstruct the whole stream when it is low is not without significance.

The third objection taken for the appellants is that the custom is indefinite, and that the Subordinate Judge has recorded no finding as to the dimensions of the dam. But he observes that appellants denied respondents' right to put up a dam at all, and did not take any objection to the dimensions of the dam mentioned in the plaint, and considers that no finding is necessary. [327] It appears, however, that the fourth issue was recorded and the question was thereby distinctly raised. The Subordinate Judge must be requested to submit a finding on the fourth issue.

Another objection is that as tenants of the zemindar, respondents are not entitled to set up a right of easement by custom. The Subordinate Judge has dealt with this objection in paragraph 11 of his judgment, and we consider that he has properly disallowed it.

There is nothing in the Easements Act to invalidate customary easements and we are of opinion that the decision of the Subordinate Judge is right except as regards the fourth issue.

Before finally disposing of this second appeal, we shall call upon him to submit a finding on the fourth issue upon the evidence on record within six weeks from the date of receipt of this order, and seven days will be allowed for filing objections after the finding is posted in this Court.

[In compliance with the above order the Subordinate Judge submitted a finding, which was not accepted. On his submitting a revised finding, the High Court passed a decree dismissing the suit with costs throughout.]

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APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr Justice Best

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SIVARAMAN CHETTI (*Plaintiff*), *Appellant* v IBURAM SAHEB (*Defendant*), *Respondent* * [1st and 25th April, 1895]

Foreign judgment—Decree "in absentem"—*Submission to jurisdiction*

The plaintiff brought a suit in the French Court at Karikal against the defendant, a British subject, resident in British India The defendant employed a Vakil to defend the suit, but on the case coming on for hearing the Vakil stated he had no instructions, and an *ex-parte* decree was passed An application by the defendant **[328]** to have the decree set aside was held to be time-barred The plaintiff now brought a suit on the judgment of the French Court to recover the amount decreed to him

Held, that the suit was not maintainable for the reason that the decree had been passed against the defendant *in absentem* by a foreign Court, to which he had not submitted himself,

Semble even if the foreign judgment had not been entirely invalid as against the defendant, the British Court would have had jurisdiction to disallow an item of claim allowed by the foreign Court on account of prospective damages which was unsupported by evidence

[**R.,** 32 M 469=19 M L J 459=5 Ind Cas 190]

SECOND appeal against the decree of V Srinivasachariu, Subordinate Judge of Kumbakonam, in appeal suit No. 485 of 1893, modifying the decree of A Kuppusami Ayyangar, District Munsif of Negapatam, in original suit No 77 of 1893

The plaintiff sued to recover the sum of Rs 1,262-15-9 upon the judgments of the French Court at Karikal affirmed by the Court of Appeal at Pondicherry

The Subordinate Judge stated the facts giving rise to this suit, as follows.—

"On the 12th August 1887, the plaintiff and another living and trading in Karikal, a French port, chartered a native brig belonging to the defendant living at Nagore, a British Indian port, for carrying certain goods from Karikal to Moulmein The vessel was, however, attached by the French Court at Karikal at the instance of a third party after plaintiff shipped his goods, and it could not, therefore, leave Karikal for Moulmein The plaintiff then chartered another vessel at Karikal to which his goods from the other vessel were removed After all this was done, he sued the defendant, British subject, in the Karikal Court for recovery of (i) loss sustained by him by reason of some of his goods being missing from the first vessel at the time of re-loading, and some damaged and broken while they were transhipped, (ii) the charge of transhipping goods from one vessel to the other, and (iii) loss sustained by him by the defendant not carrying his goods to the port of destination within the time appointed by the charter-party. He complained to the French Court that the defendant broke his contract and that he sustained the damages he sought to recover by that breach and obtained a decree *ex parte* for all the sums sued for by him The defendant appealing to the appeal tribunal in Pondicherry, that Court refused to interfere and confirmed

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* Second Appeal No 1730 of 1894.

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" the judgment of the lower Court. He sued now in the District Munsif's " Court of Nega-[**329**] patam upon these foreign judgments to recover from " defendant Rs. 1,262-15-9 being the aggregate of sums awarded by the " French Court and all costs incurred in the two Courts of Karikal and " Pondicherry."

The further facts of the case are stated sufficiently for the purpose of this report in the judgment of the High Court.

The District Munsif passed a decree as prayed. On appeal the Subordinate Judge held (i) that the Court of Karikal had jurisdiction over the suit, (ii) that the defendant was entitled to plead that the judgment pronounced by the foreign Court was wrong on the merits, (iii) that the foreign Court had passed a decree for Rs. 700 more than the defendant was liable to pay, and he modified the decree of the District Munsif accordingly.

The plaintiff preferred this second appeal, and the defendant took objection to the decree under Civil Procedure Code, Section 561.

Venkataramayya Chetti, for appellant.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

Appellant sued the respondent in the District Munsif's Court at Negapatam for the recovery of Rs. 1,031-13-10 as due to him from respondent under a decree obtained by appellant in the French Court at Karikal. The District Munsif gave appellant a decree for the whole amount, but on the defendant's appeal the Subordinate Judge modified the decree by disallowing the present appellant's claim to a sum of Rs. 700, which had been awarded as damages

Hence the present appeal with regard to this sum of Rs. 700, while respondent has objected under Section 561 to the rest of the decree on the ground that the decree of Karikal Court was a nullity in consequence of its being passed against one who was a British subject over whom the French Court had no jurisdiction.

First, as to the appeal, there can be no doubt that the Subordinate Judge was right in disallowing the Rs. 700 claimed as damages, which were altogether prospective at the time when the suit was instituted in the Karikal Court and as to which no evidence was adduced as to their having been actually incurred. The appeal must, therefore, be dismissed with costs in any case.

The objection filed by respondent questions the validity of the entire decree as passed without jurisdiction against a foreigner, non-resident in French territory.

[**330**] As observed in the recent judgment of the Privy Council in *Gurudyal Singh* v. *Rajah of Faridkote* (1). " Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently " or temporarily resident within the territory, while they are within it; " but it does not follow them after they have withdrawn from it, and when " they are living in another independent country. It exists always as to " land within the territory and it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by " domicile, it may exist as to persons domiciled, or who, when living, were " domiciled within the territory. . . . 'No territorial legislation can " give jurisdiction which any foreign Court ought to recognize against " foreigners, who owe no allegiance or obedience to the power which so

(1) 21 I.A. 171=22 C. 222.

"legislates" Consequently, "in a personal action . a decree "pronounced *in absentem* by a foreign Court, to the jurisdiction of which "the defendant has not in any way submitted himself, is by International Law an absolute nullity

1895 APRIL 25. — APPELLATE CIVIL. — 18 M. 327.

The question for consideration in the present case, is, therefore, did the defendant submit himself to the jurisdiction of the French Courts? It appears that he employed a Vakil to defend the suit in the Court of First Instance, but on the case coming on for hearing the Vakil stated he had no instructions, and consequently a decree was passed as prayed for by plaintiff apparently without any evidence being taken Subsequently, defendant applied to the French Courts to have the *ex parte* decree set aside and a decree to be given on the merits This application appears to have been acceded to but on the case coming on for hearing, the order so passed in defendant's favour was set aside on the ground that the application was barred as not having been made within eight days "of the notice of the decision"

The result is that the defendant had no hearing in the French Courts, and the mere fact of his having employed a Vakil is not sufficient to justify our holding that the decree was not passed *in absentem*

Had defendant been allowed a hearing and the case then decided against him, we should have held—following *Kandoth Mammi* v *Abdu Kalandan* (1) and *Fazal Sahu Khan* v *Gafar* [331] *Khan* (2)—that having taken the chance of a judgment, in his favour, he could not now, when an action is brought against him on the judgment, take exception to the jurisdiction, but on the facts of the present case we find that the defendant is not precluded from pleading want of jurisdiction in the French Court which passed the decree

Allowing this objection of the respondent, we direct in supersession of the decree of both the Courts below that plaintiff's suit be dismissed and that he do pay defendant's (respondent's) costs throughout including the costs both of the appeal to this Court and of the objections filed under Section 561 of the Code

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18 M. 331.

APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

THAYAR AMMAL AND OTHERS (*Plaintiff*), *Appellants* v LAKSHAMI AMMAL AND ANOTHER (*Defendants*), *Respondents* *

[28th March, and 18th April, 1895]

Mortgage—Interest 'post diem'—*Limitation Act—Act XV of* 1877, *Schedule II, Article* 116

The plaintiff sued in 1893 to recover principal together with interest due up to date on a mortgage which provided for the repayment of principal and interest in December 1882, but contained no covenant for the payment of interest *post diem*.

Held, that the claim for interest *post diem* was barred by limitation

[R., 24 C 699 (F B), 12 C P L R 18 (22) D, 22 B 107]

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* Appeal No 81 of 1894

(1) 8 M H.C R. 14

(2) 15 M 82

1895 APRIL 18. — APPELLATE CIVIL. — 18 M. 331.

APPEAL against the decree of S. Russell, District Judge of Chingleput, in original suit No 2 of 1893.

Suit to recover principal and interest due on a mortgage, dated the 16th February 1880. The instrument sued on contained a covenant for the payment of principal and interest "within December 1882," but there was no covenant for the payment of interest *post diem*.

The District Judge passed a decree for the principal together with interest up to the 31st December 1882 As to the claim for further interest he treated it as a claim for damages for the breach of contract, and held that it was barred by limitation on [**332**] the ground that it was not litigated until more than six years after the date fixed for the repayment of the debt.

The plaintiffs preferred this appeal

Bhashyam Ayyangar and *Desikachariar*, for appellants.

Sundara Ayyar, for respondent No. 2.

JUDGMENT.

BEST, J.—The sole question for decision in this appeal is whether plaintiffs (appellants) are entitled to interest *post diem*. The Judge has given them a decree for the principal amount with interest at the rate stipulated in the bond to 31st December 1882, the date mentioned in the bond as that on which the principal amount was to be paid and the property redeemed.

The Judge is right in holding that Exhibit A contains no provision for interest *post diem* and that Exhibit B cannot be said to contain any admission of liability to pay such interest.

It has been held by the Allahabad High Court in *Mansab Ali* v. *Gulab Chand* (1) and *Bhagwant Singh* v. *Daryao Singh* (2), also by the Calcutta High Court in *Gudri Koer* v. *Bhubaneswari Coomar Singh* (3), and two other cases therein referred to—one of which is reported as a note at page 23,—and also by this Court in *Badi Bibi Sahibal* v. *Sami Pillai* (4), that *post diem* interest is awarded in such cases only by way of damages, and can only be awarded if the suit is brought within the period allowed by the limitation Act for a suit for damages, *i.e*, in a case like the present (where the document is registered) within six years from the date on which the principal amount became payable.

Our attention has been called by appellants Vakil to Act XXXII of 1839 and the decisions of the Calcutta High Court in *Bikramjit Tewari* v. *Durga Dyal Tewari* (5), and of this Court in *Rama Reddi* v *Appaji Reddi* (6).

The provisions of Act XXXII of 1839 were considered in *Gudri Koer* v *Bhubaneswari Coomar Singh* (3) at page 25 with reference to the remarks of their Lordships of the Privy Council in *Juggomohun Ghose* v. *Manickchund* (7), and in *Bikramjit Tewari* v. *Durga Dyal Tewari* (5), the Judges expressly distinguish that case from the case of *Gudri Koer* v. *Bhubaneswari Coomar Singh* (3) and the case reported in the note, by saying "the only "[**333**] question in those cases was the question of limitation—a question which is entirely different from that which is now before us," which was merely whether *post diem* interest can be made a charge on the property. *Rama Reddi* v. *Appaji Reddi* (6) purports to follow *Bikramjit Tiwari* v. *Durga Dyal Tewari* (5) without noticing, however,

(1) 10 A. 85. (2) 11 A 416. (3) 19 C. 19. (4) 18 M 257.
(5) 21 C 274 (6) 18 M. 248 (7) 7 M I. A 263 (279).

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that the quetison of limitation did not arise in that case Moreover, this Court's decision in *Badi Bibi Sahibal* v *Sami Pillai* (1) does not appear to have been brought to notice

Act XXXII of 1839 extends to India the provisions of 3 and 4 Will IV cap 42, Section 28, and on referring to that statute it is clear that what is awarded in such cases is damages As observed in *Juggomohun Ghose* v *Manickchund* (2)—" The Act supposes a party to have been sued " for breach of a contract for the payment, by virtue of a written instru-" ment, of a sum certain at a certain time," and as held by the Allahabad and Calcutta High Courts the breach takes place when the defendant fails to pay the money due in accordance with the terms of the contract and it is from that date that the time begins to run. There can be no recurring cause of action

I would therefore dismiss this appeal with costs

SUBRAMANIA AYYAR, J —The substantial question in this case is, when the mortgage instrument does not provide for the payment of *post diem* interest, whether the plaintiffs' claim for it is barred under Article 116 of the Limitation Act, the plaint having been presented more than six years after the death when the principal amount due under the mortgage became payable Now it the claim for interest here is one for mere " compensation for breach of a contract " to pay money, the claim is undoubtedly barred under that article which is applicable to suits for compensation for breach of a contract in writing registered But, if on the other hand, the interest in question is " money charged on land " the claim is not barred as the article applicable to such a case is 132 and not Article 116

In determining the question whether *post diem* interest, in a case like this, is or is not mere " compensation " for breach of a contract to pay money on the due date, the two senses in which the word " interest " is now commonly used in law, according as it [334] is or is not payable under a contract express or implied, should be borne in mind When it is payable under a contract it is said to be recoverable as a part of the debt itself, but when it is not so payable it is recoverable only as damages for the detention of the debt (See Mayne on Damages, 5th Edition, page 160) In other words, when interest is agreed to be paid, it is treated as the value promised for the use of money, but when, in the absence of such promise, a Court awards interest, it is given as " com-" pensation for withholding money " (Compare Sedgwick on Damages, 8th Edition, Vol I, page 418) In the present case there being no promise to pay *post diem* interest, there can be no doubt that the plaintiffs' claim for it can be sustained only on the ground that it is compensation for the detention of a debt due under a contract in writing registered and consequently Article 116 must apply

On behalf of the plaintiffs (appellants) it was however argued that the said article does not apply and great stress was laid on the provisions of Act XXXII of 1839 and Sections 86 and 88 of Act IV of 1882, as if they were inconsistent with the position that interest awardable by a Court under Act XXXII of 1839 is compensation for the detention of a debt and nothing more That it is hardly possible to come to any other conclusion than that at which I have arrived will be perfectly plain if the state of the Common Law of England as to interest in cases similar to the present, before the passing of the statutes 3 and 4 Will IV, Cap 42

(1) 18 M. 257. (2) 7 M.I A. 263 (281).

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Sections 28 and 29 (which are substantially the same as the provisions of Act XXXII of 1839) and the changes introduced by those sections are carefully considered. What the old law was will be seen from three decisions pronounced not long before the passing of the said statute.

In *Higgins* v. *Sargent* (1) decided in 1823, Holroyd, J., said "It is "clearly established by the later authorities, that unless interest be "payable by the consent of the parties express or implied from the usage "of trade (as in the case of bills of exchange) or other circumstances, it is "not due by Common law."

Again, in *Shaw* v. *Picton* (2) decided two years later, Abbott, C.J., observed, "The general rule is that interest is not due by law for "money lent, unless from the usage of trade or other dealings between "the parties, a contract for interest is to be implied."

[335] And especially *Page* v. *Newman* (3) decided in 1829, but four years before the statute was passed, is very instructive on this point. There the claim was for money lent, but which was not repaid on the day appointed for the purpose by the written instrument between the parties. At the trial Lord Tenterden, C. J., was of opinion, there being no agreement to pay interest, that the plaintiff was not in law entitled to recover any interest On the motion for new trial, it was argued for the plaintiff that interest was recoverable on the authority of *Arnott* v. *Redfern* (4) where Best, C. J., was reported to have said.—"However a "debt is contracted if it has been wrongfully withheld by a defendant, after "the plaintiff has endeavoured to obtain payment of it, the jury may give "interest in the shape of damages for the unjust detention of the money." Lord Tenterden refused to accede to the contention and said. "It is a "rule sanctioned by the practice of more than half a century, that money "lent does not carry interest." As to *Arnott* v *Redfern* (4) cited before him, the Chief Justice observed, "If we were to adopt as a general "rule that which some of the expressions attributed to the Lord Chief "Justice of the Common Pleas in *Arnott* v. *Redfern* (4) would seem "to warrant, *viz*, that interest is due wherever the debt has been "wrongfully withheld after the plaintiff has endeavoured to obtain "payment of it, it might frequently be made a question at *nisi prius* "whether proper means had been used to obtain payment of the debt and "such as the party ought to have used. That would be productive of "great inconvenience. I think we ought not to depart from the long-esta- "blished rule, that interest is not due on money secured by a written "instrument unless it appears on the face of the instrument that interest "was intended to be paid or unless it be implied from the usage of trade "as in the case of mercantile instruments."

It was to remedy the disadvantages that creditors were thus subject to under the common law, that the provisions of the Statute 3 and 4 Will. IV, Cap. 42, Sections 28 and 29, were enacted empowering juries to allow interest in the cases specified therein.

It will thus be seen that in cases like the present, Courts had, under the common law, no power to give damages for wrongful [336] detention of money, but by the statute they were enabled, through the instrumentality of juries, to give interest which, as already stated, is only another name for "compensation for money withheld." It is therefore difficult to see how it can be rightly contended that interest awarded under

(1) 2 B & C 348, 351.
(2) 4 B. & C. 715, 723.
(3) 9 B. & C. 378, 380.
(4) 3 Bing. 353, 359.

the corresponding Indian Act XXXII of 1839 is not such compensation so as to make Article 116 inapplicable to the case

It was next urged for the plaintiffs, so far as I have been able to follow the argument on this point, that under Sections 86 and 88 of Act IV of 1882 when interest is awarded by a Court under Act XXXII of 1839, on account of money due under a written instrument creating a mortgage of immoveable property, such interest becomes *ipso facto*, a charge on the property Granting for argument's sake that this is so, it stands to reason that that can happen only when a claim for interest under Act XXXII of 1839 is not barred by the law of limitation, which is not the case here if the view taken by me above is correct

Such is the conclusion at which I have arrived independently of the decided cases, English and Indian As to the former it was argued on behalf of the respondents, that a mortgagor in England is not obliged to pay *post diem* interest up to date of redemption unless as plaintiff he wants to redeem, and consequently, English decisions, in which such an equity has been imposed on mortgagors, are inapplicable to this case where the mortgagor is not seeking to redeem as plaintiff but is only a defendant But though there are *dicta* to be found here and there in English reports in support of the contention that the obligations of a mortgagor in the matter under consideration vary with his position as plaintiff or defendant in a suit upon the mortgage instrument, yet the better opinion is against the validity of such contention In *Sober* v *Kemp* (1), Wigram, V C, said, " It has always appeared to me that the terms on which a mortgagor or those claiming under him are entitled to redeem must be the same, whether they are to be ascertained in a suit for redemption or for foreclosure It is truly said that a plaintiff seeking equity must do equity, but in determining what is equity, the question is what are the duties and liabilities which his situation at the time of instituting the suit imposes, and not whether he is [337] plaintiff or defendant on the record " (See also Coote on Mortgages, 5th Edition, page 981) The ground, therefore, on which the respondent tries to distinguish the present case from the English decisions on the point, does not seem to me to be sustainable

Nevertheless, I think that those authorities form no useful guides for determining the present question, owing to important differences which exist between the provisions of Article 116 of the Indian Act and the rules of limitation governing similar cases in England

The difference is most marked as to mortgages of personalty, for under the English law no specific period of limitation is prescribed for the recovery of interest due on moneys secured by such mortgages, *Mellersh* v *Brown* (2). No doubt it is otherwise as to interest on any sum of money charged upon or payable out of any land or any damages in respect of such interest, as these cases are provided for by 3 and 4 Will IV, cap 27, Section 42, according to which none is recoverable, but within six years next after the same shall have become due But obviously there is no real analogy between the provisions of this section and those of Article 116, notwithstanding the coincidence that six years is the limit under both enactments And even if there were any analogy between them, I have not been able to find any decisions on Section 42 of the statute which are opposed to the conclusion arrived at by us On the contrary, it is

(1) 6 Hare 155, 160

(2) L R 45 Ch D 225

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with reference to this very section that Sir Edward Sugden held, it applied to every remedy for the recovery of money falling within its provisions, observing, " when the Act of Parliament says no action shall be maintained " after a given number of years for the recovery of such sum or such in- " terest how can a man after that period bring any action in respect of " the debt?" *Henry* v. *Smith* (1). And the language of Kay, J., in *Mellersh* v. *Brown* (2), referred to above, implies that if 3 and 4 Will. IV, Cap. 27, Section 42, had applied to that case, the mortgagee could not have recovered more than six years' interest. As to Indian cases the decision of Muttusami Ayyar, and Best, JJ , in *Badi Bibi Sahibal* v. *Sami Pillai* (3) and the cases therein referred to fully support my view.

We have however been referred on behalf of the appellant to *Rama Reddi* v. *Appaji Reddi* (4) and *Kristna Reddi* v. *Varada-*[338]*rajulu Reddi* (5) in which it appears *post diem* interest was awarded under Act XXXII of 1839, notwithstanding that the plaints therein were presented after the lapse of six years from the dates fixed for the payment of the principal amounts. But in neither of these decisions is the question of limitation noticed at all On the contrary in the judgment in *Rama Reddi* v. *Appaji Reddi* (4) the learned Judges expressly follow *Bikramjit Tewari* v. *Durga Dyal Tewari* (6), which in its turn quotes with approval *Gudri Koer* v. *Bhubaneswari Coomar Singh* (7) where Macpherson and Amir Ali, JJ., held that a claim like the present is barred unless instituted within six years from the date of the breach of contract. In these circumstances the decisions in the second appeal and the original side appeal, relied upon by the appellant, can hardly be said to be in conflict with that of Muttusami Ayyar and Best, JJ., referred to above.

I concur therefore in holding that the appeal fails and should be dismissed with costs.

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(1) 2 D & W. 381, 390. (2) L. R. 45 Ch D. 225.
(3) 18 M 257. (4) 18 M. 248.
(5) Original Side Appeal No. 19 of 1894. Before Collins, C J., and Parker, J.
Judgment—Although no contract for *post diem* interest can be inferred from Exhibit A, we think interest from 30th December 1884 can be given under the Interest Act, XXXII of 1839 under the principle laid down in *Bikramjit Tewari* v. *Durga Dyal, Tewari* (I.L.R 21 Calc., 274) which case has been followed by this Court in *Rama Reddi* v. *Appaji Reddi* (I.L.R., 18 Mad., 248). We will therefore allow Rs. 696 as interest at 6 per cent. per annum from the due date to date of plaint, and make it a charge upon the mortgaged property.

The decree of the learned Judge will therefore be modified by adding this sum to the principal sum adjudged and decreeing Rs. 2,598 instead of Rs. 1,902 with costs and further interest at 6 per cent per annum. The appellants are entitled to proportionate costs on this appeal.

[R., 18 M. 331]

(6) 21 C. 274. (7) 19 C. 19.

Section 56 of the Specific Relief Act is an injunction to the Court and not to the party In fact the Specific Relief Act is not even referred to in that judgment, nor, as far as can be seen, was it referred to in the arguments The decision of this Court in *Appu* v *Raman* (1) seems to favour the distinction relied upon by the plaintiff, but even in that case the decision proceeded on the ground that the effect of the injunction granted was " to prevent the appellants from applying for execution of " the decree " and it is added " no application for execution has yet been " made and so long as the injunction is in force none can be made and " therefore no pending proceeding of a Court is restrained by the injunc- " tion." This is quite consistent with Clause (*a*) of Section 56 of the Specific Relief Act, which provides against the grant of an injunction to stay a judicial proceeding " pending at the institution of the suit in which the " injunction is sought," unless such restrain is necessary to prevent a multiplicity of proceedings

With reference to the remarks in *Appu v Raman* (1), it is, however, as well to notice here that the injunctions issued by the Courts of Chancery in England for controlling proceedings in other suits are not orders issued to such other Courts but to the party, such party, being amenable to the jurisdiction of the Court granting the injunction, and capable of being acted on by the process of contempt of Court and they are in fact orders *in personam*

The question then is, is the injunction sought for in the present suit " necessary to prevent a multiplicity of proceedings?" It is [342] difficult to see how it is necessary for such purposes more than in any ordinary case in which execution of the decree is resisted

It is also impossible to say that the Judge is wrong in holding this suit to be in contravention of Clause (*b*) of Section 56, as the proceedings sought to be stayed are proceedings in his own Court and not in a Subordinate Court Such being the case, it is unnecessary to consider the question whether this suit is barred by Section 244 of the Code of Civil Procedure

The appeal fails therefore and is dismissed with costs

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18 M 342.

APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

SUBBARAMAYYAR (*Plaintiff*), *Appellant* v NIGAMADULLAH SAHEB AND OTHERS (*Defendants Nos* 1, 2, 3 *and* 5), *Respondents*.*

[6th, 7th and 13th March and 22nd April, 1895]

Limitation—Adverse possession—Mortgage by previous owner out of possession for twelve years.

In a suit on a mortgage, dated 19th June 1888, and executed by the superintendent of a mosque, the endowments of which were comprised in the mortgage, together with defendant No 1 therein described as his disciple, it was admitted that the first mortgagor had occupied the position of superintendent up to 1871 and that in that year he had executed an instrument authorizing defendant No 2 to take possession of the properties on behalf of defendant No 3 whom, as was recited, the executant had taken in adoption and appointed to be his successor In 1874 the first mortgagor purported to cancel the instrument above referred to.

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* Appeal No 28 of 1894

(1) 14 M 425

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but it appeared that he never actually resumed the management, and that defendant No. 2 resisted various attempts then and subsequently made to interfere with his possession, and held the properties together with defendant No. 3 up to the date of the suit:

Held, that defendants Nos 2 and 3 were in adverse possession of the mortgage premises from 1871, and that the mortgage was consequently invalid whatever the purpose of the debt intended to be secured thereby.

Appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Nagapatam, in original suit No. 48 of 1892.

[343] Suit to recover principal and interest due upon a mortgage, dated the 19th June 1888, and executed in favour of the plaintiff by Nidashah therein described as Audinastar of Thas Brak Thaikal, and defendant No. 1 therein described as his disciple. Defendants Nos. 2 and 3 were, respectively, the brother and nephew of Nidashah, and it appeared that, on the 11th of January 1871, Nidashah executed an instrument authorizing defendant No 2 to manage the mosque together with its endowments of which he was superintendent on behalf of defendant No 3, then an infant, whom Nidashah had taken as his son and successor and to whom they were to be delivered on his attaining majority. Quarrels arose in 1873 between Nidashah and defendant No. 2, and in 1874 Nidashah revoked the instrument of 1871, but the endowments, which had been handed over to defendant No. 2 under that instrument, remained with him, and there was evidence that he resisted various attempts then and subsequently made to disturb his possession, and that he and the third defendant held the properties up to the date of the suit. It was asserted by the plaintiff that the debt secured by the mortgage sued on was one binding on the institution. The Subordinate Judge recorded a finding on this point in favour of the defendants, and on that ground dismissed the suit. The third and fourth issues, which are referred to bv the High Court were as follows:—

(3) Whether second defendant, since the date of the transfer, has been managing the mosque and its endowments?

(4) Whether, at the date of the plaint bond, Nidashah was entitled to mortgage the property therein contained?

The plaintiff preferred this appeal

Pattabhirama Ayyar and *Tyagaraja Ayyar*, for appellant.

Rama Rau, for respondents Nos. 2 and 3.

JUDGMENT.

The plaintiff sues for recovery of Rs. 10,528 principal and interest said to be due to him upon a mortgage bond executed on the 19th June 1888 by one Nidashah, deceased, and the first defendant jointly for Rs. 5,000.

The defendants Nos. 2 to 5 have been made parties as being persons in possession of or claiming interest in the village of Ponmanatham mortgaged under the document sued on.

The first defendant admitted the plaintiff's claim. The second and third defendants contested the suit. Seven issues were raised [344] and evidence was adduced by the parties on the various questions in controversy between them.

The Subordinate Judge dismissed the plaintiff's claim on the ground that the bond sued on and the previous transactions which led up to it were unsupported by any consideration, and had been got up collusively in the names of the plaintiff and certain others who are his relations by

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the plaintiff's seventh witness, Subramania Ayyar formerly the agent of Nidashah.

The plaintiff appeals and the important question for our determination is whether the plaintiff is entitled to proceed against the mortgaged property We think that he is not, for, we find that the defendants Nos 2 and 3 held, as pleaded by them, possession of the village in question adversely to Nidashah through whom the plaintiff and the first defendant claim, for more than the statutory period prior to the date of the bond sued upon; and that, consequently, neither Nidashah nor the first defendant had any right at the time the bond was executed to mortgage the village so as to bind it in the hands of the second and third defendants

Issues Nos 3 and 4 taken together raise the point under consideration The Subordinate Judge did not formally record a finding upon the third issue regarding possession But in dealing with the question whether there was consideration for the bond, he has fully discussed the evidence on the question of possession also, and arrived at the conclusion that the village in dispute was never in the occupation of Nidashah or the first defendant after it was handed over by the former to the second defendant in January 1871 under Exhibit II, and that the second and third defendants have ever since held the property claiming to be entitled thereto under it

Up to the execution of this document (Exhibit II), Nidashah was admittedly the manager of a Mahomedan religious institution called Thas Brak Thaikal in Tiruvalur He held the village in question, which forms part of the endowments belonging to that institution, with the rest of the properties attached to the Thaikal Being very old and infirm Nidashah executed on the 11th January 1871, Exhibit II, to the second defendant, his nephew, authorizing the latter to take possession of the Thaikal and its properties on behalf of the third defendant, who is second defendant's son The instrument after reciting that Nidashah had taken the third defendant in adoption and had brought him up as his son, provides [346] that the second defendant should assume the management of the Thaikal and its properties on behalf of the third defendant, who was then a minor, receive the rents and profits accruing from the endowments and account for the same to the third defendant when he becomes a major Under this document the second defendant entered into possession at once, and continued to manage the properties without any dispute for some time In 1873 quarrels appear to have arisen between Nidashah and the second defendant The following year Nidashah issued notices purporting to cancel the arrangement made under Exhibit II and stating that he had resumed the management The second defendant, however, resisted these attempts to interfere with his possession of the Thaikal and its endowments including the village in question It is admitted on behalf of the plaintiff that the second defendant held possession from 1871 till the end of 1884 But it is urged on his behalf that in 1885, the second defendant voluntarily restored the village to Nidashah who held it till his death in November 1888 The second and third defendants deny this alleged restoration, and contend that they have been in uninterrupted possession not only from 1871 up to 1885, but also subsequently to the present time. The story of surrender by the second and third defendants to Nidashah in 1885 was discredited by the Subordinate Judge and, we think, rightly From the time quarrels arose in 1873 between Nidashah and the second defendant various judicial proceedings to which

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it is unnecessary to refer here in detail were set up and conducted at the instigation of Nidashah or his adherents, for the purpose of depriving the second and third defendants of their possession and management of the Thaikal and its properties. It is not denied that the latter succeeded in maintaining their possession for ten or eleven years after the dispute began. No adequate explanation is assigned for their voluntarily giving up the village—which forms the most important portion of the endowments—after having kept it for so long a period. And the reason given for such alleged conduct on their part is that when the third defendant made in 1882 a claim to certain produce of the value of Rs. 30, attached at the instance of a person who had obtained a decree against Nidashah, and such claim was disallowed by the Courts, he and second defendant came to believe that they had lost their rights and consequently gave up possession to Nidashah. This [346] is an incredible story and is opposed to the weight of evidence in the case. There is no doubt that one Annasami Vandayar who held the village under Exhibit VII as lessee of the second and third defendants, enjoyed the village up to July 1884 when the term of that lease expired. In that month the third defendant leased the village to the plaintiff's fifth witness under Exhibit I for nine years. But in January 1885 one Sivasankaram Pillai claiming to be the lessee of Nidashah and the first defendant under Exhibit J, dated May 1884, tried to interfere with the enjoyment of the plaintiff's fifth witness, who, either because he was unwilling to involve himself in such a dispute, or because his brother Narayanasami Vandayar had joined Nidashah (see Exhibit K) relinquished under Exhibit L, dated the 5th January 1885, his (the fifth witness) rights as lessee Thereupon the third defendant at once granted the village on lease under Exhibit VIII for three years to the defendant's fourth witness and others who were able to overcome the opposition of Nidashah and the first defendant and their agents. The evidence clearly shows that these new lessees enjoyed the village for the whole period of their lease, and that neither Nidashah nor the first defendant nor anybody else on their behalf succeeded in regaining possession. The evidence of the defendants' fourth witness, one of the parties that had possession under Exhibit VIII between 1885 and 1888, is corroborated by that of the karnam and pattamanigar of the village, who further prove that the assessment due to Government was paid by the second and third defendants. This is not met by any reliable evidence on the part of the plaintiff. The testimony of Subramania Ayyar the plaintiff's seventh witness, who is the plaintiff's relation, is entirely unsupported on this point. He says that Sivasankaram Pillai to whom Exhibit J was executed enjoyed for one year and Narayanasami Vandayar, his sub-lessee, for the remaining two years of the lease. But neither of them was called by the plaintiff. The evidence of the defendant's fifth witness is equally unsatisfactory.

We have no hesitation therefore in coming to the conclusion that the defendants Nos. 2 and 3 were in adverse possession of the village in question from 1871, that Nidashah's right thereto was extinguished by lapse of time and neither he nor the first defendant had in 1888 when Exhibit A was executed, any right [347] to mortgage it to the plaintiff; (see *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube* (1), and *Jagan Nah Das* v. *Birbhadra Das* (2); also *Karimshah* v. *Nattan Bivi* (3), and *Sankaran* v. *Krishna* (4). In this view it is unnecessary for us

(1) 10 I.A. 90. (2) 19 C. 776. (3) 7 M. 417. (4) 16 M. 456.

to consider the contention urged on behalf of the second and third defendants that the debt for which Exhibit A is said to have been executed was incurred for purposes binding upon the institution

The appeal is dismissed with costs.

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PRIVY COUNCIL

PRESENT.

Lord Hobhouse, Lord Macnaghten and Sir R Couch

[*On appeal from the High Court at Madras*]

GURUSAMI PILLAI AND OTHERS (*Plaintiff's Representatives*) v SIVAKAMI AMMAL (*Defendant's Represeentative*)

[27th February and 30th March, 1895]

Hindu Law—Construction of will—Condition—Bequest to daughters—Meaning of the words " have issue "

The testator, after providing that his two daughters should, after their marriage, remain in his family taking the income of his property without dividing it, and that, if they should disagree, the income only should be shared between them, added the following —" If both the said daughters shall have issue, they shall " divide the said properties equally Those who have no issue shall, as afore- " said, enjoy the income for their lives, and those who have issue shall enjoy the " whole property "

Held, to be the applicable principle, that, where the language of a will is clear and consistent, it shall receive its literal construction, unless there is something in the will itself to suggest a departure from it Accordingly, the true construction was that the birth of issue was the event on which the absolute gift of a half share to either daughter was to take effect, and that there was no reason for construing the words 'have issue' to mean 'leave issue' Therefore, under the will, one of the daughters, whose only issue died before her, took a heritable share, and that share did not go over, on her death, to her surviving sister, who had children

[R, 21 B 1, 23 B 80]

APPEAL from a decree (21st December 1888) of the High Court reversing a decree (28th March 1887) of the Subordinate Judge of Tanjore

[**348**] The testator, Gurunatha Pillai, made his will on the 19th October 1864 and died on the 29th He left no son, but left two daughters, the elder Pichayi Ammal, aged seven years, and the younger Sinnattal Ammal, aged three To them he bequeathed his property, providing also for their mother Sivagangai Ammal. He directed that the daughters should joinly take the income and that, after their marriage, the share of either one of them dying without issue should go over to her sister, the latter having issue The elder was married in 1868, the younger in 1869 In 1885 the younger died. The elder brought this suit on the 29th September 1885 against Subbaraya, her late sister's husband, joining with him Sivagangai Ammal, claiming her sister's moiety as having devolved upon herself

The principal questions now raised were whether the will required that a daughter, unless her share on her death was to pass to her surviving sister, if the latter had a child, should not only have had, but should have left issue, and whether Sinnattal Ammal had, in fact, ever had issue. Subbaraya having died in 1889, Sivakami, his widow, was brought on to

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the record; and, on the death of Pichayi Ammal in 1892, the suit was revived by her representatives. The material parts of the will, as well as all the facts of the case, are stated in their Lordships' judgment.

In 1877 an arrangement for a partition was entered into by Sivagangai, her daughters and their husbands. The land forming the estate was divided, the portions to be assigned to each daughter were ascertained, and agreements were drawn up. Separate documents, embodying this arrangement, were executed by Sivagangai and the sisters. Each daughter, with her husband, was aware that her mother had executed an agreement to the other, but was not a party to it.

It was asserted, on behalf of the respondent, that, as the time of this arrangement, Sinnattal Ammal had a son who was then a few months old, and who died soon after. Also, that she had previously had a child, which lived only a few days, and that she gave birth to a third child, which died in a few days, its mother also dying.

The issues in effect were:—whether Sinnattal Ammal, who admittedly died childless was entitled, by reason of her having had issue, which predeceased her, to an absolute interest in her moiety, so that this would pass to her husband on her death. Had she at any time a living child? Did the plaintiff, by the agreement [349] executed by her to her mother on the 13th June 1877, abandon any right she had under her father's will?

The first Court held that Gurunadha's will was entitled to full operation, and was not affected by the agreements in June, 1877; that Sinnattal had not a living child at the time of the execution of the agreements in June 1877; and that the defendants' witnesses who had alleged that she then had living issue, were not credible. The Subordinate Judge specially adverted to the fact that neither of those agreements stated that she then had a son, although the existence of such issue was a fact most material as a cause of their coming to an agreement in the matter in hand, and was the cause of the partition being effected by those agreements. He decreed the claim.

The High Court (KERNAN and WILKINSON, JJ.) were of opinion that the principal fact to be decided was whether Subbaraya's wife, Sinnattal ever bore a living child

The evidence of the mother of the wife was clear that her deceased daughter had not only one child, but certainly two, and perhaps three. This was supported by witnesses who had opportunities of knowing the facts. Contrasting the evidence for the plaintiff with that for the defendant, the Judges arrived at the conclusion that the wife had, at all events, two children born alive. The plaintiff had admitted that, after the execution of the agreement in June 1877, Sivagangai Ammal, her mother, gave over to her her moiety of lands in that month; and, after this partition, the sisters were in possession of their shares. This vested an absolute estate in each of the sisters in no way contrary to what was contemplated by the will of their father. The testator had intended that there should be no partition so long as one, or both, of the daughters had no issue, but that, in case of both daughters having issue, they should take his property in equal shares.

This was what had taken place Up to 1877 the parties lived in harmony; then, having children, and being unable to agree, both daughters applied to their mother, who since the death of the testator in 1864, had been in possession of the property, to give them their shares. She did so, retaining with their consent, for her own lifetime, three and odd velis of

land for her maintenance. It could not be argued that the plaintiff, as her sister had died without making any disposition of her property, succeeded as the heir of her father. There was no authority to show that a gift to [350] an unmarried daughter, undisposed of, went back to her father's heirs. It was to be regarded as her stridhanam and descended as stridhanam That being so, the plaintiff was not the heir, but the husband of her sister, Sinnattal Ammal was the heir The judgment of the first Court was reversed, and the suit was dismissed

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The representatives of Pichayi Ammal having appealed

Mr *R V Doyne*, for the appellant The true construction was that the testator intended that, in the event of a daughter dying leaving no issue, her surviving sister having issue should take the whole estate The conditions in the will remained in force notwithstanding the agreement of 13th June 1877, no agreement having effect to get rid of the condition The will should have been construed with regard to those rights, according to Hindu law, which a testator must be understood to have in contemplation He referred to *Moulvi Mahomed Shumsol Hooda* v *Shewukram* (1) and to *Hirabhai* v *Lakshmibai* (2) The father apparently hoped that the sisters would remain joint until the death of one, he intended that, on the death of either leaving issue, her issue should succeed to their mother's interest in his property, and that, if either should die without leaving issue, the survivor, if she had issue, should take the whole estate Till the death of either, the estate was to continue in the testator's name The argument came to this that by the expression 'have issue,'' the testator meant 'leave issue' If, however, the Appellate Court below had been right in its construction of the testator's language, and had rightly held that the birth of a child conferred on the mother an absolute interest in one-half of the estate, the first Court had still been right in finding that it had not been established that Sinnattal Ammal ever had a living child The High Court had been wrong in finding this fact in favour of the defendant, and the judgment should be reversed

Mr *J D Mayne*, for the respondent —The evidence established that Sinnattal, wife of Gurusami Pillai, at the time when the agreement and the partition were made in 1877, had already then had issue The contingency had happened under which she was taken absolutely, and she and her sister were in a position, in regard to their father's will, which enabled them to act upon what had [351] taken place To proceed as they did was in accordance with the testator's provisions, and when the partition had been acted upon, the clause in the will had no effective operation to make the share of either daughter, both of them having had issue, and the estates in both having become absolute, go over upon the decease of either Doubtless, this depended on the fact that there had been issue born alive, the decision, however, of the High Court was fully borne out by the evidence that Sinnattal had one, or more, living children, who lived but a short time. The words in the will relating to the daughters' interests were to be taken in their literal sense. According to the will, survivorship between the sisters was to result from the state of things referred to therein, *viz* , where the one sister might have had issue and the other not. That state of things had not arisen when the death of Sinnattal occurred; both had had issue; there was nothing to occasion survivorship between the sisters, and the descent of the property was regulated by the

(1) 2 I A. 7.

(2) 11 B 69 on appeal, *ib* p. 573

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Hindu law of inheritance, which gave it to the husband. Therefore the judgment of the first Court had been rightly reversed.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was, afterwards on the 30th March, delivered by Lord HOBHOUSE.

JUDGMENT.

This is a family dispute, arising out of the will of Gurunadha Pillai, which was made on the 19th October 1864. The plaintiff, who is now represented by the appellants, was the testator's elder daughter Pichayi. The principal defendant, now represented by the respondent, was the husband of the testator's younger daughter Sinnattal.

By his will the testator states that he is dangerously ill, and has no male issue, but has two daughters, Pichayi, aged seven years, and Sinnattal, aged three, born of his fourth wife Sivagangai; and that by means of this will he has given away his estate, which he describes, to the said two daughters. Then occur the following sentences:—

"The aforesaid two daughters after their marriage shall with their husbands remain in this family and enjoy as one family the income of the aforesaid properties without division and without alienating by sale &c."

"If in so doing there should be disagreement between them, the income thereof minus the just expenses, shall be enjoyed by them both in equal shares. If both the said daughters have issue, they [352] shall divide the said properties equally. Those who have no issue shall as aforesaid enjoy the income for their lives, and those who have issue shall enjoy the whole property. Till then the miras shall continue in my name In case your mother and you disagree and live separately you shall pay 21 kalams of paddy and 7 rupees a year for her maintenance."

He further provided that if he should recover and get a male child, the entire property should go to that child. He died however a few days afterwards, and there has been no male child born.

Pichayi married and had issue, the present appellants, and Sinnattal also married one Subbaraya. And died on the 20th January 1885. Whether or no she had a child is matter of dispute She had none living at the time of her death.

In the year 1872 there was litigation between Pichayi's husband purporting to sue as her guardian, and Sivagangai, which was ended by an agreement of the 2nd October of that year. It was agreed that the entire family property should remain, as it had been, in the management of Sivagangai, the family living together as one family. But in case they could not agree to live together, then Pichayi, being entitled under the will to one-half of the property, was to receive from Sivagangai half the net income of the immoveables, without making division of them; and each was to take half the moveables and pay half the debts.

Disagreements soon arose, and in June 1877 two deeds were executed by which Sivagangai agreed, first with one of her daughters and then with the other, upon a partition of the property.

The first deed (marked No. 1) bears date the 11th June 1877. It is expressed to be made between Sivagangai, Sinnattal, and Subbaraya It refers to the will of Gurunadha and states the joint enjoyment of his property by the three parties. Then, stating that disagreement has arisen, it provides a maintenance for Sivagangai, and subject thereto allots a moiety of the estate for half share of Sinnattal and Subbaraya. The

lands so allotted which were then registered in Sivagangai's name are to be registered in Subbaraya's name And he and his wife undertake to bear a moiety of the family debts.

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The second deed marked as Exhibit B bears date the 13th June 1877. It is expressed to be made between Sivagangai and [353] Pichayi It refers to the will of Gurunadha, and states that the two parties have been living together as one family in conformity with the will and with the agreement of the 2nd October 1872 Then, stating that disagreements had arisen, the deed goes on to provide for Sivagangai's maintenance, and to allot to Pichayi her moiety of the property and the charges in a way corresponding in substance to the partition with Sinnattal This deed, however, differs in expression and arrangement from No. I, and it contains one passage which is not found in No I, and which has been the subject of a great deal of comment Immediately after declaring Pichayi's reversionary right to a moiety of the lands allotted for Sivagangai's maintenance, and her right to a moiety of the lands and other things held in common (apparently a repetition and quite superfluous) the deed proceeds as follows —" In continuing to enjoy (as aforesaid), those " who have no issue shall in conformity with the terms of the will left by " the said Gurunadha Pillai remain in enjoyment so long as they live and " those who have issue shall enjoy the whole property inclusive of the " property of those that are issueless '

Why the family should have chosen to effect their partition by the circuitous method of treating each daughter in turn as if she and her mother were joint-owners, is not explained There can be no doubt that they intended a partition binding on the two daughters The stipulated mutations of names were duly effected, and the benefits of the family estate were received in moieties from that time to the institution of this suit It is not now disputed by either party that the two deeds embodied one family arrangement The peculiar position taken by Sivagangai does not affect the validity of the transaction as between the others, though it probably accounts for differences of expression in the two deeds

In September 1885 Pichayi brought the present suit She states the will as providing that " I and my said sister should, till we get issue," enjoy the property in moieties " and that if either of us die without issue " the other shall take the whole She then states that Sinnattal " died without issue," and she claims the estate accordingly

In his written statement Subbaraya rests his title on the partition of 1877 He introduces the matter thus —" At the time when the two " daughters of Gurunadha Pillai mentioned in the plaint had issues and " were living together as one family it was arranged [354] &c , &c " Sivagangai also put in a written statement to the same effect

Now it is a remarkable thing that if the story of Sinnattal having a child was an invention after her death, it should have been introduced in this casual and indirect way by her husband and her mother, and that the plaintiff should not at once have denounced it as a fraud and claimed to have it tried But what happened was that directly after the defendants' statements were filed, the first hearing for settlement of issues took place, and that there is no issue directed as to the birth of a child When the parties came to put in their evidence, the plaintiff asserted that Sinnattal never had a child born alive; and she brought an uncle of Sivagangai and some residents in the village to say the same thing On the other hand Sivagangai, who was called by the plaintiff, adhered very clearly to her statement that Sinnattal had children. Subbaraya stated

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that at the time of partition he had a son, and a 1 were called to support them. On that evidence the case came to trial.

The Subordinate Judge held that unless the partition had been made in accordance with the will it would not have the effect of barring the plaintiff's right to recover. That view, the correctness of which has not been impugned in the High Court or here, brought the case to turn on the question whether the events had happened in which the will directed a partition; which, as the plaintiff's children were living, was in effect the question whether or no Sinnattal had a child. The Subordinate Judge found that she never had any.

His mind was very strongly impressed by the terms of the partition-deeds. If it were true that Sinnattal had a child, it must, he says, have been mentioned in the deeds as the cause of the partition, whereas disagreement is the cause mentioned; and it is impossible, on the same supposition, to account for the insertion in Exhibit B of the clause above quoted which expresses a contingent gift to the daughter who has issue. In the face of this written evidence he disbelieves the whole of the defendants' oral evidence. He does not so much as mention the evidence of Sivagangai or Subbaraya, nor indeed that of the plaintiff, and he hardly discusses the other witnesses.

The High Court took a different view. They considered the evidence of Sivagangai to be of paramount importance. She and [355] the plaintiff and Subbaraya are the only persons of whom it may be affirmed with certainty that they knew the truth; and the High Court considered that Sivagangai was free from the bias of pecuniary interest, and, according to all appearance, of all other bias or unfairness. Mr. Justice Wilkinson also points out that her evidence is supported by the statements of other persons who were in a position to know the facts.

As to the passages in the partition deeds which so strongly affected the mind of the Subordinate Judge, the learned Judges discuss them, not with reference to their bearing on the disputed question of Sinnattal's children, but apparently with reference to other arguments as to the effect of the partition which have not been brought before their Lordships. Their conclusion is that the partition-deeds, followed as they were by mutation of names, possession, and continued enjoyment, vested an absolute estate in each of the sisters, such as was contemplated by Gurunadha's will.

On the question of fact their Lordships have to express agreement with the High Court. It appears to them that the Subordinate Judge exaggerates the effect due to he partition-deeds. It is fair matter of observation that both deeds are silent about the birth of children to either sister, and mention disagreement as the cause of partition. But it does not go very far. There was disagreement in fact, and it gave a motive for separating at that time. Both the will and the deed of October 1872 mentioned disagreement as a reason for partition of a less complete kind, *viz.*, of the net income; but not as a reason for that complete partition of the corpus which was actually intended, and actually effected so far as the parties had power. It would have been more obvious, and more workmanlike, to state the birth of children and the directions of the will as the ground of partition; but the omission to do so is hardly a reason for rejecting a body of positive testimony.

With respect to the passage in Exhibit B which repeats the will, it is certainly difficult to say why it should be there. Whether it should be entirely connected with the property allotted for Sivagangai's maintenance, as Mr. Justice Kernan thinks; whether the plaintiff had a notion that the

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gift overturned on the contingency of issue living at the death, as seems to be indicated by her plaint, or some vaguer notion that she might somehow gain some advantage by putting into her deed what is not to be found in No I is all [356] guess-work At best the presence of the clause only raises some probability in her favour

It should also be remembered that there is a probability in the other direction, arising from the proceedings in the suit before observed on, that the plaintiff used language compatible with the birth of children who died in Sinnattal's lifetime as well as with the entire childlessness, that the defendants stated the birth of children incidentally, as they might have stated any undisputed matter, and that the plaintiff did not treat the statement as she would have been likely to treat a falsehood called up to oppose her It would be easy to make too much of such a matter, just as too much has been made of the statements in the partition-deeds It seems to their Lordships that the High Court have been right in fixing their attention on the positive testimony to the exclusion of mere conjectural matter

That testimony preponderates largely in favour of the defendants. Their Lordships have referred to the opinion of the High Court upon the evidence of Sivagangai, which they think must be taken with the qualification that she is not wholly free from pecuniary interest, because the amount of her maintenance might be affected by the suit But their Lordships have the opinion of the High Court as to her apparent fairness, and no adverse opinion from the Subordinate Judge who examined her She is supported by three household servants of the defendants against whose testimony the Subordinate Judge says nothing except that they are servants But in such a matter as the birth of a child in the house servants are persons having means of knowledge, and to pass over their evidence not otherwise impeached, as worth nothing, is somewhat too sweeping The defendants' eighth witness, Narayana Pillai, gave his evidence, as the Subordinate Judge states, so as to allow no room for unfavourable observations He was a neighbour and a friend of the family, and he deposed to having seen Sinnattal's child several times at the house of Sivagangai and at the house of one Chidambara Pillai, another neighbour and friend, who was ill and could not attend the Court The defendants' first witness attested Exhibit B and on that occasion he says that Sinnattal's child was shown to him by the grand-mother On this witness the Subordinate Judge has no remark to make except that his opportunities for knowledge have not been accounted for. But his opportunity was going to the family house to attest Exhibit B

[357] It has been observed that the Subordinate Judge does not so much as mention the evidence of the plaintiff or that of either of the defendants Probably he thought that they were all tainted by self-interest But if they are to be set aside, what remains? On the defendants' side, several persons, with means of knowledge, affirming a definite fact, on the plaintiff's side, four witnesses, who are all outside the household, of whom only one is related to the family, who speak to a negative, and that very loosely, since they take on themselves to deny, not only the birth of a child, but Sinnattal's pregnancy, of which they could know nothing It is evident that the Subordinate Judge has not balanced the oral evidence, but has dismissed it in a summary way by reason of the excessive effect which he has ascribed to the language of the partition-deeds

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It remains to construe the will with reference to the fact that both daughters had issue. The High Court have held that on the birth of children to both, the will gave them absolute interests in severalty. The Subordinate Judge apparently acted on the same view, though on his view of the facts, it was not necessary to decide the point. Mr. Doyne contended first that the testator's intention was to let the estate devolve as joint family property. That however is manifestly inconsistent with the position assigned to his widow, and with the gift first of the income and afterwards of the property to his daughters in moieties. Then Mr. Doyne contended that the contingency on which the absolute gift is made must be taken to be not the birth of issue, but having issue who survive the parent.

Their Lordships must take the will at it stands in the English translation. Indeed it is not suggested, except as an argument *ad ignorantiam*, that the plaintiff's case would be strengthened if they could have before them, and could be made to understand, the Tamil original. It is clear, that great pains have been taken to ensure accuracy, because the sentence relating to joint enjoyment has been retranslated, though it is difficult to perceive any substantial difference between the two translations. And their Lordships observe that the Subordinate Judge, who would know the Tamil language, states the critical terms in a way even less open to the suggested modification than the term " have issue." He says that if both the daughters " beget issues " the property is to be [358] divided; and again that it is not to be divided until they " beget issues."

Taking the words " having issue," as the true words, there can be no dispute as to their literal meaning in any of the three contexts in which they occur. In the first two the testator contemplates the continued existence of those who " have issue," and in the second it is almost impossible to construe the words as " leave issue." There is absolutely nothing on the face of the will to suggest any secondary meaning. The words " have issue " are often read as meaning " leave issue," but not without some reason derivable from the will. Here the reason suggested is that their Lordships are construing a Hindu will, and that a Hindu testator could not have meant that if his daughter had a child who lived for a day, she should take the estate as stridhan and pass it to her husband. That is pure conjecture and quite inadmissible to control the clear expressions of the will. Even as conjecture, it fails. How can their Lordships tell that this Hindu gentleman did not feel the simple distinction, which is widely felt, between a barren woman and one who bears a child? Or how can they tell that any conjectural emendation would have pleased him better? Mr. Doyne's suggestion is made to suit the events which have happened; but it would be easy to show that on his hypothesis another set of events would produce consequences just as untoward. Fortunately their Lordships are precluded from all this guessing by the sound principle of construction that where the language of a will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest departure from it. The result is that in their Lordships' judgment the view of the High Court is right, and that this appeal should be dismissed with costs. They will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants: *Burton, Yates & Hart.*

Solicitor for the respondent; *R. T. Tasker.*

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[359] APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

1895 April 4. — APPELLATE CIVIL. — 18 M. 359.

KASIM SAIBA AND OTHERS (*Plaintiff* and his *Representatives*), *Appellants* v SUDHINDRA THIRTHA SWAMI (*Defendant*), *Respondent* * [7th, 8th March and 4th April, 1895]

Religious endowment—De facto *manager—Debt binding on the institution*

In a suit on a mortgage, dated April 1880 and comprising lands forming part on the endowment of a mutt, it appeared that the mortgagor had been the rightful manager of the mutt until 1876 when he was outcasted and consequently forfeited his office The present defendant was appointed in 1877 to succeed him in the office of manager, but the mortgagor remained nevertheless in possession, and a suit by the present defendant to eject him was pending at the date of the mortgage The plaintiff now sought to enforce his rights under the mortgage against the defendant and the property, of which the defendant had been placed in possession as the result of the suit above referred to

Per curiam the mortgagor was not disentitled to incur expenses so as to bind the rightful manager by the mere fact that the former was not *de jure* manager at the time the expenses were incurred, provided they were incurred for the preservation of the trust property or other justifiable purposes

On its appearing that the debt was incurred for the conduct of ceremonies in which the mortgagor, after his excommunication, was disqualified from taking part, and that all the circumstances of the case were known to the mortgagee

Held, that the plaintiff was not entitled to recover the amount of the mortgage-debt

[**R**, 1 C W N 617 (623)]

APPEAL against the decree of O. Chandu Menon, Subordinate Judge of South Canara, in original suit No 10 of 1892

Suit against the swami of the Puttige mutt at Udipi to recover principal and interest due upon a mortgage of properties of the mutt, dated the 5th April 1880, and executed in favour of the father, deceased, of the plaintiff by the predecessor in office of the defendant to secure repayment of a sum borrowed for the expenses of certain ceremonies connected with the mutt The defendant pleaded, *inter alia*, that the mortgage was not binding on the institution The further facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court

The Subordinate Judge passed a decree dismissing the suit

[**360**] This appeal was preferred by the plaintiff and, after his death, was proceeded with by his legal representatives

Bhashyam Ayyangar and *Narayana Rau*, for appellants

Ramachandra Rau Saheb, for respondent

JUDGMENT

The plaintiff sues for the recovery of Rs 6,599, alleging it to be due on a mortgage bond executed in 1880 to his father, since deceased, by the late Sumatindra Swami, formerly head of the Puttige mutt at Udipi

The defendant, successor of Sumatindra and present swami of that mutt, contested the suit The Subordinate Judge dismissed it, the chief grounds for the decision being (i) that the instrument sued on was invalid as a mortgage, as it was executed pending the litigation between the late

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* Appeal No. 141 of 1893

1895 APRIL 4. — APPEL-LATE CIVIL. — 18 M. 359.

Sumatindra and the defendant which terminated in favour of the latter; (ii) that the loan was not granted under circumstances rendering the debt binding on the mutt.

On behalf of the plaintiff (appellant) no attempt was made before us to impeach the Subordinate Judge's conclusion that the mortgage is invalid on the ground of *lis pendens;* and upon the admitted facts of the case, the correctness of the Subordinate Judge's view cannot be questioned.

The main point argued before us was whether the plaintiff is entitled to recover the whole or any portion of the amount sued for as moneys lent *bona fide* for justifiable purposes of the institution, of which the defendant (respondent) is the present manager.

For a proper understanding of the case a brief statement of the circumstances which resulted in the litigation alluded to above between the late Sumatindra and the defendant is necessary.

There are at Udipi eight mutts, which are closely associated with each other, of which the said Puttige mutt is one. They are presided over by Brahmin ascetics, bound to celibacy, who carry on in turn the worship of Krishna in the celebrated temple at that place. Against the late Sumatindra charges were preferred by persons interested in the temple and the mutts, the principal accusations being that he had violated the rules of his order and the duties of his office, as he was living in adultery with a woman called Akkayya, and, as he had illegally appointed, her illegitimate son, an infant, as his successor in the Puttige mutt. After due investigation, the sabha, or committee constituted [**361**] according to usage for the purpose of enquiring into the charges, found the late Sumatindra guilty and expelled him and the infant appointed by him from the caste. In consequence, Sumatindra forfeited his right and position as the swami of the Puttige mutt. This took place in 1876. The defendant was duly appointed in 1877 as the head of the Puttige mutt. Sumatindra, however, did not submit to the decision against him but continued to hold possession notwithstanding such decision. Thereupon the defendant sued Sumatindra, his concubine Akkayya and her illegitimate son in original suit No. 3 of 1879 in the District Court of South Canara to recover the mutt and its properties and for other reliefs. Pending the litigation Sumatindra died, but the suit was carried on against the other defendants and was eventually decided in favour of the defendant on appeal to the High Court in 1883.

That Sumatindra was lawfully expelled from the caste, and that on such expulsion Sumatindra ceased to be legally entitled to hold or exercise the office, or retain the property or receive the emoluments appertaining to the office, cannot now be questioned and has not been questioned in this appeal. This being so, the point for determination is whether the money mentioned in the bond sued on, and which was lent after Sumatindra ceased to be entitled to hold the office, was lent under circumstances which render the same recoverable from the defendant, the rightful swami. Before we proceed to discuss the evidence on this question, we must notice a legal contention urged on behalf of the defendant, which if well founded, would render a consideration of the evidence unnecessary. The contention is that inasmuch as the money was lent to, and the bond in question was executed by, Sumatindra, whilst he was in unlawful possession of the office, the transaction is, in consequence of the absence of title in Sumatindra, absolutely void, however necessary and beneficial the loan might have been to the institution. But the cases relied on on behalf of the plaintiff against this contention preclude us from giving an

unqualified assent to such a contention In *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1), the latest case on the subject, decided in 1893, the Privy Council, after pointing out that the proposition that a person who is in wrongful possession is not entitled to recover sums spent on account of outgoings is not a [362] proposition of law admitting of no exception, held that when a proprietor in good faith, pending litigation, makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should, in common justice, be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents No doubt there were special facts in the case in which the law was thus laid down, but the reference made by their Lordships in their judgment to the *Peruvian Guano Company* v *Dreyfus Brothers* (2) decided by the House of Lords in 1892 shows that the Judicial Committee was dealing with the question as one of principle, and as such it was elaborately discussed in the House of Lord's case by Lord Macnaghten, who delivered the judgment in the Privy Council case It seems, therefore, that it must now be taken as well established that Sumatindra was not disentitled to incur expenses so as to bind the rightful manager, by the mere fact that the former was not *de jure* manager at the time the expenses were incurred, provided they were incurred for the preservation of the trust property or other justifiable purposes We must, therefore, consider the evidence adduced to show the circumstances in which the loan was granted to Sumatindra, and determine whether the plaintiff has discharged the *onus* which according to law lies upon him In this connection the language of Kernan, J , in *Kotta Ramasami Chetti* v *Bangari Seshamma Nayanivaru* (3) when dealing with the question of the validity of a charge created by a person who was in possession of a palayam, but without title, is peculiarly applicable to the present case, and borrowing his language, we think it may properly be stated that to entitle the plaintiff to recover the money in question from the defendant, " proof of imminent pressure or danger of loss, or of such close inquiries as to the position of the estate and the immediate circumstances of the pressure or apprehended danger as to satisfy a prudent and reasonable mind of the truth of the alleged pressure and impending danger should be given " In our opinion satisfactory proof of neither has been given.

The principal points spoken to in the evidence adduced on behalf of the plaintiff are these each turn of worship, or pariyaya [363] as it is called, devolving on each of the associated mutts lasts two years The total cost incurred by each swami during his turn amounts to between Rs 25,000 to Rs 40,000 In 1880 it was the turn of the Puttige mutt to undertake the worship and to carry it on for a couple of years according to custom and usage Sumatindra as the swami in possession made the necessary preparations for the worship and commenced and carried it on until his death He had to borrow moneys for that purpose, as every one of the swamis has to do more or less when his turn comes, It was even more necessary for Sumatindra to do so in 1880, because, in addition to the circumstance that the current income for that year was insufficient to meet the heavy outlay which had to be incurred at the beginning of the pariyaya, owing to the opposition of the defendant, some of the usual payments to the Puttige mutt, such as the contributions from

(1) 21 C. 142. (2) L R (1892) A.C. 166 (3) 3 M 145 (151).

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the Mysore State, were withheld on that occasion. Consequently the loan in question was obtained to enable Sumatindra to discharge the amounts advanced by some ten individuals for the purchase of provisions required for the pariyaya ceremonies. Who these previous creditors were, and whether the amounts borrowed from them were applied for the purpose stated, there is little or no evidence to prove. But, even assuming the statements made by the plaintiff's witnesses to be true, it is quite clear that the present case is totally different from those where money is lent to avert some pressure which, if not so averted, will result in danger to the estate, such as the discharge of Government revenue due thereon as in the Privy Council case referred to above. There is absolutely no ground in the present case for the application of the principle of salvage on which relief was given in that case (see *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1)). Not only was there an utter absence of any pressure, but it may even be doubted whether the performance of the pariyaya by Sumatindra was not, according to the notions of those interested in the temple, positively detrimental to the welfare of the institution. For it is quite plain that, after Sumatindra was lawfully excommunicated, he was disqualified from interfering with the religious concerns of the temple and the performance of worship by him after such excommunication cannot but have been looked upon by the persons interested in the temple as almost a desecration. It is therefore [364] not easy to see how the doctrine of equity and good conscience referred to in the cases relied on on behalf of the plaintiff is to be held applicable to a case like this where money was lent to carry on worship under those circumstances.

Moreover, there is no ground for thinking that plaintiff's father acted *bona fide* in lending the money. He resided at Udipi itself where the committee which investigated the charges against Sumatindra sat, the inquiry having been conducted openly and having lasted for several months. The excommunication, the consequent quarrels and riots, the arrest of Sumatindra, defendant and others by the authorities to preserve the peace, the institution and pendency of the suit by the defendant against Sumatindra, &c., were all clearly known to the lender at the date of the loan; and it is difficult to believe that the father of the plaintiff acted like a prudent and reasonable man in granting the loan under such circumstances. We think, therefore, that the plaintiff has not made out any real or accredited necessity such as is required by law to justify the loan and we agree with the Subordinate Judge in holding that the claim fails on the merits also.

It is, therefore, unnecessary for us to consider the minor objections raised on behalf of the defendant.

We dismiss the appeal with costs.

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(1) 21 C. 142 (149).

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APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar.

Narasamma (*Plaintiff's Legal Representative*), *Appellant* v Subbarayudu and others (*Defendants*), *Respondents* *

[13th and 14th March and 19th April, 1895]

Registration Act—Act III of 1877, Sections 21, 48, 49, 51—Defective description of property—Deed affecting land registered in book No 4—Purchaser for value

In a suit for land, forming part of the self-acquired property of a deceased Hindu, it appeared that in 1885 his widow and his cousin had (on the death without issue of his son) entered into an agreement whereby the latter relinquished in the widow's favour for consideration all his rights in the self-acquired property [365] left by her husband The agreement was registered in book No. 4 under the Registration Act, 1877, and it contained no such description of the property as to satisfy the requirements of Section 21 The plaintiff since purchased the land now in question from the cousin, the defendants Nos 1 and 2 having purchased it and obtained possession from the widow

Held, that the plaintiff was entitled to recover

[R, 34 B 202 (208)=11 Bom L R 1321=4 Ind Cas 588, 16 C P L R 141 (143), 15 Ind Cas 335 (336) 24 M L J 664 (677), D., 23 M 580 (582)]

Second appeal against the decree of G T Mackenzie, District Judge of Kistna, in appeal suit No 1417 of 1892, reversing the decree of O V Nanjundayya in original suit No 862 of 1889

Suit to recover possession of certain land purchased by the plaintiff on the 29th of March 1889 from one Seshayya who was defendant No 3 The defendants Nos 1 and 2 were in possession under a sale by defendant No 4, who was the widow of one Guruvarazu, a kinsman of the plaintiff's vendor It appeared that Guruvarazu died leaving a son and a daughter by a previous wife, and that, on the death of the son, disputes arose between the daughter and the widow, with the latter of whom the plaintiff's vendor took part, and on the 1st September 1885, an agreement was executed by which, *inter alia*, the plaintiff's vendor, in consideration of Rs 1,000, relinquished his rights in the property of the deceased man Defendants Nos 1 and 2 pleaded that Seshayya had no title to convey by reason of this agreement, which, however, comprised no description of the property referred to therein, and was registered in book No 4 and not in book No 1 prescribed by Registration Act, 1877, Section 51

The District Munsif passed a decree as prayed, but his decree was reversed on appeal by the District Judge, who found that the property in question was self-acquired property of the late Guruvarazu, but he expressed his opinion that the document of 1885 was effectively registered

The plaintiff having died, his daughter and legal representative preferred this second appeal

Pattabhirama Ayyar, for appellant

Rama Rau and *Sundara Ayyar*, for respondents Nos 1 and 2

JUDGMENT

Best, J —It is contended on behalf of appellant (1) that, as Exhibit I contains no description of the property sufficient to identify the same, as required by Section 21, Clause (*a*) of the Registration Act, it could not

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* Second Appeal No. 1255 of 1894

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be registered, and consequently its registration was *ultra vires* and inoperative for the purposes of Section 48 of the Act; and (ii) that even if the registration be held to be valid, as it was entered only in book No. 4 and not in book No. 1 [366] prescribed by Section 51 of the Act, it is not such as to affect immoveable property.

As observed by Pigot, J., in *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (1), the object of the Registration Act is to provide not only a guarantee of the genuineness of instruments, but also a record from which persons who may desire to enter into dealings with respect to property may be able to obtain information as to title—or to quote the words of the Privy Council in *Mohammed Ewaz* v. *Birj Lall* (2)—" Registration is mainly " required for the purpose of giving notoriety to the deed;" and such being the case, it is difficult to see how this object is attained, if a document relating to immoveable property is registered in a book expressly prescribed for documents " which do not relate to immoveable property." Section 60 of the Act requires that the document registered shall have endorsed on it a certificate of the fact of registration " together with " the number and page of the book in which the document has been " copied," and this is the certificate which is " admissible for the purpose of proving that the " document has been duly registered in manner " provided by the Act."

As the original with the endorsement made thereon is returned to the party entitled to the same, he has the means of knowing what has been done by the Registrar; and if he allows to continue a mistake which he thus has the means of causing to be rectified, he has but himself to blame if he becomes a loser thereby; and his transferees of course stand in his shoes.

In the present case the document I was executed by third defendant in favour of the fourth defendant. First and second defendants are purchasers from fourth defendant, while plaintiff is a purchaser from third defendant. First and second defendants, on seeing their vendor's title-deed, if they had exercised ordinary care and caution, must have seen the flaw in her title, whereas no amount of search in the book No. I in the Registration office would enable the plaintiff to discover that the property sold to him by third defendant did not in fact belong to third defendant as *gnati* of the last owner Gopal Rao, but to fourth defendant who is the step-mother of the last owner. Cf. *Najibulla Mulla* v. *Nusir Mistri* (3).

[367] There is authority also for the other objection taken on behalf of appellants in *Baji Nath Tewari* v. *Sheo Sahoy Bhagut* (1), where it was held by the majority of a Full Bench that the absence of a description sufficient to identify the property renders the registration of a document invalid, and where the dissenting Judge, Petheram, C. J., differed from his colleagues only because he was of opinion that the description was in fact sufficient to identify the property.

I am inclined, however, to agree with the opinion of Straight, J., as expressed in *Hardei* v. *Ram Lall* (4), that the word, ' registered ' in Section 49 of the Registration Act has reference only to the Act of Registration by the registration officer; and that, if such officer has put upon the document the certificate required by Section 60, it becomes admissible in evidence. The mere fact of registration is not, however, sufficient to cure defects arising from non-observance of the requirements of Section

(1) 18 C. 556 (570). (2) 4 I.A. 166 (175).
(3) 7 C. 196. (4) 11 A. 319 (324, 325).

21, so as to affect property not specifically described and which has passed into the hands of third parties, though, as against the executant of the document, it might be enforceable on the principle *certum est quod certum reddi potest* Cf *Ramsidh Pande* v *Balgobind* (1) As in the present case the property has passed to a third party for consideration and not only is the description not as clear as is required by Section 21, but the registration itself purports to be of property other than immoveable, I think plaintiff is entitled to a decree.

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I would allow this appeal and, setting aside the decree of the Lower Appellate Court, restore so much of the decree of the District Munsif as awards to plaintiff possession of the land Plaintiff is also entitled to *mense* profits from date of suit to date of getting possession of the property—the same to be ascertained in execution of the decree—and to his costs throughout to be paid by first, second and fourth defendants

SUBRAMANIA AYYAR, J —I concur

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18 M. 328.

[368] APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

UNNI AND OTHERS (*Defendants Nos 3 to 5*), *Appellants v* NAGAMMAL AND OTHERS (*Plaintiffs and Defendants Nos 1 and 2 and Second Defendant's Representative*), *Respondents* *

[25th and 26th February and 13th March, 1895]

Mortgage—Subsequent agreement—Covenant to pay an additional sum—Charge—Tacking.

In a suit on a mortgage, dated 1878, it appeared that the premises had been mortgaged in 1874, but the mortgagor had been left in possession under a lease, and that a suit brought by the mortgagee (on the rent reserved by the lease falling into arrears) was compromised in 1877 on the terms that Rs 3,680 should be paid together with the amount secured by the mortgage of 1874 The instrument of compromise was not registered and the amount was not paid

Held, that the plaintiffs' mortgage was subject to the mortgage of 1874 only and not to the arrangement comprised in the compromise

Quære · whether the compromise would, if registered, have charged the land with Rs 3,680, or whether its effect was merely to make the equity of redemption conditional on payment of that amount, in such a manner as not to affect the rights of the subsequent mortgagee

[R., 9 C W.N 789 (791), 11 O C 248 (251)]

APPEAL against the decree of E K Krishnan, Subordinate Judge of South Malabar, in original suit No 7 of 1893

Suit to recover principal and interest due on a mortgage, dated the 16th March 1878, and executed by the deceased father and uncle of defendants Nos. 1 and 2 in favour of the plaintiff No. 1 to secure the repayment with interest of the sum of Rs 4,000 Defendants Nos. 3 to 5 were the assignees of one Varadan Patter to whom the lands had previously been mortgaged on the 6th April 1874 for Rs 20,000 and on the 7th April 1874 for Rs 1,000. It appeared that Varadan Patter after the execution of his mortgages demised the mortgage premises on lease to the mortgagor, and subsequently in 1877 instituted a suit against him to

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* Appeal No. 97 of 1894

(1) 9 A. 158.

1895 MARCH 13. — APPELLATE CIVIL. — 18 M. 368.

recover possession of the property with arrears of rent. That suit was compromised and a document was executed in the following terms:—

"Razi presented under Section 375 of the Civil Procedure Code by "Vakil Ramanatha Ayyar for Varadan Patter, plaintiff in [369] original "suit No. 24 of 1877, and by Vakil Sankara Menon for first defendant "Govinda Mannati

"The subject-matter of the above suit has been talked before and "adjusted by mediators as follows:—first defendant shall, on the third "Makarom next, pay plaintiff 675 parahs of paddy out of rent accruing "due up to 1053, and the sum of Rs. 3,680 being value of paddy due on "account of balance pattam and the costs of the suit shall be paid by "the first defendant, together with the sum of Rs. 21,000 which the "plaintiff has to get from the properties mentioned in the plaint; till "payment the first defendant shall pay 4,319 parahs of paddy and 50 "cocoanuts inclusive of interest of 644 parahs at the rate of 5½ parahs "of paddy per 10 fanams due on the said sum in Kanni (September-"October) and Makarom (January-February) commencing from 1054 "(1878-79)."

The following decree was passed on the presentation of the razinamah:—"The Court doth order and decree in the terms of the said "razinamah that on account of the rent for 1053 (1877-78) the first "defendant do pay plaintiff 675 parahs of paddy or their value according "to the market rate at execution, and that the suit be in all other respects "dismissed assessing first defendant with his costs."

The question in the present suit was whether the plaintiffs' mortgage was subject to the mortgages of 1874 only, or whether his rights were affected by the transaction of 1877 also. The Subordinate Judge decided this matter in favour of the plaintiff and passed a decree accordingly.

Defendants Nos 3 to 5 preferred this appeal

Sankaran Nayar, for appellants

Sundara Ayyar, for respondents Nos. 1 and 2.

JUDGMENT.

SUBRAMANIA AYYAR, J.—This is a suit for the recovery of the amount due under a mortgage executed to the first plaintiff on the 16th March 1878 by the father of the defendants Nos. 1 and 2. The defendants Nos 3 to 5 are the assignees of the rights of one Varadan Patter to whom the father of defendants Nos. 1 and 2 had executed two prior mortgages, one for Rs 20,000 and the other for Rs. 1,000 on the 6th and 7th April 1874, respectively

Varadan Patter, having been entitled to the possession of the property as mortgagee, leased the same to the mortgagor. The [370] mortgagor lessee failed to pay the rents and Varadan Patter brought a suit against him in 1877 for the recovery of arrears of rent and the possession of land. The disputes were amicably adjusted and a razi petition was put in on the 30th October 1877. The portions of the compromise material for our present purpose are as follows:—"The first defendant (father of "the defendants Nos. 1 and 2) shall, on the third Makarom next, pay "plaintiff (Varadan Patter) 675 parahs of paddy out of rent accruing "due up to 1053 and the sum of Rs 3,680 being value of paddy due on "account of balance pattam shall be paid by the first defendant, together "with the sum of Rs. 21,000 which the plaintiff has to get from the "properties mentioned in the plaint; till payment the first defendant shall "pay 4,319 parahs of paddy and 50 cocoanuts inclusive of interest of "644 parahs at the rate of 5½ parahs of paddy per 10 fanams due on the

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" said sum in Kanni (September-October) and Makarom (January-February) commencing from 1054 (1878-79)." These terms were not embodied in the decree which was passed on the compromise The only question, we have to determine in this appeal, is whether the plaintiffs (respondents) are entitled to redeem the property under mortgage to the third, fourth and fifth defendants (appellants) without paying them Rs. 3,680 in addition to the Rs 21,000 admittedly due under the mortgages of 1874. The Subordinate Judge decided in favour of the respondents On behalf of the appellants it is argued that the Subordinate Judge was wrong and that he should have held that the respondents were bound to pay Rs. 3,680 as well as the Rs. 21,000; the razi having created a charge upon the land for the former amount also In my opinion the razi does not create a charge for the amount in question as the appellants contend I see no words in it which either expressly or by implication create any lien on the land The language of the document appears to be more consistent with the construction suggested for the respondents, *viz*, that the razi only imposes an obligation on the mortgagor to pay the said sum along with the Rs 21,000 before he claims redemption If the parties intended to create a charge for the Rs 3,680, it was quite easy to use apt words to give effect to such intention But, on the contrary, the language employed falls, in my view, far short of what the parties would have said, had the idea of creating a charge been clearly in their minds The only circumstance relied upon on behalf of the appellants in [371] support of their contention is that the total sum payable at the time of redemption is Rs. 24,680 which includes Rs 3,680 in question This is not, however, inconsistent with the argument for the respondents who concede that so far as the mortgagor is concerned he must pay both the sums before he can ask for the surrender of the lands, he having contracted to do so On the other hand, the manner in which reference is made in the document to Rs 3,680, coupled with the provision therein made about the payment of interest on the sum, rather points to the view that the amount was looked upon by the parties as constituting a debt distinct from the Rs. 21,000 and standing on quite a different footing from the latter which carried no interest This construction is in accordance with *Hari Mahadaji Savarkar* v *Balambhat Raghunath Khare* (1) and *Yashvant Shenvi* v. *Vithoba Sheti* (2) In the first case the mortgagor of an estate gave to the mortgagee subsequently to the date of the mortgage two successive money bonds, in each of which it was stipulated that if the amounts were not paid on the due date they should take priority of the amount due under the mortgage, and that redemption of the mortgage should not be claimed until the bonds had been satisfied The assignee of the equity of redemption sued for possession of the estate on payment merely of the mortgage money His claim was upheld by Sargent, C. J, and Mr Justice Kemball, who ruled that the two subsequent bonds did not create a further charge on the mortgaged premises, although they would prevent the original mortgagor from redeeming without paying their amounts In the second case the learned Chief Justice observed —" We think that the Subordinate Judge was right in his construction of the mortgage deed (Exhibit 29) There are no words in that " instrument which expressly make the old debt of Rs. 100 a charge on the " property. The mortgagor undertakes to pay it together with the Rs 64 " when he takes back the land and also agrees to the mortgagee's continu-

(1) 9 B. 233. (2) 12 B 231

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" ing in the enjoyment of the land till he pays off both the debts; but these " provisions are satisfied by construing them as intended to make the equity " of redemption conditional on the payment of both the debts. This " construction, moreover, receives corroboration from the allusion to the " old debt as a distinct and separate transaction which would have [372] no " significance if the intention was to make the Rs. 100 a charge equally " with the Rs. 64."

Following these decisions I hold that the razi did not create a charge for Rs. 3,680, but only makes the equity of redemption conditional on the payment of that amount also

It was next urged on behalf of the appellants that even if no charge was created in their favour, the obligation to pay Rs. 3,680, undertaken by the mortgagor, is equally binding on the respondents claiming from him under a subsequent mortgage, and in support of this, reference was made to the principle embodied in Section 40 of the Transfer of Property Act. At first I was inclined to think that there was some force in this argument. but further consideration convinces me that that contention is not sound For the obligation respecting the payment of Rs. 3,680, arising out of the contract between the mortgagor and Varadan Patter, cannot properly be said to be one annexed to the ownership of the land under mortgage as laid down in Section 40. And the cases in which the principle relied on has been applied will be found to be such as involved obligations directly connected with the ownership of immoveable property, though they do not amount to interests therein or easements thereon. But the obligation in question here is quite unlike the class of obligations dealt with in those cases and a typical instance of which is furnished by *Tulk* v. *Moxhay* (1) where it was held that a covenant between vendor and purchaser on the sale of land that the purchaser and his assignees shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice. In other words, the obligation so to be enforced must amount to an equity attached by the owner to the property itself. I hold that is not the case here and I am of opinion that the obligation to pay Rs. 3,680, though, of course, binding upon the mortgagor, is not binding upon parties who have subsequently acquired from him for value an interest in the mortgaged property. This view is supported by the decision in *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (2) already quoted, in which Sargent, C. J., and Kemball, J., held that the assignee of the equity of redemption was entitled to redeem without paying the unsecured debt which the original mortgagor had contracted to pay along [373] with the mortgage amount notwithstanding that the assignor himself had he been the plaintiff would have been prevented from redeeming without paying the two amounts. A different view was however taken in *Allukhan* v. *Roshan Khan* (3), but the authorities quoted in the judgment from the Roman and the French Laws do not go to the length to which Duthoit, J., proceeded in that case. They only allow tacking of the description contended for in the present case against the mortgagor. They do not lay down that a similar consolidation of unsecured and secured debts is allowable against subsequent purchasers for value. It is true that such consolidation or tacking has been permitted under special circumstances against a beneficial donee of the debtor in *Ragho Govind Parajpe* v. *Balvant Amrit Gole* (4). But the rule followed there is not founded on any principle of equity. It is merely to avoid circuity of action, so that the creditor may not be driven

(1) 2 Phill. 774 (778). (2) 9 B. 233. (3) 4 A. 85. (4) 7 B. 101.

to enforce by separate proceedings the claims to which the operation of law or the act of the mortgagor has rendered the same person liable; but the tacking of the debts on the principle of avoiding circuity is inapplicable to the case of persons in the position of the respondents against whom the creditor has no equity. (See Fisher on Mortgages, 4th edition, pages 573-4). It is therefore difficult to see on what principle the obligation of the mortgagor in the present case is to be saddled on the respondents who are subsequent mortgagees

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In the view I have taken, it is unnecessary to consider the other points raised. I would dismiss the appeal with costs.

BEST, J.—I am of opinion that it was the intention of the parties to make the additional Rs 3,680, a charge on the property originally mortgaged for Rs. 21,000 to Varadan Patter whose assignees the appellants are, and that if the razinamah Exhibit I had been registered the plaintiffs' subsequent mortgage under Exhibit A would have been subject to the appellants' prior mortgage for Rs 24,680 But, as the razinamah was not registered, no valid charge was created thereby and the Subordinate Judge's decree is correct

I concur, therefore, in dismissing this appeal with costs

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18 M. 374.

[374] APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

RAMANUJA AYYANGAR AND OTHERS (*Plaintiff's Representatives*), *Appellants* v
NARAYANA AYYANGAR AND OTHERS (*Defendants Nos 1 to 7*), *Respondents*.*

[26th and 27th April, 1893, and 18th March, 1895.]

Limitation Act—Act XV of 1877, Section 12—Delay in obtaining copies for the purpose of appeal—Res judicata—*Champerty—Speculative purchase—Public policy—Contract Act—Act IX of 1872, Section 23*

In a suit for land worth Rs. 2,300 the plaintiff claimed under a conveyance executed to him by defendant No 1 shortly before suit in consideration of Rs 250 The property had previously belonged to the father, since deceased, of the first defendant's wife and her sister defendant No 2 Shortly after the father's death a suit for maintenance was brought by his sister-in-law against his widow and two daughters, in which the then defendants alleged that the property now in question had been given by him to the wife of the plaintiff's vendor, and the Court recorded a finding that the gift was valid Defendant No 2 now raised a plea that the gift to her sister had not been accompanied by possession and was invalid, and she asserted title in herself under the will of her mother, under which title she had been in possession for ten years

The Court of First Instance passed a decree for the plaintiff, the judgment and decree bearing date the 29th of September. Defendant No 2, being desirous of appealing *in forma pauperis* applied for copies on the following day Stamp papers were called for on the 28th of October, but were not produced by the 31st, when the application was struck off under the copyist rules On the 6th of November a petition was put explaining the circumstances which prevented the stamps being produced within the period of three days, and praying for restoration of the previous application

Held, (1) that the application of the 6th of November must be considered a continuation of the former one for the purpose of computing the time allowed by the Limitation Act within which an appeal should be preferred to the District Court,

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* Second Appeal No. 1891 of 1891.

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(2) that the second defendant was not precluded by the proceedings in the former suit from raising the plea above referred to;

(3) that the plaintiff's purchase, which was found by the District Judge not to be a champertous transaction, was not void as being contrary to public policy.

[F., 25 B 74 (78); R., 2 N L R 17 (21); D., 29 M. 515 (517).]

Second appeal against the decree of C. H. Mounsey, Acting District Judge of Salem, in appeal suit No. 95 of 1891, reversing the decree of P. A. Lakshmana Chetti, District Munsif of Tirupatore, in original suit No. 401 of 1889.

[375] Suit to recover possession of certain land. It was alleged in the plaint that the property had previously belonged to Srinivasaraghavachari since deceased; that he had given it to his daughter, the first defendant's wife, who had remained in possession until her death in 1879; that thereupon her son had entered into possession and retained it until his death in 1880, and that thereupon the title to the property devolved on defendant No. 1, who sold it to the plaintiff on the 25th March 1889 for Rs. 250. Defendant No. 2 put in a written statement to the effect that she and the first defendant's wife were sisters; that the alleged gift to the former was unaccompanied by possession and invalid; that on the death of Srinivasaraghavachari the property passed to his widow, and that she devised it by will to defendant No. 2 who, since then had been in possession by herself or her tenants.

It was proved that, in original suit No. 67 of 1894, a sister-in-law of Srinivasaraghavachari sued his widow and two daughters for maintenance, seeking to have the amount awarded to her created a charge on the family property. The defence was that the widow had inherited nothing from her husband, that a part of his estate had been sold to the present defendant No. 2, and the rest, including that now in question, had been given to the other sister, namely, the wife of the present defendant No. 1 In that suit it was held that the gift in question was valid, but the decree made no reference to this matter. The District Munsif held that in view of that finding in the previous suit, it was not open to the present defendant No. 2 to claim title through her mother, and disposing of the remaining issues in favour of the plaintiff, he passed a decree as prayed, the judgment and decree of the District Munsif bearing date 29th of September 1890.

On the 29th of November defendant No. 2 preferred an appeal *in forma pauperis* to the District Court It appeared that copies of the District Munsif's decree and judgment were applied for on the 30th of September. The decree was only ready on the 28th of October on which date stamps were called for. On the 31st of October the application was struck off under the copyist rules for the reason that no stamps had been produced. The stamps were produced on the following day; the application for copies was renewed on the 6th of November, stamp papers were called for on the 8th, the copy was ready on the 18th, and delivered on the 19th November, but the District Munsif's Court failed to attach [376] the value slip to the copy of the judgment until the 26th of November.

The District Judge admitted the appeal and reversed the decree appealed against, holding that the case was unaffected by the previous suit and that the plaintiff's purchase was not enforceable. He said that regard being had to the value of the property which was about Rs. 2,300, and the other circumstances in the case he was not able to consider that the plaintiff had entered on the litigation *bona fide*, and that the case

was accordingly governed by *Goculdas Jagmohandas* v. *Lakhmidas Khimji* (1)

This second appeal was preferred by the representatives of plaintiff since deceased.

Pattabhirama Ayyar, for appellant.

Venkatarama Sarma, for respondent No 2

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JUDGMENT

It is first urged that the District Judge admitted the appeal after it had become time-barred

The judgment of the Court of First Instance is dated 29th September, and this also is the date of the decree The appeal was filed on the 29th November The time allowed for an appeal by Article 170 of Schedule II of the Limitation Act is thirty days from the date of the decree

The question is whether any, and what deduction of time is to be made under Section 12 of the Limitation Act It is not material to determine the precise date on which the decree was actually signed, since the date on which the judgment was pronounced must be taken as also the date of the decree under Section 205 of the Code of Civil Procedure.

The application for copies of judgment and decree was made on the 30th September, *i e* , the day following that on which the judgment was delivered It was not till 28th October that stamp papers were called for, and, on the same not being produced during the next three days, the application was struck off on the 31st *idem* under the Copyists' Rules On the 6th November, petition was put in explaining the circumstances which prevented the stamps being produced within the three days, and praying for a restoration of the previous application On this application the District Munsif passed an order directing that copies should be [377] granted, but that it should be left to the discretion of the District Judge to decide whether the second application should be treated as a continuation of the previous one

Though we are not prepared to accept the opinion of the Judge that the date on which the decree was actually signed is in itself material, we agree in the conclusion at which he has arrived, namely, that the appeal is within time, as we are of opinion, that the application of 6th November must be considered a continuation of the former one, and this being done, the appeal is within 30 days after deducting the time allowed under Section 12 of the Limitation Act

It is next contended that the Judge is wrong in holding the defendant's plea to be not *res judicata* The first defendant's wife and second defendant were co-defendants in the former suit, and as between them there was no active controversy either as to the *factum* or as to the validity of the deed of gift, but the gift was set up by both of them jointly with the object of defeating the suit of the then plaintiff The Judge is therefore right in holding the defendants' plea to be not *res judicata*

It is lastly contended that the Judge is not warranted in dismissing the suit on the ground that the sale to plaintiff was champertous Though the second issue raises the question of the *bona fides* and validity of the sale, it is not sufficiently specific to direct the attention of the parties to the question whether it is champertous The Judge, no doubt, points out circumstances showing the transaction to be one of a gambling nature, but

(1) 3 B. 402.

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we think that a specific issue is necessary to give plaintiff a fair opportunity of showing that the transaction was otherwise.

We shall, therefore, ask the Judge to try the following issue:—

'Whether the plaint sale is invalid as being champertous.'

Either party can adduce fresh evidence, and the finding is to be submitted within one month after the re-opening of the Court. Seven days after the finding is posted up in this Court will be allowed for filing objections.

In compliance with the above order, the then District Judge submitted a finding which concluded as follows:—

"I should say, that there is no proof that the transaction was of a "champertous nature—in the technical sense of the word. There [378] "is no proof that there was any agreement as to division of spoil. What "we have is a sale (consideration for which probably passed) of property "for only about one-ninth or one-tenth of its market value to an outsider, who would have to try his luck in a very doubtful litigation thereon. The purchase was, therefore, of a very speculative kind though not "champertous. On the further question whether such a transaction is "opposed to public policy, I have not been asked for an opinion, and I "therefore refrain from expressing any opinion."

This appeal again coming for final hearing the Court delivered judgment as follows:—

JUDGMENT (FINAL).

The Judge's finding is that the purchase by plaintiff from first defendant was a speculative transaction though not champertous. It has been held by the Bombay High Court in *Gopal Ramchandra* v. *Gangaram Anandishet* (1) that a similar transaction was not bad on the ground of being against public policy. Following that decision, we set aside the decree of the Court below and remand the appeal for disposal according to law.

The costs in this Court will abide and follow the event.

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18 M. 378.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

RANGAMMAL (*Plaintiff*) *v.* VENKATACHARI (*Defendant*).*
[14th August, 1895.]

Fraudulent conveyance—Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree

A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration, and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to B a house in part satisfaction of the decree: and it appeared that certain of A's creditors were consequently induced to remit parts of their claims. A having died, his widow and legal representative under Hindu law, now sued B to have the [379] promissory note and the conveyance set aside and to have the defendant restrained by injunction from executing the decree:

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* Civil Suit No. 69 of 1894.
[*N.B.*—See on appeal 20 M. 323—Ed.]

(1) 24 B. 72.

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Held, (1) that the plaintiff was not entitled to relief in respect of the promissory note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through A by whose contrivance and collusion the defendant was enabled to obtain the decree,

(2) that the plaintiff was not entitled to have the sale set aside inasmuch as there had been at least a partial carrying into effect of the illegal purpose in a substantial manner

[R., 27 C 231 (233), 33 C 967=4 C L J 22=10 C W N 650, 20 M 326 (330), 20 M 333 (337), 31 M 97=18 M L J 151=3 M L T 240, 31 M 485=18 M L J 576=4 M L T 331, 63 P R 1898, U B R (1897—1901) 544 (550), D., 23 B 406 (411), 23 C. 460 (474)]

SUIT to declare invalid as against the plaintiff a mortgage, a sale-deed and a decree on a promissory note The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Sundaram Sastri, for plaintiff

The Advocate-General (Hon Mr *Spring Branson*) and Mr *J G Smith*, for defendant

JUDGMENT.

The plaintiff, who is the widow and legal representative of one Virasami Ayyangar, deceased, sues to set aside (1) the mortgage of certain lands, dated the 3rd June 1891, executed by Virasami to the defendant, (2) the decree in civil suit No 319 of 1891 on the file of this Court obtained by the defendant against Virasami in 1892 on a promissory note, also dated the 3rd June 1891, and (3) the deed of sale of a house, dated the 14th March 1893, executed by the latter to the former and for an injunction restraining him from enforcing the said mortgage and the sale and from executing the decree

The material allegations of the plaintiff are that the late Virasami, who traded and carried on business in Madras and in the mofussil, having got into debt about the year 1891, in collusion with the defendant, for the purpose of defrauding his creditors, executed the mortgage and the promissory note for Rs 5,442 of the 3rd June 1891, without receiving consideration for either of them, and allowed the defendant to bring suit No. 319 of 1891 referred to above on the latter document, and obtain a decree therein, and executed the sale-deed of the 14th March 1893 in part satisfaction of the amount alleged to be due under the said decree

The defence is that the mortgage, the promissory note, the decree, and the sale-deed were all obtained *bona fide*

The questions, to be decided are whether the said allegations of the plaintiff or any of them are true, and, if so, whether she is entitled to any and what relief

[380] On behalf of the plaintiff nine witnesses were called and Exhibits A to H produced, and on behalf of the defendant he himself was examined and twelve documents filed.

The first witness for the plaintiff Rajagopalachari stated that he was a gumastah under Virasami Ayyangar up to 1891; that about the middle of that year Virasami communicated to him his intention to get up certain documents in the name of the defendant for the purpose of making it appear that his debts amounted to a larger sum than it was in reality, and thereby inducing his creditors to accept from him in full satisfaction of the amount due to them less than they were justly entitled to, that the witness objected to Virasami attempting to commit any such fraud and that in consequence misunderstandings arose between Virasami and

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himself which led to his quitting the service of the former. It appears that Virasami brought in 1891 a charge of embezzlement against the witness and also that subsequent to Virasami's death there have been quarrels and criminal complaints between the defendant on the one hand and the witness and his father on the other. Moreover the witness is the plaintiff's brother and his father is managing the suit for her. In these circumstances I am unable to attach any weight to the evidence of this witness.

The second, the fourth, and the ninth witnesses for the plaintiff said nothing in support of her case.

The fifth and the seventh witnesses were called to prove that the defendant is not possessed of much property. They spoke to the extent of the lands alone, held by him in two or three villages, which do not appear to be very valuable.

The third and the sixth witnesses gave material evidence. Virayya Naidu, the third, stated that Virasami and his son-in-law Narasimmachari who traded together owed him in October 1891 Rs. 9,600 and odd; that in that month Virasami and Narasimmachari came and represented to him that they could pay only Rs. 5,000, and that he accepted that amount in full discharge of his claim, as he was unwilling to undertake the trouble and expense of litigating with them in connection with certain fraudulent acts, which he had come to know Virasami had committed for the purpose of defeating the rights of his creditors. The entry in his account book, dated the 9th October 1891 (Exhibit C) supports his statement that he gave up Rs. 4,000 and odd out of the amount due to him.

[381] The sixth witness Thiruvengadathan Chetti who is a partner in a firm carrying on business under the style of King and Co., stated that Virasami and Narasimmachari owed the firm in 1891 over Rs. 6,000, that suit No. 339 of 1891 on the file of this Court was brought against them by the firm for the amount so due, and a decree obtained for the same, that when steps were taken to execute the decree, Virasami stated that he was unable to pay the whole amount, and that consequently in August 1893, the firm received Rs. 2,750 in full satisfaction of the decree.

The remaining witness Narasimmachari, the partner and son-in-law of Virasami and undivided nephew of defendant, was called for the plaintiff. But he entirely supported the case of the defendant, who himself gave evidence in his own favour.

In dealing with the transactions impeached by the plaintiff, it will be convenient to take up the mortgage first, as it is to some extent a distinct transaction from the promissory note of the same date. By the said instrument of mortgage, the lands and houses, which belonged to Virasami in certain villages in the Karvetnagar zemindari, were mortgaged for Rs. 3,740 made up of six items. The largest of these is Rs. 2,000, which the defendant stated he undertook to pay to Narasimmachari's mother at the request of Virasami, on account of the amount that Narasimmachari had borrowed on the security of his house, and paid to Virasami a short time before the mortgage to the defendant. The remaining Rs. 1,740 consists of moneys said to have been paid on five different occasions by the defendant to or on account of Virasami to enable the latter to redeem certain jewels which he had pledged, and which belonged to his wife and his daughters who insisted that the properties should be got back and returned to them. There is no doubt that Narasimmachari's house was mortgaged to the plaintiff's second witness for Rs. 2,000 as alleged by the defendant, and it is probable that Virasami wanted to repay the amount to

his son-in-law, and requested the defendant to undertake to pay the same to his mother as stated in the instrument of mortgage. This item therefore appears not to be fictitious. As to the remainder Rs. 1,740 there is nothing to contradict the statements of the defendant and Narasimmachari that the several amounts making up the said sum were paid to or on account of Virasami as alleged on behalf of the defendant. There is other evidence than that of the said persons to show that, as a matter of fact, Virasami [382] had pledged the jewels referred to above, and that they were redeemed about the time the mortgage to the defendant was executed. The testimony adduced on behalf of the plaintiff to prove that the defendant did not possess sufficient property to enable him to advance the Rs 1,740, which he says he actually paid to Virasami, or on his account does not satisfy me that he was too poor to raise that sum. I am therefore of opinion that the plaintiff has failed to establish that the mortgage in question was executed fraudulently without consideration.

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The next question is as to the promissory note Exhibit H, the decree thereon and the sale of March 1893. The promissory note purports to have been executed for Rs 5,442, of this amount it is stated that all but Rs 600 were found due upon a settlement of accounts evidenced by Exhibit IV, dated 6th May 1891. The first item mentioned in this exhibit is Rs 700 stated to be the value of the produce of the defendant's own lands in Punimangadu village, and alleged to have been delivered by the defendant to Virasami from 1877 to 1891 annually. The next item of Rs 1,600 is said to be the value of the defendant's share of the produce derived from the lands which belonged to Virasami in the village of Mamandur, and which were cultivated by the defendant under an agreement that he was to take the kudivaram share, and pay Virasami the melvaram. The defendant's case is that he handed over every year from 1877 to 1891, not only the melvaram, but his own kudivaram also. Now it is admitted that Virasami never interfered with the cultivation of either the defendant's lands to which the first item relates, or his own to which the second item relates, and that the defendants alone attended as the business why in these circumstances the defendant gave to Virasami the produce of his own lands and his kudivaram share out of the produce of Virasami's lands, is not satisfactorily explained. And it is curious that though the lands were not let out for a fixed money rent, yet the annual yield therefrom turned out, throughout 14 years, to be worth exactly Rs 170 each year as Exhibit IV states. The third item consists of Rs 600 principal and Rs 1,008 interest thereon. And the principal is alleged to have been the sum that the defendant got in 1877 when his daughter was married, from her husband's family, partly for the expenses connected with the marriage ceremonies, and partly for jewels to be made for her. It is stated however that no portion of the Rs 600 was spent during the [383] marriage or in making the jewels, but that the whole was lent to Virasami and remained in his hands up to 1891. This appears to be highly improbable. The fourth and the last item consists of Rs. 350 and of Rs 504 interest thereon. The former is said to be the sale proceeds of the defendant's deceased wife's jewels alleged to have been handed over by the defendant to Virasami in 1880 and sold by the latter. If the different sums of money referred to above had been really lent, it is likely that the defendant would have secured some written evidence contemporaneous with the loans, but no such writing is produced. Again it is unlikely that the interest would have been allowed to accumulate for such

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long periods as eleven and fourteen years as stated in Exhibit IV. I am therefore constrained to say that the items set out in Exhibit IV appear to me to be altogether fictitious and the settlement therein alleged a sham.

The sum of Rs. 600, which, with the Rs. 4,842 specified in Exhibit IV, makes up the amount for which the promissory note was executed, is said to have been paid by the defendant to Virasami between the date of Exhibit IV and that of the promissory note. To establish this payment there is no evidence beyond the statement of the defendant, and Exhibit III, which was produced to support it. It is an agreement executed by Virasami to the defendant, wherein the former promised to repay the said Rs. 600 with interest on demand when this amount had already been included in the promissory note, dated the 3rd June. What necessity there was for executing a further document about it nine days later, is not properly explained. Exhibits IV, H and III all seem to me to have been collusively got up to support an untrue claim.

This view is confirmed when I consider the circumstances in which Virasami was placed at the time the said documents came into existence, and the subsequent conduct of the parties in connection with suit No. 319 of 1891, the proceedings in which, as I shall presently show, synchronises with those of No. 339 of 1891 in a very remarkable manner.

From the evidence of the plaintiff's first, third and fifth witnesses, it is quite clear that Virasami was greatly indebted in 1891, and was exerting himself to get his creditors to take in full satisfaction of their claims much less than what they were entitled to. Exhibit C shows as already stated that in October of that year the plaintiff's third witness actually gave up more than Rs. 4,000 out of a debt of Rs. 9,000 and odd. On the 18th November 1891 [384] Messrs. King and Company instituted suit No. 339 of 1891 against Virasami and Narasimmachari for the recovery of Rs. 6,000 and odd, obtained a decree on the 2nd February 1892 and applied for execution in February 1893 The defendant's suit No. 319 was also instituted in November 1891, the decree was passed in March, 1892, and an application for execution was put in March 1893. At the instance of Messrs. King and Company notice was issued in their suit to Virasami and Narasimmachari to show cause why the decree should not be executed and it was served on them on the 22nd February 1893. On the 14th March 1893 Virasami executed Exhibit G conveying his house to the defendant in part satisfaction of the decree in suit No. 339 of 1891; and two days afterwards the defendant presented the application for execution referred to before asking for a warrant for the arrest of Virasami (Exhibit XI). Narasimmachari admitted that he assisted the defendant in getting this application filed and was actually present when it was verified by the defendant in Court. It is also admitted that at this time the defendant and Narasimmachari on the one hand and Virasami on the other were friendly to each other, as they afterwards continued to be up to Virasami's death in December 1893. It seems, therefore, extremely unlikely that the defendant really wanted to arrest Virasami who was his sister's son. Nor would Narasimmachari have taken an active part in seeing Exhibit XI filed if he believed that it was seriously intended to proceed against his father-in-law. Again if the sale-deed of the 14th March were a *bona fide* transaction, would it have been followed, within 48 hours of the execution of the document evidencing it, by an application for the arrest of the vendor by the vendee who were close blood relations of each other? Would the nephew not have been able to persuade his uncle to refrain from proceeding against his own person? At all events would some reasonable time not have been

given to a judgment-debtor placed in circumstances in which Virasami was then placed to enable him to arrange for the payment of the balance of the decree amount? The execution of the sale-deed on the 14th and the presentation of Exhibit XI on the 16th appear to me to have been clearly intended to put pressure upon King and Company who were then trying to execute their decree to come to terms, which they did five months afterwards by accepting in satisfaction of the whole claim Rs 2,750 which was less than half of the decree amount. As to possession of the house after the alleged sale, it is[385] admitted that Virasami resided there till his death without paying any rent, though he agreed to do so under Exhibit V executed by him on the 16th March, the very day on which the application for a warrant for his arrest was filed by the defendant—Exhibit VIII, dated the 16th March and Exhibits VI and VII, dated the 17th of the same month and Exhibit IX, dated the 1st May 1893, are rent agreements executed by certain tenants who occupied portions of the house other than those in Virasami's possession and yet the stamp papers on which they are written were sold to Virasami This circumstance also shows that he was getting up evidence to support the sale I hold therefore that the decree in suit No 319 of 1891 was collusively obtained on the promissory note Exhibit H, executed without consideration, for the purpose of defeating the rights of Virasami's creditors and that the sale-deed Exhibit G executed in part satisfaction of that decree is fraudulent

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The next question is whether the plaintiff is entitled to set aside the decree and the sale, as to both of which my finding upon the facts is in her favour

First as to the decree, the authorities are distinctly against the proposition that the plaintiff is entitled to impeach it *Venkatramanna* v *Viramma* (1), *Chenvirappa* v *Puttappa* (2) In the former case A had obtained a decree against B in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants A subsequently sued B and the tenants to recover possession of the same land. B pleaded that the decree obtained by A was the result of collusion between himself and A in fraud of B's creditors It was held that it was not open to B to raise this plea Parker, J , there said, " although when a " contract or deed is made for an illegal or immoral purpose, a defendant " against whom it is sought to be enforced may not for his own sake but " on grounds of general policy (Per Lord Mansfield in *Holman* v *Johnson* " (3) and *Luckmidas Khimji* v *Mulji Canji* (4)) show the turpitude of " both himself and the plaintiff, it is otherwise when a decree has been " obtained by the fraud and collusion of both the parties In such a case " it is binding upon both, *Ahmedbhoy Hubibhoy* v *Vullecbhoy Cassumbhoy* (5) and *Prudham* v *Phillips* (6) "

[386] In the other case cited by me above, the party who sought to get rid of the fraudulent decree, was the plaintiff, and the facts and the decision there were, so far as the point I am now dealing with is concerned, these In 1874 the plaintiff Puttappa bought a house from G, but caused the conveyance to be executed by G in the defendant Chenvirappa's name This was done with the object of protecting the property against the claims of the plaintiff's creditors The plaintiff occupied the house, obstensibly as tenant of the defendant, for a nominal rent

(1) 10 M 17. (2) 11 B 708 (3) Cowper, 343
(4) 5 B 295. (5) 6 B. 703 (6) 2 Ambler 763

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In 1880 the defendant brought a suit against the plaintiff to recover possession of the house, and obtained an *ex-parte* decree. He applied for execution of the decree, but allowed the execution proceedings to drop. In 1888 he made a fresh application for execution. Thereupon the plaintiff filed a suit for a declaration of his title to the house in question and of his right to retain possession alleging that the defendant was a mere *benamidar;* that the sale-deed and *ex-parte* decree were sham and collusive transactions in fraud of the plaintiff's creditors. It was held that the plaintiff was bound by the decree passed in 1880 in the defendant's favour though it was a collusive decree, and that the plaintiff could not get the judgment set aside which the defendant had obtained against him by his own contrivance. After an elaborate examination of the authorities on the point, West and Birdwood, JJ., who decided the case just cited, conclude with the observation that " a party " to a collusive decree is bound by it, unless possibly when some other " interest is concerned that can be made good only through his." No such interest being at stake in the case before me, I must hold that the plaintiff is not entitled to set aside the decree, even though she was not personally a party to the fraud, inasmuch as she stands in the shoes of Virasami, through whom she claims and by whose contrivance and collusion the defendant was enabled to obtain the decree sought to be set aside. The dictum in *Mathew* v. *Hanbury* (1) in favour of the proposition that in such cases the legal personal representative of a party committing the fraud stands in a better position than the latter has been held to be erroneous by Lord Selborne, L.C., in *Ayerst* v *Jenkins* (2).

With reference also to the sale of the 14th March 1893, it seems to me that the plaintiff is in law not entitled to any relief. Before [387] stating the specific ground which disentitles her to relief it is necessary to notice briefly the state of the law on the point. The result of the authorities may be summed up thus. The mere fact that an assignment has been made for an illegal purpose does not of itself, prevent the Court, at the instance of the assignor from interfering. Where the purpose, for which the assignment is made is not carried into execution and nothing is done under it, the *mere intention* to effect an illegal object when the assignment is executed, does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. But it is otherwise where the illegal purpose or any material part of it is carried out (May on Fraudulent and Voluntary Dispositions, second edition, pages 471 and 472; *Chenvirappa* v. *Puttappa* (3) already cited, and *Kearley* v. *Thomson* (4). In stating the law thus, I have not omitted to consider the cases of *Sreemutty Debia* v. *Bimola Soonduree* (5) and *Bykunt Nath Sen* v. *Goboollah Sikdar* (6). If they were intended to lay down a rule differing from that enunciated above, those decisions cannot be accepted as correct. The unqualified language used by Sir R. Couch, C.J. in the former case and by Markby. J., in the latter, has been commented upon in *Chenvirappa* v. *Puttappa* (3), already referred to and where the question under consideration is discussed in all its bearings. Referring to those cases, West and Birdwood, JJ., observe: " These decisions go a long " way towards enabling a party to a dishonest trick, by which his creditors " may have been defrauded to get himself reinstated when his purpose " has been served," and again, " amongst the English cases, from which

(1) 2 Vern. 187.
(2) L.R. 16 Eq. 281.
(3) 11 B. 708.
(4) L.R. 24 Q.B.D., 742.
(5) 21 W.R., (C.R. 422 (424)).
(6) 24 W.R. (C.R.) 391.

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"the principles stated in the Calcutta decisions have been drawn, it "would not be easy to find any in which a plaintiff seeking to have his "own solemn act set aside simply and solely in his own interest, has "succeeded in getting the formal act to be replaced by the real intention "when that intention involved a fraud on third parties." Nearly all the reported English cases up to 1887 when *Chenvirappa* v. *Puttappa* (1) was decided are noticed by West and Birdwood, JJ., but *Kearley* v. *Thomson* (2) which lays down a more qualified rule than that apparently adopted by the said learned Judges had not been decided then and may be considered here. Then Fry, L.J., who delivered the judgment of the Court said [388] "I hold, therefore, that where there has been a partial carrying "into effect of an illegal purpose in a substantial manner, it is impossible, "though there remains something not performed, that the money, paid "under that illegal contract can be recovered back," and he made the following remarks which seem to show that the tendency of judicial opinion is in favour of making the rule ever stricter, "there is suggested to us a "third exception, which is relied on in the present case, and the authority "for which is to be found in the judgment of the Court of Appeal in the "case of *Taylor* v. *Bowers* (3). In that case Mellish, L.J., in delivering "judgment says at page 300:—'if money is paid, or goods delivered for an "illegal purpose, the person who has so paid the money or delivered the "goods may recover them back before the illegal purpose is carried out.' "It is remarkable that this proposition is, as I believe, to be found in no "earlier case than *Taylor* v. *Bowers* (3), which occurred in 1869, and not- "withstanding the very high authority of the learned Judge who expressed "the law in the terms which I have read, I cannot help saying for myself "that I think the extent of the application of that principle, and even the "principle itself, may, at some time hereafter, require consideration, if not "in this Court, yet in a higher tribunal. I am glad to find that in express- "ing that view I have the entire concurrence of the Lord Chief Justice." It is clear, therefore, that the terms, in which the Calcutta decisions referred to above are expressed, are too wide to be accepted as containing a strictly accurate exposition of the law on the question under consideration.

The only plausible argument in favour of the contention that the Courts ought not to decline to grant relief, even if the illegal purpose has been completely or partially carried out is that otherwise "they would be "assisting in a fraud for they would be giving an estate to a person when "it was never intended that he should have it," (*Sreemutty Debia* v. *Bimola Soondurec* (4).) The answer is that this objection is allowed not for the sake of the defendant, but on grounds of general policy which the defendant has the advantage of contrary to the real justice as between him and the person seeking the relief by accident as it were, (*Holman* v. *Johnson* (5).) In such cases the Court (to borrow the language of [389] Story,) "cannot but leave the guilty plaintiff to the consequences of his "own inequity and decline to assist him to escape from the toils which "he had studiously prepared to entangle others." (Equity Jurisprudence, page 697). The remarks of Fry, L.J., quoted above, would seem to throw a doubt even upon the proposition that the formal act may be relieved against by reference to the real intention of the parties in cases in which the transaction is still inchoate and the transferor still retains a *locus penitentiae*.

(1) 11 B. 708. (2) L.R. 24 Q.B.D. 742. (3) L.R. 1 Q.B.D. 291.
(4) 21 W.R. (C.R.), 422 (424). (5) Cowper, 341, 343.

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But to lay down that when that stage has passed and the illegal purpose has been fully or partially carried out, the transferor is nevertheless entitled to claim relief would not only remove the risk of the sham transferor losing his property which operates as pointed out by West and Birdwood, JJ., in *Chenvirappa* v. *Puttappa* (1) as a check upon knavery, but also stain the administration of justice and make the Courts active instruments for securing to the guilty plaintiff the fruits of his successful fraud —a position which it is hardly necessary to say, is absolutely indefensible. It is clear therefore that assuming that the first part of the statement of the law made by me above is still open to reconsideration as suggested in *Kearley* v. *Thomson* (2) the second part of it is not only supported by authority, but is also sound in principle.

I hold that the sale of the 14th March 1893 falls within the second part of rule inasmuch as the fraudulent object of Virasami was gained with reference to two of his creditors as proved by the plaintiff's third and fifth witnesses, and there has been at least a partial carrying into effect of an illegal purpose in a substantial manner within the meaning of *Kearley* v. *Thomson* (2).

The suit fails and is dismissed, but under the circumstances, without costs.

Branson & Branson:—Attorneys for defendant.

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18 M. 390=5 M.L.J. 203.

[390] APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

PERUNDEVITAYAR AMMAL (*Plaintiff*), *v.* NAMMALVAR CHETTI AND ANOTHER (*Defendants*).* [21st February, and 4th March, 1895.]

Limitation Act—Act XV of 1877, Schedule II, Articles 59, 60—Money deposited—Banker and customer—Money lent—Deposit— Cause of action—Demand

A, at the suggestion of B, a shopkeeper, deposited with him certain sums of money on the terms that the money should be repaid with interest on demand It appeared that B was in the habit of receiving deposits from his customers on such terms. A having died, his widow and administratrix sued more than three years after the date of the deposit to recover the amount deposited, the money having been demanded within three years of the date of the suit.

Held, that the suit was governed by Limitation Act, Schedule II, Article 60 and not by Article 59 and accordingly was not barred by limitation.

[R., 29 A. 773=4 A.L.J. 628=A W.N. (1907) 263; 6 C.L J. 535 (541); 15 C.P L R 147 (149).]

CASE referred for the decision of the High Court by N. Subramanyam, Second Judge of the Madras Court of Small Causes, under Civil Procedure Code, Section 617, and Presidency Small Cause Courts Act, Section 69.

The case was stated as follows:—

" Plaintiff sues to recover from the defendants Rs. 1,978-2-7. The following facts are proved before me:—

One Gopalakrishnama Chetti now dead, the father of the plaintiff and defendants, was a shopkeeper carrying, on business at Madras. In addition to the ordinary business of a shopkeeper, he used to receive from some of

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* Referred Case No. 38 of 1894

(1) 11 B. 708.

(2) L.R. 24 Q.B.D. 742.

1895 MARCH 4. — APPEL-LATE CIVIL. — 18 M. 390— 5 M.L.J. 203.

his customers sums of money which were repayable by him on demand with interest at different rates of interest agreed upon between him and them. One Rangayya Chetti, the husband of the plaintiff, who was a Government servant, was advised by the said Gopalakrishnama Chetti to deposit with the latter his savings on the usual terms, namely, that they should be repayable on demand with interest at 12 per cent per annum, and accordingly he did deposit various sums of money from time to time which, together with interest at the above rate, amount to the sum now claimed in the suit The said Rangaya Chetti is now [391] dead and the plaintiff, his widow and legal representative, who has obtained letters of administration to his estate, brings the suit to recover the sum due in respect of the above-mentioned transaction

The defendants, the sons of the late Gopalakrishnama Chetti, have become partners in the business carried on by their father and have succeeded to all the rights and liabilities of the said firm; and I find on the evidence that they are liable to pay the plaintiff the said sum of Rs 1,978-2-7, if the suit brought by her is not barred by the Statute of Limitations Whether the suit is barred or not depends upon the answer to the question whether the suit is governed by Article 59 or 60 of the Limitation Act If Article 59 applies, then the suit is clearly barred, for all the deposits by Rangayya Chetti were made more than three years before the suit.

In *Ichha Dhanji* v *Natha* (1) the Bombay High Court has held following the case of *Foley* v *Hill* (2) that the relationship between the parties to transactions of the nature is that of borrower and lender, that such suits are governed by Article 59 of the Limitation Act and that the cause of action in respect of each deposit arises on the day the deposit is made On the other hand, the Calcutta High Court in *Eshur Chunder Bhaduri* v. *Jibun Kumari Bibi* (3) has held that suits of this nature are governed by Article 60 of the Limitation Act, and therefore the cause of action does not arise until demand is made; and if the view held by the Calcutta High Court is the correct one plaintiff's suit is clearly within the time, as I find on the evidence that the demand was made within three years before the date of suit I am of opinion that the view taken by the Bombay High Court is the more correct one, but in view of the conflict of decisions and at the request of parties, I refer the following question for the opinion of the High Court —Whether the suit is governed by Article 59 or 60 of the Limitation Act and subject to such opinion I reserve my judgment "

Krishnasami Chetti, *Sundram Sastri* and *Kumarasami*, for plaintiff

Mr *G P Johnstone* and *Venkatramayya Chetti*, for defendants

JUDGMENT

This is a case referred by the Second Judge of the Court of Small Causes at Madras under Section 617 of the Civil Procedure Code, and the question submitted for our decision is [392] whether the suit is governed by Article 59 of Schedule II of the Limitation Act or by Article 60

So far as we have been able to gather the facts of the case from the statement of the Judge they seem to be as follows The father of the defendants carried on business as a shopkeeper and banker, and the plaintiff's husband deposited with him certain sums of money on the distinct understanding that they were to be repaid with interest on demand.

(1) 13 B. 338 (2) 2 H L C 28 (3) 16 C 25

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The circumstances that the depositor was a near relative of the banker and the moneys in question (which were the depositor's savings) were handed over to the banker under the advice or at the suggestion of the banker himself, seem to be mentioned by the Judge in the statement of facts if we understand him rightly, for the purpose of showing that there was something in the nature of confidence reposed by the depositor in the banker, and that the transaction was not a simple loan, but a deposit made under special circumstances.

If Article 59 applies, the suit is barred, the transaction having taken place more than three years before the date of the plaint. But if the case is governed by Article 60, the suit is in time, the suit having been instituted within three years from the date of the demand.

For the defendant, it is urged, that the money in question is ' money lent ' within the meaning of Article 59, and *Ichha Dhanji* v. *Natha* (1) is relied on as supporting this contention. For the plaintiff it is argued that regard being had to all the circumstances of the case, the transaction should be held to be a ' deposit ' falling under Article 60 as laid down in *Ishur-Chunder Bhaduri* v. *Jibun Kumari Bibi* (2).

We agree with the latter contention. Article 59 should be limited to cases of simple loans not falling within the class of transactions specifically provided for by Article 60. There can be no doubt that an essential distinction exists between loans pure and simple to be paid back on demand and deposits with a banker similarly repayable.

This distinction is noticed and recognised in *Tidd* v. *Overell* (3)—where North, J., cites a passage from Pothier in support of his opinion, and adds that that passage equally expresses the law of England on the point under consideration. The statement of the [393] law by Pothier runs thus:—" where a man deposits money in the hands of another, to " be kept for his use, the possession of the custody ought to be deemed the " possession of the owner, until an application and refusal, or other denial " of the right; for, until then, there is nothing adverse, and I conceive " that, upon principle, no action should be allowed in these cases without " a previous demand; consequently, that no limitation should be computed " further back than such demand." This is also in substance the view taken by Wilson and O'Kinealy, JJ., in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (2). The case referred to above, however, seems to be in conflict with the decision of Sargent, C.J., and Nanabhai Haridas, J., in *Ichha Dhanji* v. *Natha* (1) decided the year before, but which does not appear to have been brought to the notice of Wilson and O'Kinealy, JJ.

The ruling in the Bombay case seems almost to imply that money deposited with a banker under an agreement that it shall be payable on demand is in point of law to be treated as money lent and not as deposited. But doubt was thrown upon a very similar proposition in *Pott* v. *Clegg* (4) by Pollock, C.B., who, referring to the facts there, observed:—" I must certainly, with considerable doubt and diffidence, " confess the hesitation of my own opinion, whether there is not " a special contract between the banker and his customer as to the " money deposited, which distinguishes it from the ordinary case " of a loan for money. It seems to me that is a question for the Jury, " who ought to decide what is the liability of the banker, and whether the " money deposited with him is money lent or not; I could not concur " in the judgment of the rest of the Court without expressing this doubt,

(1) 13 B. 338. (2) 16 C. 25. (3) (1893) 3 Ch. 154. (4) 16 M. & W. 321

"in which, however, they do not partake, as they are of opinion that "money in the hands of a banker is merely money lent with the super-"added obligation that it is to be paid when called for by the draft "of the customer" We venture to think that there is nothing in the relation between a banker and his customer to preclude full effect being given to the intention of the parties in such transactions Of course, the mere use of the term 'deposit,' cannot alter the substance of the transaction should that be otherwise proved to be different But whether a particular [394] transaction is a 'loan' or a deposit is clearly a question of fact to be decided upon the evidence in each case and if *Ichha Dhanji* v *Natha* (1) be intended to lay down a different rule, we with all deference to the learned Judges who decided that case, are unable to agree with that decision The view taken in the Calcutta case seems to us to be more reasonable, and we accordingly hold that this case is governed by Article 60

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18 M. 390 = 5 M.L.J. 203

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18 M. 394=2 Weir 17.

APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt., Chief Justice, and Mr Justice Best

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QUEEN-EMPRESS *v* BASAPPA * [3rd April, 1895]

Criminal Procedure Code—Act X of 1882, Sections 16, 350—Bench of Magistrates—Change in constitution of the Court during a trial

A trial under the Town Nuisances Act of 1889 was begun before a bench of Magistrates and adjourned On the adjourned date the bench was constituted differently, only one magistrate being present of those who attended on the first occasion, but the trial was proceeded with and resulted in a conviction

Held, that the conviction was illegal and should be set aside

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of C Ramasesha Ayyar, Deputy Magistrate of Bellary, in criminal appeal No. 83 of 1894, affirming a conviction by the Bench Magistrates of Bellary Town

The facts of the case are stated above sufficiently for the purposes of this report.

Subramania Ayyar, for petitioner

The Government Pleader and the Public Prosecutor (Mr *E. B. Powell*), in support of the conviction

JUDGMENT.

Following the decision of the Calcutta High Court in *Hardwar Sing* v *Kheg Ojha* (2), with which we entirely agree, we set aside the conviction and sentence and direct that the fine, if paid, be refunded and the case retried.

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* Criminal Revision Case No 30 of 1895

(1) 13 B. 338 (2) 20 C. 870.

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[395] APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

ORR AND ANOTHER (*Plaintiffs*) *v.* NEELAMEGAM PILLAI AND OTHERS (*Defendants*).* [25th February, 1895.]

Provincial Small Cause Court's Act—Act IX of 1887, Schedule II, Article 3—Karnam in a zemindari—Officer of Government.

The plaintiffs being the lessees of a settled zemindari brought a suit in a Small Cause Court against a karnam in the zemindari to recover damages sustained by reason of the defendant's default in keeping certain accounts, &c.:

Held, that the karnam was not an officer of Government, and that the suit was maintainable under the Provincial Small Cause Court's Act

CASE referred for the orders of the High Court by J. W. F. Dumergue, District Judge of Madura, under Civil Procedure Code, Section 646-B.

The case was stated as follows:—

"The suit was first filed in No. 364 of 1892 on the small cause side of the Subordinate Judge's Court of Madura (East), by the lessees of the Sivaganga Zemindari against the karnam of a village appertaining to the zemindari for recovery of Rs. 405 odd alleged to be damages, &c., sustained by the plaintiffs in consequence of the defendant's failure to keep and give plaintiffs inavali, jama, and vasul bakki accounts for the said village as required by law and custom.

The Subordinate Judge, holding that a karnam was a public servant, and that Article 3 of Schedule II of the Provincial Small Cause Courts Act, applied to the case, returned the plaint for presentation to the proper Court.

The plaintiffs then filed the plaint on the original side of the District Munsif's Court of Mana Madura in No. 175 of 1893. The District Munsif has, by his order, dated 22nd August 1893, returned the plaint for presentation to the proper Court, holding that the suit is one triable only by a Small Cause Court, and that he has no jurisdiction.

[396] An appeal was preferred to this Court against the order of the District Munsif, and the appellant at the same time applied under Section 646-B for the submission of the records to the High Court, but subsequently withdrew the application. A similar application has, however, been made by the respondent, and therefore in accordance with the ruling contained in *Simson* v. *McMaster* (1) and *Suresh Chunder Maitra* v. *Kristo Rangini Dasi* (2), I have the honour to submit the records for the decision of the High Court.

I may add that in my opinion the order of the District Munsif is erroneous because it seems to me that zemindari karnam is an officer of Government within the meaning of Article 3 of Schedule II of the Small Cause Court's Act. He is certainly an officer whose duty it is to make, authenticate and keep documents relating to the pecuniary interests of Government (*vide* preamble and Section 11, Clauses 6, 10 and 13 and Article 13 of Regulation XXIX of 1802), and therefore a public officer within the definition in Section 2 of the Code of Civil Procedure and in these respects I would say he is an officer of Government."

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* Referred Cases Nos. 6 and 7 of 1894.

(1) 13 M. 344.

(2) 21 C. 249.

Mr. E. Norton, for plaintiffs
Mr R. F Grant, for defendants

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18 M. 395.

JUDGMENT

The question is whether a karnam in a settled zemindari is an "officer of Government" within the meaning of Article 3 of Schedule II of the Small Cause Court's Act IX of 1887 The Subordinate Judge appears to have considered that the phrase "officer of Government" is synonymous with "public servant" Officers of Government are, no doubt, public servants, but every public servant is not an officer of Government This is clear from the article itself in which the Court of Wards is expressly mentioned, indicating that otherwise it would not come within the article

We are clearly of opinion that the karnam in question is not an officer of Government, and that Article 3 is no bar to the suit in the Small Cause Court

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18 M. 397=5 M.L.J. 66.

[397] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best

SANTAPPAYYA (*Defendant No* 1), *Appellant v* RANGAPPAYYA (*Plaintiff*), *Respondent*.* [4th and 20th December, 1894.]

Hindu law—Adoption—Adoptive mother under pollution—Subsequent datta homam—Absence of natural father at datta homam—Natural father and adoptive mother, members of the same gotram—Saraswati Brahmans—Estoppel

In a suit to recover possession of certain land to which the plaintiff claimed title as the adopted son of a deceased Saraswati Brahman, it appeared that he had been taken in adoption by the widow of the deceased acting on the authority of her late husband, that datta homam was performed subsequently, and that the plaintiff had since been recognized as the adoptive son of the deceased, and had acted accordingly during a period of twenty-five years The defendant was in possession under a claim of title as a reversionary heir, the widow having died shortly before suit It appeared further (i) that the widow was under pollution at the time of the plaintiff's adoption, but the pollution had ceased at the time of the datta homam, (ii) that the natural father was not present at the time of the datta homam, but his wife took part in the ceremony with his consent

Semble neither of the last-mentioned circumstances invalidated the adoption, but *quære* whether the adoption was not invalid for the reason that the plaintiff's adoptive mother was by birth a member of the same gotram as his natural father

Held on the evidence, that the defendant was estopped from denying the validity of the adoption

[R., 30 A 549=5 A L J 568=A W N (1908) 231=4 M L T 385, 150 P R 1908]

SECOND appeal against the decree of O Chandu Menon, Subordinate Judge of South Canara, in appeal suit No 60 of 1893, affirming the decree of M. Mundappa Bangera, District Munsif of Mangalore, in original suit No. 251 of 1891

The plaintiff sued to recover possession of certain land as the property of his adoptive father, Venkataramanayya deceased The defendant denied that the plaintiff had been adopted as alleged, and claimed to be the lawful reversionary heir to the estate of the deceased, and averred that he had taken possession of the land in question lawfully on the death of

* Second Appeal No 1034 of 1894

1894 Dec. 20. — Appellate Civil. — 18 M. 397 = 5 M. L. J. 66.

Manjamma, the widow of the deceased. It appeared that Manjamma had taken the plaintiff in adoption in April 1867 under an authority conferred on her by her husband since deceased; that the adoptive mother was under [398] pollution at the time of the adoption; that after the period of pollution was over, the ceremony of datta homam was performed in the absence of the natural father whose wife however took part in it with his consent; and that the adoptive mother belonged by birth to the same gotram as the natural father. The District Munsif in paragraphs 9 to 16 of his judgment set out the evidence, on which he found that the plaintiff had since his adoption been treated as the adopted son of Venkataramanayya: it was to the effect that he lived with Manjamma until 1880; that his upanayanam and marriage had been performed in her house and at her charge in the presence of the members of the family; that he was in possession of the family idol and performed the shraddhas of the deceased members of the family; that he had been appointed as his adoptive son to succeed Venkataramanayya in a caste office, and that his adoption had been asserted in previous litigation. Both of the Lower Courts decreed in favour of the plaintiff.

The defendant preferred this second appeal.

Narayana Rau, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

The question which arises for determination in this appeal is whether respondent's adoption can be upheld. Both the Courts below have found that the adoption is proved, and that Manjamma had her husband's permission to make the adoption. These findings of fact, we must accept in second appeal.

As regards appellant's contention that Manjamma was under pollution when she adopted respondent, the Subordinate Judge has found that, when the pollution was over, the datta homam was performed, and the defect was cured. As to this, it is urged by appellant's pleader that, unless the gift and acceptance and the datta homam take place at the same time, there can be no valid adoption. To this contention, however, we are unable to accede. The learned pleader overlooks the fact that during the ceremony a formal gift and acceptance are repeated and they are then consecrated by sacrifice by fire or homam. If, therefore, the first gift was invalid as a religious act, because there was pollution, the second was perfectly valid. Pollution is only a bar to a religious act and renders religious ceremonies inefficacious, but a gift and an acceptance are secular acts and they may therefore be supple-[399]mented by datta homam after the expiration of the period of pollution. It was held in *Venkata* v. *Subhadra* (1) that a datta homam performed subsequent to the gift and acceptance validates the adoption.

It is then said that the plaintiff's natural father was absent when the datta homam was performed, and that his absence invalidated the ceremony. It must here be observed that it was Manjamma who received respondent in adoption, and it was some male proxy on her behalf that should perform the ceremony according to Hindu usage. Such being the case, the absence of plaintiff's natural father is immaterial. Respondent's mother was present on the occasion and made the gift with her husband's consent, and a gift so made by a wife is as valid as if her husband was present.

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(1) 7 M. 548

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APPELLATE CIVIL.
18 M. 97 = 5 M. L. J. 66.

The next contention urged on appellant's behalf is that Manjamma's father and respondent's natural father being of the same gotram, no legal marriage was possible between the former in her maiden state and the latter, and consequently, the adoption was invalid. The Courts below have overruled this objection, on the ground that marriage is forbidden only among sapindas but not among sagotras. This view is no doubt at variance with the Hindu law as explained by this Court in *Minakshi* v *Ramanada* (1). But the parties in this case are Saraswati Brahmans, and one instance is mentioned by the Subordinate Judge of a marriage between persons of the same gotram. If it were necessary to determine this question for the purposes of this appeal, we should remit for trial an issue, *viz.*, whether among Saraswati Brahmans in South Canara, marriage is permitted by usage between persons of the same gotram. But having regard to the special circumstances of this case, it appears to us that the adoption should prevail by reason of the doctrine of estoppel. These circumstances are set forth in paragraphs 9 to 16 of the original judgment and in paragraph 7 of the appeal judgment. In *Parvatibayamma* v *Ramakrishna Rau* (2) this Court discussed the limitation subject to which the doctrine of estoppel is to be applied in the case of invalid adoptions. In the case before us the adoption took place in 1876, a quarter of a century ago, and respondent has ever since been [400] recognized as adopted son. He was aged four or five years when he was adopted and he is now 29 years old. His upanayanam and marriage were performed in the adoptive family, and he is no longer in a position to resume his rights in his natural family. During this long period, respondent performed the shraddhas and other ceremonies in the adoptive family, and a cousin of his adoptive father presided on the occasion of his upanayanam. Thus, the course of conduct of Manjamma and others in the adoptive family was such as to inspire the belief that the communion, which a valid adoption creates and is intended to create, existed. Again, the adoption was made in April 1867, and in the same year Manjamma applied for an heirship certificate on behalf of her minor adopted son. Though appellant and his brothers were then aware of the adoption, they did not then oppose it. It was in 1879 that they instituted original suit No 402 of 1879 on the ground that respondent's father and they were undivided, but this suit failed, as the Appellate Court found that the properties in dispute were the self-acquired properties of Pandit Venkataramanayya. In 1883 appellant's brother brought original suit No 269 of 1883 to set aside the adoption, and it was finally dismissed as barred. Though this suit was brought by one brother only, yet it appears that appellant actively co-operated with him in conducting that suit, and did not join it, in order that he might institute separate legal proceedings if that suit failed. After that suit was dismissed it appears that appellant gained over some of the tenants and procured attornments from them in collusion. Under these circumstances, we think that the doctrine of estoppel applies, and that appellant must be held not to be at liberty to impugn the adoption at this distance of time.

We dismiss this second appeal with costs.

(1) 11 M 49 (2) 18 M 145.

1895
JULY 23.
APPELLATE CRIMINAL.
18 M. 401=1 Weir 203.

18 M. 401=1 Weir 203.

[401] APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

QUEEN-EMPRESS *v.* MUPPAN.* [23rd July, 1895.]

Penal Code—Act XLV of 1860, Section 224—Escape from lawful custody.

The accused, having been legally arrested, was subsequently left unguarded and he escaped. He was then re-arrested, and was tried and convicted under Indian Penal Code, Section 224:

Held, that the conviction was right

[D., 7 Ind Cas 329=11 Cr. L.J 477=8 M.L.T. 286 (287).]

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by E. A. Elwin, Acting District Magistrate of Trichinopoly.

The case was referred as follows:—

"The accused in the case was charged under Secion 224, Indian Penal Code, for escape from lawful custody. It appears from the evidence of the police constable, from whose custody he was stated to have escaped, that accused was left unguarded at the time when the escape was effected. The sub-magistrate convicted the accused under the above section.

"The case is similar to *Queen-Empress* v. *Sarabaiya* (1) and *Queen-Empress* v. *Nallan* (2)."

Counsel were not instructed.

JUDGMENT.

We think the accused was rightly convicted. The custody of a prisoner does not necessarily come to an end because the custodian absents himself for a few minutes. A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of 'escape.' It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law (I Russ., 5th edition, [402] p. 567, Roscoe, 11th edition, p. 453, and Bishop's Criminal Law, 7th edition, Section 1104). Consequently in the present case the neglect of the police officer in absenting himself from the place where the accused was detained when he escaped does not affect the accused's guilt.

We decline to interfere.

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* Criminal Revision case No. 222 of 1895.

(1) Weir's Criminal Rulings, p. 124 (2) Weir's Criminal Rulings, p. 125.

18 M. 402=2 Weir 91

APPELLATE CRIMINAL

Before Mr Justice Best and Mr. Justice Subramania Ayyar

1895 MAY 3. — APPELLATE CRIMINAL — 18 M. 402=2 Weir 91.

PALANIAPPA CHETTI AND OTHERS (*Petitioners*) v DORASAMI AYYAR AND OTHERS (*Respondents*) * [3rd May, 1895]

Criminal Procedure Code—Act X of 1882, Sections, 144, 435—Disputed possession—Revision by High Court.

The District Temple Committee dismissed the trustees of a certain temple and appointed others The dismissed trustees retained possession. A breach of the peace having become imminent in the opinion of a Deputy Magistrate, he made an order under Criminal Procedure Code, Section 144, directing the newly-appointed trustees not to interfere with the temple or its management

Held, that the High Court had no power to interfere in revision under Criminal Procedure Code, Section 435

[R, 1 S.L R 50 (56)]

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of E. C. Rawson, Acting District Magistrate of Trichinopoly, affirming the order of Khadir Knavaz Khan, Deputy Magistrate of Trichinopoly

The order sought to be revised was made under Criminal Procedure Code, Section 144, and it directed certain persons who were the petitioners in the High Court not to interfere with a temple at Lalgudi or with its management. These persons had been appointed trustees of the temple in question by the majority of the Temple Committee of the District, in the place of certain other persons who had been dismissed from that office by the same authority Contests having arisen between the dismissed trustees and those appointed in their places, the Deputy Magistrate, being of opinion that a breach of the peace was imminent, made the order in question This order was affirmed by the District [403] Magistrate, who concurred in the finding that the dismissed trustees remained *de facto* in possession He pointed out that no steps had been taken to eject the dismissed trustees, and that the Temple Committee had no power to dismiss them except for good and sufficient cause, and he declined to draw the presumption that the dismissal was legal and their retention of possession in consequence wrongful.

The newly-appointed trustees preferred this petition.

Mr *H G Wedderburn,* for petitioners

Mr *E Norton,* for respondents

The Government Pleader and the Public Prosecutor (Mr. *E. B Powell*), for the Crown.

JUDGMENT

We are clearly of opinion that the Deputy Magistrate acted within his jurisdiction in passing the order complained of under Section 144 of the Code of Criminal Procedure Cf *Ramanuja Jeeyarsvami* v *Ramanuja Jeeyar* (1)

It was not necessary for him to decide the question as to possession before passing such order and his finding that counter-petitioners were in possession is merely incidental and in the absence of any necessity in his

* Criminal Revision Case No. 177 of 1895

(1) 3 M. 354

1895 MAY 3. — APPELLATE CRIMINAL.

opinion for the passing of an order under Section 145, we cannot say that the order passed by him was improper. Moreover, under Section 435 of the Code we have no power to interfere with an order passed with jurisdiction under Section 144.

This petition is dismissed

18 M. 402-2 Weir 91.

18 M. 403.

APPELLATE CIVIL.

Before Mr Justice Muttusami Ayyar and Mr. Justice Best.

SESHAMMA (*Plaintiff*), *Appellant v* SUBBARAYADU (*Defendant*), *Respondent*.* [24th and 26th October, 1893.]

Hindu law—Widow's suit for maintenance—Previous demand—Right to arrears

A Hindu widow brought a suit against her husband's brother to establish her [404] right to maintenance, and to recover arrears for six years, she had made no demand before suit:

Held, that she was not entitled to a decree for the arrears

[R., 16 C P R 30]

SECOND appeal against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 102 of 1892, modifying the decree of P. Lakshminarasu, District Munsif of Amalapur, in original suit No. 571 of 1890.

The plaintiff, being the widow of the defendant's brother, sued for a declaration of her right to receive maintenance at the rate of Rs 100 a year, and sought to have it made a charge on the family property in the hands of the defendant, and to recover a sum representing six years' arrears of maintenance The defendant pleaded that the rate at which maintenance was claimed was excessive and that no arrears were payable, maintenance never having been demanded.

The District Munsif was of opinion that Rs 50 was the right rate at which maintenance was payable to the plaintiff and granted the relief asked for upon that basis

The District Judge modified the decree by omitting therefrom the provision for the payment of arrears

The plaintiff preferred this second appeal.

Rama Rau, for appellant.

Ramachandra Rau Saheb, for respondent.

JUDGMENT.

The contention in this appeal is that the judge is in error in disallowing arrears of maintenance claimed for six years prior to the suit. It is true that the right to maintenance is inherent in her *status* as brother's widow and is a legal right So it was observed in *Venkopadhaya* v. *Kavari Hengusu* (1) that it is a legal right and that the only bar to the enforcement of a purely legal right is the lapse of the time required by the statute of limitations to bar the remedy. It was held also by the Bombay High Court in *Jivi* v *Ramji* (2), that this legal right exists irrespective of demand and refusal, and that demand and refusal do not

* Second Appeal No 282 of 1893

(1) 2 M H.C.R. 36

(2) 3 B. 207.

create the right, though they may limit it. As observed by Mr Mayne in his treatise on Hindu Law, 4th edition, Section 417, the award for arrears of maintenance is in the discretion of the Court, and it may be refused where a widow has chosen to live apart from her husband's family without sufficient cause, and has [405] sued not only for a declaration of her right to future maintenance, but also for a lump sum as arrears for the period during which she resided with her family

1893 Oct 26.

Appellate Civil

18 M. 403.

Though demand and refusal are not necessary to create the right to maintenance, yet they may show that the right was only insisted on from the date of such demand and refusal and thereby limit the period for which a claim to arrears is entitled to recognition In a Hindu family each member is ordinarily maintained in the family house, and a widow may quit that house for her own convenience to live with her parents for a time and then resume her residence in her husband's family It may also happen that when her father is well-to-do no need for maintenance from her husband's family is felt by her, and there is, therefore, no intention to claim such maintenance unless it becomes necessary for her to do so. To justify an award of arrears the circumstances of the case should be such as to raise a presumption that there was an infraction of her right to maintenance or a wrongful withholding of maintenance for the period for which arrears are awarded On this view the decision of the Judge is correct, and we dismiss this appeal with costs

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18 M 405

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt , Chief Justice, and Mr Justice Parker

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KRISHNABHUPATI DEVU (*Plaintiff*), *Appellant* v RAMAMURTI PANTULU AND ANOTHER (*Defendants*), *Respondents* *
[18th April and 1st May, 1894]

Specific Relief Act—Act I of 1877, Section 42—Possession—Civil Procedure Code—Act XIV *of 1882, Section 319—Constructive possession*

In a suit for a declaration of the plaintiff's title to certain land, no prayer for possession was contained in the plaint It appeared that the land in question had been given to the plaintiff by his father and had subsequently been attached and brought to sale in execution of a decree against the plaintiff's father and had been [406] purchased by the defendants who were put into constructive possession under Civil Procedure Code, Section 319, the land being in the actual possession of tenants

Held, that the suit for a declaration merely was not maintainable under Specific Relief Act, Section 42

[F, 26 C 845]

APPEAL against the decree of N Saminadha Ayyar, Subordinate Judge of Vizagapatam, in original suit No 11 of 1893

Suit to declare the title of the plaintiff to certain lands under a deed of gift from his father, dated the 13th September 1878 Defendant No 1 had attached the properties in question in execution of a decree obtained by him against the donor, and defendant No 1 and the father, deceased, of defendant No 2, had purchased them at the Court-sale The plaint averred that the symbolical delivery of the properties obtained by the

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* Appeal No 136 of 1893

1894 MAY 1. — APPELLATE CIVIL. — 18 M. 405.

purchasers under Civil Procedure Code, Section 319, was null and void against the plaintiff, who was an infant at the time, and only attained majority shortly before the suit. It was objected that the suit for a declaration merely was not sustainable under Specific Relief Act, Section 42.

The Subordinate Judge upheld this objection observing that the persons in actual possession were the tenants and that the possession given by the Court to the auction-purchasers as such was possession within the meaning of the section above quoted.

The plaintiff preferred this appeal.

The Advocate-General (Honorable Mr. *Spring Branson*) and *Subramania Ayyar*, for appellant.

Subramania Ayyar and *Mahadeva Ayyar*, for respondents.

JUDGMENT.

The only point arising in the appeal is whether the Subordinate Judge has rightly decided that it is necessary for the plaintiff to sue for possession.

It is not alleged in the plaint that plaintiff was in possession or that the property had actually passed to his possession, but the learned Advocate-General contends that when the property was attached and symbolical possession given under Section 319, Civil Procedure Code, the plaintiff's father was really in possession on plaintiff's account, and hence that there was no dispossession of plaintiff, though his father may have been himself dispossessed.

We were referred to the following cases:—*Narainan* v *Nilakandan Nambudri* (1), *Dayachund Nemchand* v. *Hemchand Dharam*-[407]*chand* (2), *Juggobundhu Mukerjee* v. *Ram Chander Bysack* (3) and *Lokessur Koer* v. *Purgun Roy* (4), but we do not think they support this contention. The two first are authority for the proposition that mere attachment is not dispossession, and the two latter show that formal or symbolical possession operates as a complete transfer of possession.

Where, therefore, the land being in the actual occupation of tenants, the formal possession was given to the auction-purchaser (second defendant's father) under Section 319, Civil Procedure Code, the plaintiff's father was completely dispossessed whether he held on his own account or for his son. Plaintiff was then a minor, but had his father as his guardian brought this suit on his account, there can be no doubt that he would have been obliged to sue for possession having been actually dispossessed and the property transferred to another. The case is not altered by plaintiff attaining majority, and we think the principle laid down in *Narayana* v. *Sankunni* (5) applies.

Taking this view we must dismiss the appeal with costs.

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(1) 4 M. 131. (2) 4 B 515 (527). (3) 5 C. 584.
(4) 7 C. 418. (5) 15 M. 255.

18 M. 407=5 M.L.J. 84.

APPELLATE CIVIL

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker

1894 Nov. 5.

APPELLATE CIVIL.

18 M. 407=5 M. L. J. 84

SHANGUNNI MENON (*Defendant No. 3*), *Appellant v.* VEERAPPAN PILLAI AND OTHERS (*Plaintiff* and *Defendants Nos. 5, 1, 2, 4 and 6*), *Respondents.** [5th November, 1894.]

Malabar Compensation for Tenant's Improvements Act (Madras)—Act I of 1887, Sections 3, 6—Cocoanut trees—Valuation of improvements.

In a suit to redeem a kanom in Malabar, it appeared that the plaintiff paid into Court the kanom amount together with a sum on account of the defendants' improvements, but subsequently withdrew the money, which the defendant had not taken out of Court. The defendant claimed that he was entitled to receive under the head of compensation for improvements the capitalized value of the produce of [408] cocoanut trees planted by him computed with reference to the probable productive life of the trees.

Held, that the plaintiff was entitled to redeem and that the defendant was not entitled to have the whole of the future annual produce of the trees taken into consideration in computing the value of improvements under the Malabar Compensation for Tenants' Improvements Act, 1887.

[R., 19 M. 384.]

SECOND appeal against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 123 of 1893, affirming the decree of V. P. DeRozario, Subordinate Judge of South Malabar at Palghat, in original suit No. 16 of 1891.

Suit to redeem a kanom, dated the 20th December 1878, and executed by the jenmi in favour of defendants Nos. 1 to 4. The plaintiff was the melkanomdar. Defendants Nos. 1 to 3 claimed to be entitled to continue in possession for twelve years after the expiry of the term of the kanom under a purankadom document of further charge executed in their favour by the jenmi, and they also claimed compensation for improvements. Defendant No. 5 was a sub-mortgagee holding a karipanayom under defendants Nos. 1 to 4. He also claimed compensation for improvements. The plaintiff made a tender of the kanom amount together with a further sum on account of improvements and deposited the amount in Court on the 16th of March 1891, but it was not taken out of Court and he subsequently withdrew it.

The Subordinate Judge held that the document of further charge was not proved, and valued the compensation due to defendants Nos. 1 to 4 at Rs. 890, and passed a decree for redemption on payment of the kanom and the value of improvements, providing for the satisfaction of the claim of defendant No. 5. The amount payable on account of improvements was referred to a commissioner, upon whose report the decree proceeded. The District Judge affirmed this decree.

Defendant No. 3 preferred this second appeal.

Sundara Ayyar, for appellant.

Pattabhirama Ayyar, for respondent No. 1.

Govinda Menon, for respondent No. 2.

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* Second Appeal No. 1312 of 1894.

1894 Nov. 5.

APPELLATE CIVIL.

18 M. 407 = 5 M. L. J. 84.

JUDGMENT.

As the appellant did not choose to take the money out of Court, he has no right to complain that the plaintiff withdrew it. . . . No reference to Exhibit III as bearing upon the genuineness of the purankadom Document II seems to have been urged in the Courts below, and there is nothing to show any negligence on the part of the vakil. We are unable to accede to [409] the contention that appellant is entitled to the capitalized value of the produce of the cocoanut trees for the period of the life of those trees. See *Valia Tamburatti* v *Parvati* (1) We are referred to explanation (*a*), Section 6, of Madras Act I of 1887, as showing that the Legislature intended the probable life of the trees to be taken into consideration. The enumeration in Section 6 of the matters to be taken into consideration evidently refers to the different classes of improvements specified in Section 3, and the matters to be considered will vary according to the class of the improvement. The Subordinate Judge has properly considered the cost of planting and protecting the trees, and he has also taken into consideration the value of the annual produce. It is not enacted in Section 6 that the whole of the future annual produce shall be considered. The Act is very difficult to construe, but, in the absence of express words to that effect, we are not prepared to hold that the Legislature intended to give to a tenant holding only a twelve years' lease the whole value of the produce of the cocoanut trees on his landlord's paramba for 54 years in addition to his lease (that being said to be the productive life of the cocoanut trees). This is practically what is now contended for. The title of the Act may be " to secure to tenants the market value of their improvements," *i.e.*, improvements made by them, but it does not profess to create for them an interest in the land beyond the period of their leases, and this in effect would be done if such a claim were allowed, and it would amount to a virtual confiscation of the jenmi's property. A reasonable interpretation must be given to the Act, and we must assume that, if the Legislature had intended to give the tenant an interest in the land after his lease had expired, they would have said so in plain terms.

We dismiss the second appeal with costs for respondents Nos. 1 and 2.

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18 M. 410.

[410] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr Justice Parker.

VENKATAPPA NAYANIM AND ANOTHER (*Defendant No.* 1 *and his Representative*), *Appellant* v. THIMMA NAYANIM AND OTHERS (*Plaintiffs Nos.* 1 *and* 2, *and Defendants Nos.* 2 *to* 8), *Respondents.**

[13th and 27th September, 1894.]

Civil Procedure Code—Act XIV of 1882, Section 375—Compromise extending beyond scope of suit

In a suit for the partition of a zemindari the parties effected a compromise in writing which provided, *inter alia,* for certain reliefs which could only have been given by the Court in a suit based upon a different cause of action. The compromise was presented in Court and a decree was passed embodying the whole of its terms:

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* Appeal No. 182 of 1893.

(1) 13 M. 454.

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18 M. 410

Held, (1) that an appeal lay against the decree,

(2) that the decree should have been passed in the terms of such of the provisions agreed upon as related to relief to which the Court could have given in the suit,

(3) that the decree should be modified accordingly

[F, 33 M 102 (105)=3 Ind Cas 701=20 M L J 207=6 M L T 313 77 P R 1908 =140 P W R 1908, **R**, 24 C 908 (**F B**), 30 M 423=17 M L J 255=2 M L T 349, 30 M 478, 1 C L J 388]

APPEAL against the decree of W H Welsh, Acting District Judge of North Arcot, in original suit No 12 of 1890

Suit for the partition of family property including the zemindari of Kalahastri Defendant No 1 was the titular zemindar and brother of plaintiff No 1 and defendants Nos 2 to 5, and he pleaded that the estate was impartible During the pendency of the suit a compromise was drawn up and was filed by the plaintiffs and defendants, and a decree was passed which ordered and decreed in accordance with its terms as follows —

"that the zemindari of Kalahastri is impartible,

(i) that the first plaintiff and defendants Nos 2 3, 4 and 5 do receive each a monthly allowance of Rs 600 for the first ten years commencing from 1st August 1892, and thereafter a monthly allowance of Rs 700 from first defendant and from the incomes of the estate of Kalahastri on account of their maintenance and establishments, &c , that they and their male heirs [**411**] do continue to receive the said allowances from first defendant and the successors to the zemindari afterwards and from the incomes of the estate once in two months payable on or before the 10th of the following month, that if the same be not paid till the end of the second month, it shall be payable on demand with interest at 8 annas per cent per mensem from date of default, that they (first plaintiff and defendants Nos 2 to 5) and their male heirs do enjoy the said allowance as fixed above and shall not for ever claim more in case of increase in their progeny,

(ii) that first defendant do pay first plaintiff and defendants Nos 2 to 5 within two months hence such amount without interest that may be found due to them as arrears of allowances till end of July 1892 calculated according to the rate they have hitherto been receiving,

(iii) that first plaintiff and defendants Nos 1 to 5 do within three months from this date divide the jewels, &c , shown in the schedule of moveables herewith attached according to the value as given therein into six equal shares and each do enjoy such share of jewels, &c , as may be given him,

(iv) that first plaintiff, second and fifth defendants and their heirs do perpetually enjoy the palaces which are in their enjoyment,

(v) that as fifth defendant's palace is out of repair the first defendant do pay him Rs. 1,000 within six months from this date for its restoration: that as defendants Nos 3 and 4 have no palaces for them, the first defendant do pay within six months from this date to third defendant Rs 7,000 to enable him to build up his palace in the place where a foundation has already been laid, that first defendant do give within six months from this date to fourth defendant a suitable site for his palace and Rs 7,000 for building it,

(vi) that neither first plaintiff and defendants Nos 2 to 5, nor their heirs shall have any right to the villages, given them by their deceased father as per his registered will, dated 22nd February 1881, but that first

1894 Sep. 27. defendant and his successors in title do enjoy them as part and parcel of their impartible estate;

APPEL-LATE CIVIL.

18 M. 410.

(vii) that first plaintiff and defendants Nos. 2 to 5, who are entitled to allowances, do receive from the holders of the zemindari any pecuniary help which they might be pleased to give them for marriages, &c.;

[412] (viii) that if any holder of the estate shall have no male heir he shall take in adoption a son of the other brothers of the family as mentioned in the will referred to above, that if any such holder of the estate die without leaving a son born or adopted, the estate in question and all its moveables and immoveables of impartible nature shall go to the surviving eldest male member of the family and he shall enjoy the same as per custom prevailing with regard to primogeniture;

(ix) that of the villages mentioned in plaint Schedule D, the first defendant to enjoy the villages purchased by him and his father, that the first plaintiff and fourth defendant do respectively enjoy perpetually the villages purchased by them;

(x) that plaintiffs and defendants Nos. 2 to 5 do, without any objection whatever on the part of the estate holders, cut and take green grass from the fields in the villages belonging to the estate as much as is necessary for their horses and cattle and they do graze their cattle on the Kylasagiri hills and in the Ramapuram forests;

(xi) that plaintiffs and defendants Nos. 2 to 5 do take from the forest of Ramapuram village, on a free license, fuel, not more than 30 cart loads per month required for the use of the family of each brother;

(xii) that plaintiffs and defendants Nos. 2 to 5 do, on a free license, take from the estate forests timber required for the repair of their own palaces;

(xiii) that plaintiffs and defendants Nos. 2 to 5 whenever they wish to go about hunting they do previously inform the estate holder and with his consent go about hunting;

(xiv) that each party do bear his own costs, that first defendant do pay only first plaintiff a sum of Rs. 25,000 for his costs in the suit, &c., with interest at 8 annas per cent. per month from date;

(xv) that plaintiffs and defendants Nos. 2 to 5 shall have no right whatever to, or any claim for a share in any other property moveable or immoveable, or to the management of the devastanams and chatrams belonging to the estate;

and (xvi) that neither plaintiffs nor defendants nor their heirs shall have any claim of whatever nature over each other for ever contrary to the above said terms."

[413] After the compromise had been filed, the parties were heard on the question whether all its provisions could be embodied in the decree with reference to Civil Procedure Code, Section 375.

The District Judge, as above stated, answered that question in the affirmative and defendant No. 1, who upheld the opposite contention, preferred this appeal.

The Advocate-General (Hon. Mr. *Spring Branson*), *Sadagopachariar* and *Venkatasubba Ayyar*, for appellant.

Subramania Ayyar, Balajee Rau, Krishnasami Ayyar, Sundara Ayyar and *Subramania Ayyar*, for respondents.

JUDGMENT.

This suit was brought for a partition of the Kalahastri zemindari and was based on the assumption, that the zemindari was partible. The

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action was compromised by the parties and a razinamah was presented to the District Court in order that it might be recorded, and a decree passed thereon in accordance with the provisions of Section 375 of the Civil Procedure Code. The preamble to the terms of the compromise expressly lays down that the zemindari is impartible and has always descended and must always descend according to the rule of primogeniture, thus negativing the basis of the claim on which the suit was brought. Before the District Judge it was objected that some of the stipulations of the compromise do not relate to the suit, and therefore should not have been embodied in the decree. The Judge, however, decided that all the stipulations should be embodied and passed a decree accordingly.

Two questions arise for decision: (1) whether the stipulations in the razinamah "relate to the suit?" and (2) whether any and what decree should be passed?

The suit being for partition, it is contended by the respondents that the whole family estate and its apportionment is the subject-matter of the suit, and hence that any decree which relates to the family estate can be properly described as one which relates to the suit. It is also pointed out that part of the property may follow the rule of primogeniture, while the rest may be divisible under the Mitakshara law.

The suit being for partition, it is clear that all the clauses of the compromise which relate to the division of property can be embodied in the decree. But there are other stipulations which are based upon the assumption that the zemindari is impartible, and that the junior members of the family are entitled to allowances for [414] their maintenance (Clauses 1 and 2 of the razinamah). Clause 8 lays down rules for future reigning zemindars making adoptions in the event of having no issue, and also regulates the course of descent, while Clauses 10-12 give general rights as to grazing and timber to all members of the family. Can it be said that stipulations such as these relate to the suit, i.e., to a suit for partition? We think not, since it is quite evident that no such reliefs could have been decreed by the Court had the parties proceeded to trial. It seems reasonable to hold that the words "so far as it relates to the suit" in Section 375 must be restricted to relief which the Court could have given in the suit, and will not embrace reliefs which could only have been given in a suit based upon a different cause of action.

In this view we are constrained to hold that the reliefs decreed by the Judge in Clauses 2, 3, 8, 9, 11, 12, 13 and 14 do not relate to the suit. Clauses 8 and 14 contain provisions which are impossible of execution in any decree.

The next question is whether the decree should stand with reference to the remaining clauses. We are referred to the decision in *Fajaleh Ali Miah* v. *Kamaruddin Bhuya* (1) in which apparently it was held that when a compromise embodied a new contract much wider in its scope than the mere adjustment of the claim in suit, the Court could only record it and leave the parties to proceed with the case as they may choose. We observe, however, that that case was not argued, and with all respect to the learned Judges it appears to us that this view fails to give effect to the directions in Section 375 that "the Court shall pass a decree in "accordance therewith so far as it relates to the suit." We observe that Scott, J. in *Ruttonsey Lalji* v. *Pooribai* (2) followed this view and directed that a decree do issue in accordance with the agreement so far as

(1) 13 C. 170. (2) 7 B. 304.

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it related to the subject-matter and settlement of the suit, but excluding the arrangement made as to the matters outside the scope of the suit. This case was approved and followed in *Appasami* v. *Manikam* (1).

We have no doubt that an appeal lies since a decree under Section 375 is only final so far as it relates to so much of the subject-matter of the suit as is dealt with by the compromise We [415] have held that the decree of the Judge has dealt with matters extraneous to the suit.

The appeal must be allowed and the decree modified by striking out the directions given in Clauses 2, 3, 8, 9, 11, 12, 13 and 14 of the decree. As the appellant has been only partially successful, we direct that he be allowed half costs from respondents Nos. 1 and 2.

The seventh respondent will bear his own costs.

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18 M. 415=5 M.L.J. 164.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KRISHNASAMI AND ANOTHER (*Defendants*), *Appellants* v SUNDARAPPAYYAR (*plaintiff*), *Respondent*.*
[5th December, 1894.]

Contract Act—Act IX of 1872, Section 11—Specific Relief Act—Act I of 1877, Section 28—Contract relating to the property of an infant—Decree for specific performance—Insufficient payment of Court-fees, procedure to be adopted on

The mother and guardian of a Hindu minor entered into a contract for the sale of his land. The vendee sued the minor by his mother and guardian *ad litem* for specific performance of the contract and for possession It was found that the contract was binding on the minor:

Held, that the suit was maintainable.

The plaintiff not having in the first instance paid the full Court-fees he should have been called upon to do so. As this was not done, the Court of first appeal was not in error in entertaining the appeal which was preferred by the plaintiff; but he should have passed no decree until the fees due had been paid, and if they were not paid he should have dismissed the suit

[**Appl.**, *27 C* 276; **R.**, *26* P 326=3 Bom L R 898; 34 C 163 **(F.B.)**=4 C L J 131=11 C W N 34 & 267=1 M L T 360, 4 Bom L R 587, 11 Bom L R 51 (565) U B R (1897—1901) 315]

SECOND appeal against the decree of C. Venkobachariar, Subordinate judge of Tanjore, in appeal suit No. 230 of 1893 reversing the decree of V. T. Subramania Pillai, District Munsif of Kumbakonam, in original suit No. 3 of 1892.

Suit to enforce specific performance of a contract for the sale of land and for possession of the property to which it related. The first defendant was a minor who was sued by his mother and guardian. The fact of the contract alleged was put in issue, [416] and it was pleaded that it was not enforceable against the infant. It was also alleged, *inter alia* that the plaint was insufficiently stamped. The second defendant was a subsequent vendee from the guardian of the minor.

The District Munsif dismissed the suit. On appeal the Subordinate Judge reversed the decree and passed a decree for the execution of a conveyance by the infant's mother on his behalf, and further decreed that, if

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* Second Appeal No. 1080 of 1894
(1) 5 M. 103

1894 DEC. 5. — APPEL-LATE CIVIL. — 18 M. 415 = 5 M. L. J. 164.

the deficient Court fees were paid, possession of the property should be delivered to him but that on his failure to do so his claim for possession should be dismissed

The defendants preferred this second appeal

Pattabhirama Ayyar, for appellants

Subramania Ayyar and *Ayya Ayyar*, for respondent

JUDGMENT

Several objections have been argued in support of this appeal

The first of them is that specific performance cannot be decreed against a minor. Section 28 of the Specific Relief Act mentions the persons against whom specific performance cannot be decreed and a minor is not mentioned as one of them

No doubt Section 11 of the Contract Act mentions persons who have attained majority as persons competent to enter into contracts But this does not exclude the power of a guardian of a minor to represent him and enter into contracts on his behalf either beneficial or necessary to the minor

The English law is, it is true, the minor cannot claim specific performance, and this proceeds on the ground of want of mutuality It is on this ground that Mr. Justice Norris acted in *Fatima Bibi* v *Debnauth Shah* (1) citing as his authority *Flight* v *Bolland* (2) But there is reason to believe that *Flight* v *Bolland* (2) was a case in which the contract was made with the minor himself who was also himself seeking to enforce it In *Fatima Bibi* v *Debnauth Shah* (1), the Judge has not noticed the provision of Hindu law that a guardian is competent to act for a minor and bind him by contract within certain limits.

Moreover, as pointed out by Mr Whitely Stokes, the doctrine of mutuality on which *Flight* v *Bolland* (2) proceeded has no application in this country

[417] We agree with the ruling in *Mahamed Arif* v *Saraswati Debya* (3) that a contract with a minor is merely voidable by him and that this principle is not affected by Section 11 of the Indian Contract Act

The next objection is that there is no finding that the contract now sought to be enforced is binding on the minor This is a mistake The Subordinate Judge has found the contract to be both true and valid

The third objection pressed upon us is that, as plaintiff did not pay the deficient Court-fees as soon as the first issue was decided against him, the Subordinate Judge should have held that the suit had been properly dismissed The District Munsif ought to have called upon the plaintiff to pay the deficient Court-fee, as he failed to do so, the Subordinate judge was not in error in entertaining the appeal and dealing with it It appears that the requisite Court-fees have since been paid We do not therefore think this objection is entitled to weight We have to observe, however, that the Court-fees should have been collected before passing the decree, and the decree is clearly irregular in directing that in default of payment of the fees, the prayer for possession alone would be disallowed instead of saying that the suit would stand dismissed

As to the last objection *viz*, misjoinder of parties, we do not consider it to be well founded. The cause of action, namely the right to obtain a sale deed and possession of the property purchased, concerns both the defendants and entitles plaintiff to relief against both

(1) 20 C. 508. (2) 4 Russ 298 (3) 18 C 259

1894 DEC. 5. — APPELLATE CIVIL — 18 M. 415=5 M. L. J. 164.

The case *Luckumsey Ookerda* v. *Fezulla Cassumbhoy* (1) is distinguishable in that unity of title did not exist in that case. A case more in point is to be found in *Mokund Lall* v *Chotay Lall* (2).

We dismiss this appeal with costs.

18 M. 418.

[418] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MUTHUSAMI MUDALIAR (*Defendant No.* 1), *Appellant v.* NALLAKULANTHA MUDALIAR (*Plaintiff*), *Respondent.**

[12th December, 1894.]

Hindu law—Property excluded from partition—Limitation—Suits Voluation Act—Act VII of 1889, Section 11.

The members of a joint Hindu family made a partition of family property in 1877, reserving undivided, however, certain land and the capital and assets of their family business which remained under the control and in the possession of one of them, *viz*, the present first defendant. The plaintiff, who was a member of the family, demanded his share in the undivided property on the 4th of March 1882, and the defendants refused to give effect to his claim. The plaintiff now in 1892 sued for his share in the court of the District Munsif valuing his claim at Rs. 2,400

Held, that the property in question was coparcenary property notwithstanding the transaction of 1877, and that the plaintiff's suit was not barred by limitation, and that the High Court in second appeal was not at liberty to entertain an objection that the suit was not within the pecuniary limits of the District Munsif's jurisdiction, as it appeared that the appellant had not been prejudiced.

[R., 14 C W N 221=3 Ind Cas 9; 10 Ind Cas 967 (969)=4 S L R 225 (229); 35 P R. 1901=47 P L.R 1901.]

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No 63 of 1893, affirming the decree of M. Visvanatha Aiyar, District Munsif of Conjeeveram, in original suit No. 116 of 1892.

The plaintiff sued the defendants, who were his first cousins, for possession of his one-sixth share of certain immoveable properties, and he also sought to have an account taken of an indigo business in which he alleged that defendant No. 1 was the representative of the family claiming his one-sixth share of Rs. 2,000, being the capital of the business, and a declaration of his right to one-sixth share of the outstanding credits of the business. It appeared that in 1877 a partition had taken place in the family, from which, however, the lands now in question, as well as the money and utensils of the indigo business, were excluded and were left in the possession and control of defendant No. 1. On the 4th March 1882 the plaintiff had demanded his share now claimed, and it was refused shortly afterwards, and the present suit was filed in January 1891. The fourth issue which related to the indigo business was framed as follows:—

[419] "What is the plaintiff's interest in the assets? Is he entitled "to a declaration of his one-sixth interest therein, to an account from "defendant No. 1, to possession of properties in A, B and C Schedules "and to damages? Is he entitled to an award of his share in the out-"standings at the hands of defendant No. 1?"

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*Second Appeal No. 1335 of 1894.

(1) 5 B. 177. (2) 10 C. 1061.

1894 Dec. 12.

APPEL-LATE CIVIL.

18 M. 413.

The District Munsif passed a decree for the plaintiff, which was upheld on appeal by the District Judge

Defendant No. 1 preferred this second appeal.

Sankaran Nayar and *Masilamani Pillai*, for appellant

Seshachariar, for respondent.

JUDGMENT

Three objections are urged in support of this appeal The first is that the Courts below are in error in holding the suit to be not barred by limitation. Assuming the averments in the plaint to be correct, we are not prepared to accede to this contention The suit is for partition of family property reserved for future division at a partition of 1877 In March 1882 plaintiff and his brothers demanded their shares and first defendant denied their claim by the letter C on the 12th idem The suit is brought within twelve years from that date and Article 127 of Schedule II of the Limitation Act is applicable The suit is, therefore, not time-barred

It is urged that when a portion of property is reserved for future partition, it ceases to be coparcenary or joint family property, and the decision of the Privy Council in *Approvier* v *Rama Subba Aiyan* (1) is referred to as supporting this contention The passage relied on has reference to property divided into shares, though not by metes and bounds But in the case before us there was no division of any kind and the previous coparcenary continued *quoad* the property in question The case in *Ramachandra Narayan* v *Narayan Mahadev* (2) is inapplicable, as there was a demand and refusal in this case within twelve years, and it is conceded that there was no prior exclusion to plaintiff's knowledge

It is next objected that the claim as decreed is beyond the District Munsif's jurisdiction On referring to the plaint, we find that the suit as valued therein did not exceed the Munsif's pecuniary jurisdiction

The one-sixth share of the assets realized is estimated at Rs 333-5-4 and no amount is mentioned of the outstandings in which [420] also a share is claimed In his written statement defendant did not object to the suit as under-valued Having regard to Section II of the Suits Valuation Act VII of 1889, we are not at liberty to entertain this objection at this stage, as on the merits we are of opinion that appellant has not been prejudiced

The third objection is that the share decreed to the plaintiff includes shares due to other partners in the indigo business, who were not members of the family, who failed to realize their shares within the statutory period

Appellant's contention is that such shares should be treated as his self-acquisition; on the other hand respondents alleged in the plaint that the shares were surrendered in favour of themselves and appellant Though this is found not to be proved, plaintiff has been held to be entitled to participate in such shares also, on the ground that they constitute gains made by first defendant, while he continued in management of the indigo business on behalf of the family with a view to winding up that business

It has been contended on behalf of appellant that this is not the case stated in the plaint. We find, however, that the fourth issue is wide enough to raise the question, and we cannot say appellant has been prejudiced

The appeal fails on all points and is dismissed with costs

(1) 11 M I A 75. (2) 11 B 216

1894
DEC. 4.

APPEL-
LATE
CIVIL.

18 M. 420.

18 M. 420.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SEETARAMAYYA (*Plaintiff*), *Appellant* v. VENKATARAZU AND OTHERS (*Defendants*), *Respondents*.* [4th December, 1894.]

Regulation XXIX of 1802, s. 7—Zemindari karnam—Order of succession to hereditary office.

A woman, who had been appointed to succeed her husband, the holder of the hereditary office of karnam in a zemindari, died leaving the defendant, her daughter's son and the plaintiff, the son of her late husband's paternal uncle:

Held, that the defendant was entitled to succeed in preference to the plaintiff.

SECOND appeal against the decree of C. Suri Ayyar, Subordinate Judge of Cocanada, in appeal suit No. 25 of 1893, confirming the [421] decree of T. Varadarajulu Nayadu, District Munsif of Peddapur, in original suit No. 399 of 1891.

The plaintiff sued to have cancelled the appointment of defendant No. 1 to the office of karnam to which he had been appointed by the zemindars who were defendants Nos. 2 and 3 and to have himself appointed to that office. The last holder of the office was Bhagamma, who had been appointed in succession to her husband, deceased: she who died leaving defendant No. 1, the son of her daughter, and the plaintiff, the son of her late husband's paternal uncle.

The District Munsif dismissed the suit and his decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Venkatarama Sarma, for appellant.

Sriramulu Sastri, for respondent No. 3.

JUDGMENT.

The decision of the Subordinate Judge is correct. It is in accordance with the decision in *Krishnamma* v. *Papa* (1), where it was held that a daughter's son was to be preferred to a brother's son, on the ground that the "heirs of the preceding karnam" in Section 7 of Regulation XXIX of 1802, mean his next of kin according to the order of succession of the several grades of legal heirs, and not heirs in the order of succession to undivided divisible ancestral property.

This appeal fails and is dismissed with costs.

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* Second Appeal No. 1017 of 1894.
(1) 4 M.H.C.R. 234.

18 M. 421.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt , Chief Justice, and Mr. Justice Parker.

1894 Nov. 13.

APPELLATE CIVIL.

18 M. 421.

SUBBA SASTRI AND OTHERS (*Plaintiffs*), *Appellants* v BALACHANDRA SASTRI AND ANOTHER (*Defendants*), *Respondents*.*

[29th October and 13th November, 1894]

Civil Procedure Code—Act XIV *of* 1882, *Sections* 562, 588, 590, 591—*Order of remand —Right of appeal.*

On an appeal from a decree of a District Munsif, it appeared that he had decided all the issues framed in the suit, but in the opinion of the District Judge he had based [422] his judgment upon evidence improperly taken The District Judge remanded the case to be retried, and in the event a decree was passed dismissing the suit which was affirmed on appeal by the Subordinate Judge.

Held, on second appeal, that the order of remand was illegal and although it had not been appealed against, the subsequent proceedings should be treated as non-existent, and the appeal to the District Court should be remanded to be disposed of in accordance with law

[F., 28 C 324=5 CWN 509, 19 M 479, 32 M. 83=4 MLT 479, R., 12 CPLR 119; 9 Ind Cas 173=21 MLJ. 263=9 MLT 251=(1911) 1 MWN 151 (153); 14 Ind Cas 394 (395)=11 MLT 69, 14 Ind Cas 673=8 NLR 42, 21 M.LJ. 1063 (1071)=10 MLT 437; 5 Ind Cas 764=7 MLT 93 (94)]

SECOND appeal against the decree of T Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 443 of 1893, affirming the decree of V. T. Subramania Pillai, District Munsif of Kumbakonam, in original suit No 16 of 1891

This was a suit for injunction. The plaintiff obtained a decree in the Court of the District Munsif of Kumbakonam, but this decree was reversed in appeal suit No 72 of 1892 by the District Judge, who directed a trial *de novo* on the ground that the trial before the District Munsif had been irregular for the reasons that the Munsif had issued a commission immediately on the filing of the plaint before the defendants had notice of the suit, and based his judgment partly on the report of the Commissioner which was submitted before the defendants had notice of the suit, and further because there was incorporated in the decree a description of boundaries which was filed after the judgment had been delivered and which differed from the boundaries mentioned in the plaint. The suit having been reheard by the then District Munsif of Kumbakonam, a decree was passed for the defendants.

The plaintiffs preferred an appeal to the Subordinate Judge, which was dismissed, and they preferred this second appeal.

Pattabhirama Ayyar, for appellants.

Mr. *E. Norton*, for respondents.

JUDGMENT.

We are of opinion that the order of remand passed by the District Judge in appeal No 72 of 1892 was illegal. The suit had not been decided by the District Munsif upon any preliminary point, on the contrary he had decided all the six issues framed; and if he had based his judgment upon evidence improperly taken, it was open to the District Judge to exclude that evidence or to call for or take further evidence

* Second Appeal No 1176 of 1894

1894 Nov. 13. It is open to the appellants to take this objection now, although they might have appealed against the order of remand (Section 591, Code of Civil Procedure; see also *Savitri* v. *Ramji* (1)).

APPELLATE CIVIL. [423] The order having been *ultra vires*, the subsequent proceedings are also *ultra vires* and must be treated as non-existent—*Rameshur Singh* v. *Sheodin Singh* (2).

18 M. 421. We must set aside the decree of the Subordinate Judge and the second decree of the District Munsif and remand the original appeal No. 72 of 1892 to the file of the District Court of Tanjore to be disposed of according to law.

The costs hitherto incurred will abide the event.

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18 M. 423 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker and Mr Justice Subramania Ayyar.

HUSANANNA (*Defendant*), *Appellant v.* LINGANNA (*Plaintiff*), *Respondent.** [30th March, and 2nd May, 1894, and 11th March, and 1st and 2nd May, 1895.]

Civil Procedure Code—Act XIV of 1882, *Sections* 525, 526—*Arbitration without intervention of Court—Application for decree in terms of award—Denial of submission to arbitration and genuineness of award.*

An appeal lies against a decree passed upon an award under Civil Procedure Code, Sections 525, 526, when the cause shown against the filing of the award as denied the submission to arbitration and the genuineness of the award.

[R., 25 C. 757 (F.B.); 33 C 757 (F.B.)=3 C.L J. 450=10 C.W.N. 609; 20 M. 89; 20 M. 490; 2 C.L.J. 153=10 C W.N. 601, 13 C.P.L.R. 53; 9 Ind. Cas. 173=21 M. L.J. 263=9 M.L.T. 251=(1911) 1 M.W N. 151 (164); 84 P.R. 1901=112 P.L. R 1901; 1 S.L.R. 149; 6 S.L.R. 168 (175); D., 22 M. 172.]

SECOND appeal against the decree of M. R. Weld, District Judge of Kurnool, in appeal suit No. 39 of 1892, affirming the decree of V. Ranga Rau, District Munsif of Nandyal, in original suit No. 117 of 1890.

Suit under Civil Procedure Code, Section 525, that an award to be filed in Court. The other party to the alleged arbitration, said to have resulted in the award, was joined as defendant and alleged as cause against the filing of the award, that there had been no reference to the arbitration and that the award was not genuine.

The District Munsif held that there had been an arbitration, which resulted in the award, and passed a decree as prayed.

[424] The District Judge passed a decree upholding this decision on the ground that no appeal lay.

The defendant preferred this second appeal.

Runga Rau, for appellant.

Respondent was not represented.

This second appeal came on for hearing before COLLINS, C. J., and PARKER, J., who referred the matter to the Full Bench as follows:—

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* Second Appeal No. 1754 of 1893.

(1) 14 B. 232. (2) 12 A. 510.

ORDER OF REFERENCE TO THE FULL BENCH.

1895 May 2.

Full Bench.

18 M. 423 (F.B.).

The plaintiff applied, under Section 525 of the Civil Procedure Code, that an award made without the intervention of the Court might be filed and a decree given in accordance with the terms thereof The defendant denied the reference to arbitration and the genuineness of the award. The District Munsif found both these points in plaintiff's favour and gave him a decree. On appeal the District Judge considered the Munsif's finding was wrong, but held that he was concluded by the decision in *Micharaya Guruvu* v *Sadasiva Parama Guruvu* (1) and that there was no appeal Hence this second appeal

For the defendant (appellant) it was contended that the decision in *Micharaya Guruvu* v *Sadasiva Parama Guruvu* (1) had not been followed in more recent cases, (see *Suppu* v. *Govindachariyar* (2) and *Venkayya* v *Venkatappayya* (3) and it was urged that the view of the Calcutta High Court was also in favour of an appeal (*Sashti Charan Chatterjee* v *Tarak Chandra Chatterjee* (4), and Surjan Raot *v* Bhikari Raot (5) The argument was that though an appeal would be barred if the enquiry had been as to objections under Sections 520 and 521 of the Civil Procedure Code, it was otherwise when the enquiry was as to the very existence of the award and the fact of the agreement of arbitration

There is a conflict of authority as to the course to be taken should the defendant appear and deny the reference to arbitration and the genuineness of the award In Calcutta it was held by a Full Bench (*Sashti Charan Chatterjee* v *Tarak Chandra Chatterjee* (4), that no judgment ought to be given when the award or the consent to arbitration is disputed, that the special jurisdiction [425] was then ousted and that an appeal would lie if a decree and judgment had been erroneously passed upon the award Similar views were expressed in *Ichamoyee Chowdhranee* v. *Prasunno Nath Chowdhri* (6), *Bijadhur Bhugut* v *Monohur Bhugut* (7) and *Hurronath Chowdhry* v *Nistarini Chowdrani* (8), some Judges going so far as to hold that the special procedure under Section 525 was also ousted, if the objections raised fell under Sections 520 and 521 These cases were again considered by a Full Bench of the Calcutta High Court in *Surjan Raot* v. *Bhikari Raot* (5) when it was unanimously held that when the objections to the award fell within Section 521 of the Civil Procedure Code, the Court was not bound to hold its hand and reject the application, but should enquire into the validity of the award and determine whether it should be filed or not Three of the Judges composing the Full Bench intimated an opinion that where the objection taken was that the matters in dispute had never been referred to arbitration, the Court had no jurisdiction under Section 525 But this point did not really arisen on the reference

In Bombay, a similar view has been taken (see *Samal Nathu* v *Jaishankar Dalsukram* (9) It was there held that the procedure under Sections 525 and 526 of the Civil Procedure Code only related to cases in which the reference and the award are accepted facts The judges considered that if the objection was obviously unfounded it should be regarded as no cause against the filing, but if it appeared a substantial objection the applicant should be referred to a regular suit upon the award But in

(1) 4 M 319 (2) 11 M. 85 (3) 15 M 348.
(4) 8 B L R 315 (5) 21 C 213 (6) 9 C 557
(7) 10 C 11 (8) 10 C 74 (9) 9 B 254.

1895 MAY 2. — FULL BENCH. — 18 M. 423 (F.B.).

Vishnu Bhau Joshi v. *Ravji Bhau Joshi* (1), it was held that there was no appeal against the decree passed upon an award.

We have not been referred to any case in which this particular point has been decided in Allahabad.

In *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (2) that point was not raised. In that case, the District Munsif found that the award was genuine and decreed for plaintiff accordingly and the High Court held that the District Court could not entertain an appeal. This was an application filed under Section 525 of the Civil Procedure Code.

[426] In *Suppu* v. *Govindacharayar* (3) which was a case in which the reference to arbitration had been made by the Court, it was held that Section 522 presupposed the existence of an award as the basis of a decree and could not apply to a case in which there had been no award in law or in fact. The appeal was therefore allowed. The case of *Gopi Reddi* v. *Mahanandi Reddi* (4) is not in point. It was merely held that the procedure of Section 525 could not apply when the award itself could not be produced. In *Venkayya* v. *Venkatappayya* (5) the reference to arbitration was made in the course of a suit. Objections alleging misconduct of the arbitrators and the invalidity of the award were overruled by the District Munsif who passed a decree in accordance with the award. The High Court held that the District Judge had power to hear an appeal on the ground that the award was not legal. This case also as well as *Suppu* v. *Govindacharyar* (3) seems in conflict with *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (2).

In Madras, the objection that a Court is ousted of its jurisdiction under Section 525 when the existence of the award is denied, does not seem to have been taken. In all the cases cited, like the present, the Court of First Instance has proceeded to enquire and determine the fact,—and the sole question is whether there is an appeal.

We find it impossible to reconcile the decision in *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (2) with *Suppu* v. *Govindacharyar* (3) and *Venkayya* v. *Venkatappayya* (5), and though it is in accord with *Vishnu Bhau Joshi* v. *Ravji Bhau Joshi* (1), it is in conflict with the course of decisions in the Calcutta High Court.

We, therefore, refer for the determination of a Full Bench the following question:—" Is there an appeal against a decree passed upon an award " under Sections 525 and 526 of the Civil Procedure Code when the cause " shown has denied the submission to arbitration and the genuineness of " the award? "

This second appeal came on for hearing before the Full Bench.

Runga Rau, for appellant.

Pattabhirama Ayyar, for respondent.

The Court delivered the following.

JUDGMENTS OF THE FULL BENCH.

[427] Subramania Ayyar, J.—I am of opinion that there is an appeal against a decree passed upon an award under Section 526 of the Civil Procedure Code when the cause sought to be shown against the filing of the award has denied the submission to arbitration and the genuineness of the award.

The main objections taken to this view are two:—The first is that what is called a decree on an award, filed under Section 526, is not in

(1) 3 B. 18. (2) 4 M. 319. (3) 11 M. 85.
(4) 12 M. 331. (5) 15 M. 348.

1895 May 2. — Full Bench. — 18 M. 423 (F.B.).

reality one according to the definition of the term as contained in Section 2 of the Civil Procedure Code, for the adjudication under Section 526 is not an adjudication in a suit or appeal as required by the first part of the definition. The second objection is that, even if such an adjudication be held to be a decree in the proper sense of the term an appeal from it is prohibited by the last clause of Section 522, even in such a case as the present.

Now as to the first contention, no doubt the proceedings under Sections 525 and 526 begin with an application and not with a plaint. But the former section directs that the application so presented shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants and the latter (Section 526) lays down that if the Court orders the award to be filed, such award shall take effect as an award made under the provisions of Chapter XXXVII of the Code, the meaning, of course, being that the award shall take effect in the same way as an award made under a reference to arbitration through the Court, after a suit had commenced, upon which award judgment and decree follow as provided by Section 522. It is thus quite clear that though a proceeding, taken under Sections 525 and 526, does not in its inception commence in the way in which a suit is begun, yet in its subsequent stages, it is treated by the law as a suit, especially in the requirement that as soon as an award is ordered to be filed, it must be followed by judgment and decree That such is the proper construction of the clause "and such award shall then take effect as an award made under the "provisions of this chapter" in Section 526, there can be no doubt

This view is moreover supported by the uniform practice of the Courts from the time of the enactment of Section 327 of Act VIII of 1859 (corresponding to Sections 525 and 526 of the present Code) In *Sashti Charan Chatterjee* v *Tarak Chandra Chatterjee* (1) decided twenty-two years ago, Norman, J , referring [428] to the point I am considering, observed (at page 325) —"It seems to me that the only order which "a Judge is empowered to make under Section 327 is simply an order "that the award shall be filed When the award is filed it is to be "enforced under the provisions of Chapter VI, Act VIII of 1859 Now "the mode of enforcement of an award is by passing judgment and "making a decree in accordance with the award." And Paul, J , in the same case, said (at pages 330—31) —"It appears to me that an order "directing the filing of an award is not a decree in its ordinary significa-"tion; and being in its nature a proceeding ancillary to the passing of "judgment and decree it is an order made in the course of a suit (com-"menced by an application,) and relating thereto prior to decree "It is clear that unless an order directing an award to be filed is followed "up by judgment and decree no execution can issue"

The same opinion has been emphatically expressed again in Calcutta in the very recent case of *Surjan Raot* v *Bhikari Raot* (2) There Petheram, C J , rejected the view put forward by the Judges who decided *Sree Ram Chowdhry* v *Denobundhoo Chowdhry* (3), to the effect that when the application to file an award is registered as a suit, that has not the effect of converting the application into a suit for all purposes, but merely means that for the purposes of the entry in the register of civil suits and for those purposes only the application is regarded as a suit. The Chief Justice argued

(1) 8 B L R. 315. (2) 21 C. 213 (221). (3) 7 C. 490.

1895 MAY 2. — FULL BENCH. — 18 M. 423 (F.B.)

against this view as follows:—" If the application to file the award is not " converted into a suit for all purposes, it is not converted into one at all " for any but an administrative one as defined by Field, J., and it must " follow that the award cannot be enforced under the provisions of those " sections as there is no suit pending in which a decree can be made, and " filing the award has no effect whatever, as even after it is filed, it can only " be enforced by a regular suit to be commenced by a plaint in the ordinary " way, which could be done as well before it is filed as it could afterwards; " and this is to hold that these two Sections 525 and 526 have no practical " effect whatever. I understand that from the passing of the Act down to " the present time proceedings under these sections have been treated as " suits in this way and that when the award has been filed, judgment and " decree have in all [429] cases followed upon such finding without any " question and I think it would be impossible to hold now that all such dec- " rees have been waste paper because they were not made in any suit."

The force of this reasoning cannot but be admitted, and it must be taken as perfectly well established that an adjudication which follows the filing of an award under Section 526 is in almost every essential particular a decree with nearly all the incidents attaching to one passed in an ordinary suit. One of these incidents is that under Secton 540 an appeal lies " unless when otherwise expressly provided by the Code or by any " other law for the time being in force." The question therefore is whether when a decree is passed under Section 526 in a case where the submission and the genuineness of the award are denied, an appeal from such decree, is prohibited by any other provision of the Code or by any other law.

And this leads me to the consideration of the next contention raised, *viz.*, that the last clause of Section 522 bars such an appeal. That this contention is untenable will be manifest if the scope of the clause in question is clearly kept in view. The words of the clause are " no appeal " shall lie from such decree except in so far as the decree is in excess of, " or not in accordance with, the award." It will here be seen that the prohibition against an appeal contained in the said clause is not unqualified, but is subject to certain conditions, some of them being expressly specified in the clause itself, while others are necessarily implied by the very language of it. Among the conditions so implied, the most important are (*i*) there must have been a matter referred to arbitration and (*ii*) there must have been an award on the matter referred. These conditions, as observed by the Full Bench of the Allahabad High Court in *Amrit Ram* v. *Dasrat Ram* (1) must exist as the foundation of the jurisdiction of a Court to order, under Sections 525 and 526 the award to be filed. Consequently in the absence of either condition, there can be no valid adjudication under Section 526 and a decree passed in such a proceeding and purporting to rest on a supposed award must, in reason, be liable to be impeached, unless there is a specific provision of the law to the contrary, on the ground that there was no submission or there was no award, and the Court had therefore no jurisdiction to pass the decree. But no such provision being [430] found in Section 522 or elsewhere, it follows that the remedy open to a party against whom a decree has, in the circumstances supposed above, been given under Section 526, is the ordinary one of an appeal against it under Section 540. This view is now conceded by the High Courts of Calcutta, Bombay and

(1) 17 A. 21 (25, 26, 28).

Allahabad. See *Sashti Charan Chatterjee* v *Tarak Chandra Chatterjee* (1) *Nandram Daluram* v *Nemchand Jadavchand* (2), and *Amrit Ram* v. *Dasrat Ram* (3).

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The principle on which these cases proceed seems to be that the finality contemplated by Section 522 is confined to a determination by the Court of certain specific matters, such as are enumerated in Sections 520 and 521, which do not include denial of submission or the genuineness of the award or other like circumstances That there is an undoubted distinction between an adjudication on these latter questions and an adjudication upon the other matters, referred to above, cannot be denied The distinction is that whereas a decision as to the truth of the submission or the genuineness of the award is a determination which goes to the very root of the jurisdiction of the Court to proceed under Sections 525 and 526, the orders of the Court passed under Sections 520 and 521 are merely more or less ancillary to the enforcement of an award given under a reference made through the intervention of a Court about the *factum* of which reference or award there can generally be little ground for dispute. This distinction was lost sight of in *Micharaya Guruvu* v *Sadasiva Parama Guruvu* (4) which was, in my opinion, consequently wrongly decided The error into which the learned Judges fell is in their holding that a Court, proceeding under Section 526, is empowered to adjudicate with conclusive effect not only on the ancillary matters above referred to, but also upon the question whether there is a submission or not, when there is no warrant for such a conclusion in the language of any of the provisions of Chapter XXXVII Nor is there anything in principle to support the conclusion Now an ordinary suit lies to enforce an award made without the intervention of a Court of Justice, the special procedure provided in Section 526 not being imperative, *Palaniappa Chetti* v *Rayappa Chetti* (5) Suppose such a suit is brought If, in it, the Court upholds the award and passes a [**431**] decree, it is certainly open to a party impeaching the award to raise, in any appeal preferred against the decree, the objection that there was no submission or award Why then should a party against whom a decree is passed in similar circumstances in a special suit commenced by a petition, under Section 526, be precluded from raising such objections in an appeal against that decree in the absence of an express prohibition in law against the adoption of such a course? I think, therefore, that the last clause of Section 522 was not intended to, and does not prevent, an appeal in a case like the present.

It was next argued on behalf of the respondent before us that it was not competent to the District Munsif to try the questions of the denial of submission and the genuineness of the award, that as soon as such objections were raised the District Munsif was bound to reject the application without proceeding further, that consequently the decree passed by him was void *ab initio* and that the remedy for the appellant was not by an appeal to the District Judge, but by an application for revision to this Court.

Upon the question which is assumed as the first step in the above argument, *viz.*, whether the District Munsif was competent to try the truth of the cause here sought to be shown, it is unnecessary to pronounce any opinion now. Because, even granting for argument's sake that that assumption is well founded, it is clear that the proper and appropriate

(1) 8 B. L. R 315 (2) 17 B 357 (3) 17 A 21 (25, 26, 28).
(4) 4 M 319. (5) 4 M H C R. 119.

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remedy against the Munsif's decree said to be void, is by an appeal to the District Judge under Section 540 of the Code. For, under that section (except when otherwise expressly provided for, which is not the case here as has been already shown), an appeal lies against every decree whether such decree was passed in a suit over which the Court passing the decree had jurisdiction or not. The respondent's contention under consideration involves the reading into the definition of a decree in Section 2 of the Code of a proviso which is not there. That part of the definition, with which we are for the present concerned, runs thus:—"Decree means "the formal expression of an adjudication upon any right claimed or "defence set up in a Civil Court when such adjudication, so far as "regards the Court expressing it, decides the suit or appeal." To sustain the respondent's argument it would be necessary to add after the word 'appeal' words to the following effect "provided the Court "so adjudicating has jurisdiction to entertain the suit or appeal." [432] There is absolutely no justification for importing any such proviso. Therefore in the face of the clear language of the definition coupled with Section 540, it would be exceedingly unreasonable and unjust to hold that a party against whom a decree has been passed by a Court without jurisdiction is, in consequence of that want of jurisdiction, prevented from resorting to his remedy by an appeal, which in the case of decrees pronounced by a Court having jurisdiction, he can claim as a matter of right; and is solely dependent upon the exercise by this Court, in its discretion, of the extraordinary powers vested in it in respect of matters coming up before it on revision to get rid of such decree.

I agree, therefore, in answering the question referred in the affirmative.

PARKER, J.—The question referred to the Full Bench is "Is there "an appeal against a decree passed upon an award under Sections 535 "and 526, Code of Civil Procedure, when the cause shown has denied the "submission to arbitration and the genuineness of the award?"

Sections 525 and 526 provide an optional method of enforcing an award when any matter has been referred to arbitration without the intervention of a Court of Justice. It is a procedure which is only applicable when the reference and the award are accepted facts, *Samal Nathu* v. *Jaishankar Dalsukram* (1), and it does not detract from the right to bring a regular suit to enforce the terms of an award, *Palaniappa Chetti* v. *Rayappa Chetti* (2), and *Kota Seetamma* v. *Kollipurla Soobbiah* (3).

Section 525 provides that the application shall be numbered and registered as a suit and notice shall be given to the other parties to the arbitration to show cause why the award should not be filed, and Section 526 further provides that if no ground such as is mentioned or referred to in Section 520 or Section 521 be shown against the award, the Court shall order it to be filed. These provisions clearly indicate that the reference and the award itself must be undisputed facts, since it would be absurd to suppose the legislature intended to limit the objections which could be raised to those referred to in Sections 520 and 521 if there was any dispute as to the *factum* of the award. It must be remembered that, [433] though there is no appeal against an order refusing to file an award (*Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (4), such refusal does not operate as *res Judicata* or bar a suit to enforce the award. I am inclined, therefore, to

(1) 9 B. 254. (2) 4 M. H. C. R. 119.
(3) 8 M. H. C. R. 81. (4) 7 C. 490.

agree in the view of the Calcutta and Bombay High Courts that if the award and the consent to arbitration is substantially disputed the special jurisdiction created by Sections 525 and 526, Code of Civil Procedure, is ousted and that the applicant should be referred to a regular suit upon the award.

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In the case under reference there was such a substantial dispute and the District Munsif disposed of the case without jurisdiction An appeal will therefore lie.

See *Sashti Charan Chatterjee* v *Tarak Chandra Chatteerjee* (1), *Surjan Raot* v. *Bhikari Raot* (2), *Amrit Ram* v *Dosrat Ram* (3), *Suppu* v. *Govindacharyar* (4) and *Secretary of State for India* v *Vydia Pillai* (5). I would answer the question referred to the Full Bench in the affirmative.

COLLINS, C. J.—I have had the advantage of reading the judgments of PARKER and SUBRAMANIA AYYAR, JJ , and I agree with the conclusion arrived at.

This second appeal came on again for final disposal and the Court (COLLINS, C J., and PARKER, J) delivered the following.

JUDGMENT (FINAL)

The Full Bench having held that an appeal lay to the District Judge, the decree must be reversed and the appeal remanded to be heard on the merits The costs incurred in the High Court will be borne by the plaintiff and the costs in the Courts below will abide and follow the result

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18 M. 434

[434] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar and Mr Justice Best.

PERIAROYALU REDDI (*Plaintiff*), *Appellant* v ROYALU REDDI AND OTHERS (*Defendants Nos. 1 to 4 and 6*), *Respondents* * [12th and 13th December, 1894]

Darkhast rules—Application to Government for waste land—Irregular publication of application

The plaintiff, having obtained an assignment from Government of waste land, was obstructed by the defendants in his attempt to enter into occupation, and he sued for a declaration of his title and possession It appeared that his application for the land had not been duly published, and certain other formalities had not been observed, as provided by the darkhast rules, but the land had been assigned to him and a patta granted by Government·

Held that the plaintiff's title was not invalidated by reason of the non-compliance with the darkhast rules

[R., 26 M 268=12 M L J 453, 29 M 161=1 M L T 278, 30 M 270 (F.B.)=2 M L T 141; 31 M 264=18 M L J 62, 32 M 300=19 M L J 206=5 M L T 31, 12 M L J 417]

SECOND appeal against the decree of W. F Grahame, District Judge of South Arcot, in appeal suit No 309 of 1893, reversing the decree of T Gopalakrishna Pillai, District Munsif of Vriddhachalam, in original suit No 535 of 1892.

The plaintiff sued for a declaration of his title to, and for possession of certain land The plaintiff's case was that he applied on darkhast for

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* Second Appeal No 1346 of 1894

(1) 8 B L R 315 (2) 21 C 213 (3) 17 A 21
(4) 11 M 85 (5) 17 M. 193.

1894 Dec. 13.

APPELLATE CIVIL.

18 M. 434.

the land in question on the 26th April 1884, and the revenue authorities assigned it to him and granted a patta on the 19th May 1885, and that he since paid tirwa therefor. The defendants had objected to the plaintiff's application on the ground that the land in question was a threshing-floor and applied to the Board of Revenue which, however, upheld the assignment to the plaintiff. In September 1891 the plaintiff attempted to plough the land but was obstructed.

The District Munsif passed a decree as prayed, but his decree was reversed on appeal by the District Judge, who held that the darkhast was vitiated by reason of non-compliance with the Standing Order of the Board of Revenue, No 30, Section 5, which requires that the applications such as that of the plaintiff should be proclaimed in the village by beat of tom-tom, and that the signature [435] of the nearest landholders should be obtained and a notice put up in two places. The District Judge was of opinion that these formalities not having been complied with, the plaintiff had obtained no title to the land.

The plaintiff preferred this second appeal.

Ethiraja Mudaliar and *Sivagnana Mudaliar*, for appellant.

Respondents were not represented.

JUDGMENT.

We are unable to agree in the opinion of the Judge that because some of the formalities prescribed by the darkhast rules have not been observed, he is entitled to cancel the patta granted to the appellant by the Government. Darkhast rules are departmental and if they are infringed, the remedy for such infringement is also departmental. Irregularities in observing those rules constitute no valid ground of interference by the Civil Courts with a grant of land made by the Government. The land in dispute is entered in the pymash account as waste and as such it is at the disposal of Government. It is not competent to the Civil Courts to set aside a grant made by an officer competent to make the grant. The two objections taken by the respondents against the grant have been disallowed. It has been found that he has no title as against the Government and it appears also that the land is entered in the pymash accounts as waste and not as threshing-floor. The District Munsif has further found that there is no communal necessity for reserving the land as a threshing-floor. It was held by this Court in *Subbaraya* v. *The Sub-Collector of Chingleput* (1) that a Civil Court cannot compel the revenue authorities to make settlement with a particular person on the ground that he was entitled to preference under the darkhast rules, (see also *Subbaraya* v. *Krishnappa* (2)).

We set aside the decree of the District Judge and restore that of the District Munsif.

Respondents must pay appellant's costs in this Court and also in the Lower Appellate Court.

(1) 6 M. 303 (309). (2) 12 M. 422.

18 M. 436=5 M.L.J. 200.

[436] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt , Chief Justice, and Mr. Justice Parker.

1895 MARCH 12.

APPELLATE CIVIL.

18 M. 436=5 M. L. J. 200.

KUMBALINGA PILLAI (*Defendant No. 1*), *Appellant v.* ARIAPUTRA PADIACHI (*Plaintiff*), *Respondent.**
[8th February and 12th March, 1895.]

Civil Procedure Code—Act XIV of 1882, Section 317—Sale under mortgage decree—Benami purchaser—Purchase on account of a subsequent usufructuary mortgagee—Suit for conveyance and possession

Certain land was hypothecated to A and subsequently put in the possession of B under a usufructuary mortgage, A obtained a decree upon his hypothecation for the sale of the property against B and the mortgagor In execution the land was purchased by the agent of B with his money and he agreed to execute a conveyance to B This agreement was not carried out and the nominal purchaser ejected B's tenant

Held, that B was entitled to a decree for delivery of possession and execution of a conveyance

[R., 20 M 349; 6 C W N 279, D., 22 A 434= 20 A W N 152]

SECOND appeal against the decree of W F. Grahame, District Judge of South Arcot, in appeal suit No. 280 of 1893, affirming the decree of T. B. Vasudeva Sastri, District Munsif of Chidambaram, in original suit No. 109 of 1893.

The plaintiff sued to compel defendant No. 1 to execute in his favour a conveyance of certain land and deliver possession thereof or in the alternative to pay him a sum of Rs. 1,010. The land had originally been the property of Paramasiva Pillai by whom it had been mortgaged to the plaintiff in 1883, having already been hypothecated to Armuga Pillai In suit No 518 of 1885 the assignee of Armuga Pillai obtained against the plaintiff and the mortgagor a decree for sale, in execution of which the plaintiff became the purchaser in the name of defendant No 1 who acted as his agent and agreed to convey the land to him on the confirmation of the court-sale The plaintiff paid the money and remained in possession by his tenant until November 1892 when defendant No. 1 ejected him It was objected that the suit was not maintainable by reason of the provisions of Civil Procedure Code, Section 317, but the District Munsif overruled this objection [437] and passed a decree requiring that the defendant No 1 should execute a conveyance as prayed, and his decree was affirmed on appeal by the District Judge

Defendant No. 1 preferred this second appeal.

Krishnasami Ayyar, for appellant

Tirumalaisami Chetti, for respondent.

JUDGMENT.

At the time of the auction-sale the plaintiff was the usufructuary mortgagee in possession, and the land was brought to sale in satisfaction of a decree upon, a prior hypothecation. The equity of redemption was purchased by the first defendant, who at the time was the plaintiff's paid agent, and it is found that in the purchase the first defendant acted as plaintiff's agent and that the plaintiff supplied the

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* Second Appeal No 1570 of 1894.

1895 MARCH 12.

APPELLATE CIVIL.

18 M. 436=5 M.L.J. 200.

money for the purchase. The plaintiff remained in possession through his tenants. The mortgage being usufructuary, the first defendant could not have disturbed him without redeeming the mortgage even if he (first defendant) had purchased the equity of redemption on his account. But it is found that he agreed to execute a conveyance to the plaintiff, allowed plaintiff to take possession of the sale certificate and delivery order and that he was at the time plaintiff's agent.

We think the case falls within the principles laid down in *Monappa* v. *Surappa* (1) and *Sankunni Nayar* v. *Narayanan Nambudri* (2) and that Section 317, Code of Civil Procedure, is not a bar to the suit.

The second appeal is dismissed with costs.

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18 M. 437=5 M.L.J. 60.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MUNIAPPA NAIK AND OTHERS (*Defendants*), *Appellants* v. SUBRAMANIA AYYAN (*Plaintiff*), *Respondent*.* [20th December, 1894.]

Civil Procedure Code—Act XIV of 1882, Sections 268, 274—Attachment of mortgage-debt—Suit by purchaser on mortgage.

The plaintiff sued to recover principal and interest due on a mortgage. He claimed title as purchaser at a court-sale held in execution of a decree against the [438] mortgagee. It appeared that there had been no attachment under Civil Procedure Code, Section 274, but under Section 268 only:

Held, that the purchase by the plaintiff was not invalid by reason of the last-mentioned circumstance, and that the plaintiff was entitled to recover as against the property.

[**Rel.** 5 Ind. Cas. 798 (799)=13 O.C. 43; 16 Ind. Cas. 438=12 M.L.T. 300=(1912) M. W.N. 879; 24 M.L.J. 70 (71)=13 M.L.T. 207=(1913) M.W.N. 136; **R.** 30 M. 255=17 M.L.J. 201=2 M.L.T. 167, 14 C.P.L.R 5; 8 M.L.J. 1; 22 M.L.J. 105 (107)=10 M.L.T. 503=(1911) 2 M. W N. 590; 18 P.R. 1909.]

SECOND appeal against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in appeal suit No. 524 of 1893, reversing the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in original suit No. 113 of 1893.

Suit to recover principal and interest due upon a mortgage, dated the 9th November 1880, and executed by the father of the defendants to Maruda Asari to secure the repayment of Rs. 100 with interest. The plaintiff claimed as the purchaser at a court-sale held in execution of a decree against the mortgagee. There had been no attachment under Civil Procedure Code, Section 274, but attachment had taken place under Civil Procedure Code, Section 268 as of a simple debt, and it was objected that the sale was invalid for this reason.

The District Munsif overruled this objection, but he dismissed the suit on the ground of limitation on, it appearing that the due date in the bond was the 9th of March 1881 and the plaint was not filed until the 4th March 1893. He referred to *Appasami* v. *Scott* (3), *Sami* v. *Krishnasami* (4) and *Karimunnissa* v. *Phul Chand* (5).

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* Second Appeal No. 1427 of 1894.

(1) 11 M. 234. (2) 17 M. 282. (3) 9 M. 5.

(4) 10 M. 169. (5) 15 A. 134.

1894 DEC. 20. APPELLATE CIVIL. 18 M. 437 = 5 M. L. J. 69.

The Subordinate Judge reversed this decree and passed a decree for the plaintiff. He held that the omission on the part of the plaintiff to effect an attachment under Section 274 was an irregularity unattended by substantial injury and did not vitiate the sale, and he held that the plaintiff was entitled to a decree for sale, although his claim was barred so far as the personal remedy was concerned

Defendants preferred this second appeal

Krishnasami Ayyar, for appellants

Rajagopalachariar, for respondent.

JUDGMENT.

We agree with the learned Judge who decided the cases of *Debendra Kumar Mandel* v. *Rup Lall Das* (1) and *Kasinath Das* v. *Sadasiv Patnaik* (2)

[439] The object of attachment is to take the property out of the disposition of the judgment-debtor Though the omission to attach under Section 274 of the Code of Civil Procedure was an irregularity, we are not able to hold that the irregularity was material or that plaintiff has been prejudiced thereby

It is next contended that the document contains no provision for interest *post diem*, and that consequently the claim is one for damages and barred under Article 116 of the Limitation Act. But on the true construction of the document the last clause appears to provide for interest to date of payment and to make the same a charge on the property; and as interest is not asked for at the enhanced rate there is no question of reasonable compensation under Section 74 of the Contract Act, nor is the suit barred under the Limitation Act

The appeal fails and is dismissed with costs

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18 M. 439=5 M.L.J. 206.

APPELLATE CIVIL

Before Mr. Justice Shephard and Mr. Justice Best

AMIR BAKSHA SAHIB (*Petitioner*) *Appellant v* VENKATACHALA MUDALI (*Counter-petitioner*), *Respondent* *

[26th July, and 6th August, 1895]

Civil Procedure Code—Act XIV of 1882, Sections 293, 306, 588—Execution sale—Default by purchaser in paying deposit—Remedy against purchaser

The purchaser at an execution sale failed to make the deposit of 25 per cent under Civil Procedure Code, Section 306, alleging that the property was discovered by him subsequently to the sale to be subject to an incumbrance. The Property was put up for sale again and knocked down for a smaller sum The decree-holder sought in execution to recover the amount of the difference from the first purchaser. The Court of first instance made an order dismissing the application·

Held, that an appeal lay against the order in question

[F., 25 C 99, D., 23 M. 73, 7 N L R 134 (135)]

APPEAL against the order of E J Sewell, District Judge of North Arcot, in miscellaneous appeal No 18 of 1893, dismissing the appeal

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* Appeal against Appellate Order No 40 of 1894.

(1) 12 C 546 (2) 20 C 805.

1895 Aug. 6. — Appellate Civil. — 18 M. 439=5 M. L. J. 206.

against the order of T. Venkataramayya, District Munsif of Vellore, in execution petition No. 527 of 1893.

[440] A house was brought to sale in execution of a decree in original suit No. 17 of 1893 on the file of the District Munsif of Vellore. The house was knocked down to Venkatachala Mudali for Rs. 280, but he did not deposit 25 per cent. of the purchase money as required by Civil Procedure Code, Section 306. The house was accordingly put up again for sale on the next day, and it was purchased for Rs. 205 by the decree-holder, who had permission to bid. Venkatachala Mudali explained that he would not pay the deposit for the reason that, since the sale, he had heard of an incumbrance to which the property was subject. The present application was made by the decree-holder, who sought to recover Rs. 75 from Venkatachala Mudali.

The District Munsif dismissed the application on the ground that the applicant had falsely stated in his petition for execution that the house was free from incumbrances and that he was now seeking to take advantage of his own wrong. The District Judge held that no appeal lay against the order of the District Munsif.

The decree-holder now appealed to the High Court.

Masilamani Pillai, for appellant.

Ethiraja Mudaliar and *Sivagnana Mudaliar*, for respondent.

JUDGMENT.

SHEPHARD, J.—The question raised in this appeal is whether an appeal lies against an order refusing relief to a decree-holder as against the bidder at an auction sale who is alleged to have made default.

The 293rd Section of the Code provides that the deficiency of price, resulting on a re-sale occasioned by the purchaser's default, shall be certified to the Court by the officer conducting the sale, "and shall, at the "instance of either the judgment-creditor or the judgment-debtor, be "recoverable from the defaulter under the rules contained in the chapter "for the execution of a decree for money."

No such certificate as the section contemplates appears to have been made. The decree-holder, alleging the bidder's default, simply asked for a warrant against the alleged defaulter. This application was dismissed by the District Munsif on the merits. On appeal being made the District Judge held that he had no jurisdiction to entertain it. The 293rd Section is not one of the sections mentioned in the 588th Section. The only ground, therefore, on which it can be held that an appeal lies is that orders made in respect of an alleged default by the purchaser are in the [441] nature of decrees, and that the parties affected must be deemed to be parties to the suit within the meaning of the 244th Section. This was the view taken by the Full Bench of the Allahabad Court in a case decided with reference to the Code of 1859 and Act XXIII of 1861 (*Ram Dial* v. *Ram Das* (1). It must be presumed that the case was present to the mind of the Legislature when the Codes of 1877 and 1882 were under consideration, and that if the decision was thought to be wrong, an alteration would have been made in the section so as to make the matter clear in the future. This has not been done The 293rd Section of the Code merely reproduces the 254th Section of the Code of 1859 with immaterial variations of language. In the same Court it has also been held with reference to the 411th Section of the Code that the Government, seeking to recover the amount of Court fees payable under a decree

(1) 1 A 181 (188).

obtained by a pauper plaintiff, is placed in the position of a party to the suit, and that, accordingly, an appeal lies against an order made under that section. The language of the section is similar to that used in the 293rd section. (*Janki* v *The Collector of Allahabad* (1)) In Calcutta the precise point which now arises was in 1889 decided in favour of the appellant (*Baijnath Sahai* v *Moheep Narain Singh* (2)) In Madras the point does not seem to have been decided in any reported case The case of *Vallabhan* v *Pangunni* (3) only goes to show that where the contest is between the judgment-debtor and the decree-holder who is alleged to have made default, the question between them must be treated as a question arising between the parties to the suit within the meaning of the 244th section

As against the view above stated in favour of an appellant there is the recent case of *Deoki Nandan Rai* v *Tapseri Lal* (4) In the judgment in this case stress is laid on the fact that, whereas the 294th section is mentioned, the 293rd section is not mentioned in Section 588, and considerable weight is attached to the decision of the same Court in *Rahim Bakhsh* v *Dhuri* (5) I am unable to admit the force of the argument suggested by the reference to 294th section That section contains no such language as is contained in the 293rd section, and because the Legislature thought fit to give an appeal, and that a final appeal, against orders [442] passed under the 294th section, it does not follow that they intended orders made under the 293rd section to be final

As to the case of *Rahim Bakhsh* v *Dhuri* (5) it is to be observed that it turns on another section, the 315th, the language of which is in a marked way distinguishable from that used in the 293rd In the latter section the imperative mood is used throughout, whereas in the 315th the language is permissive The liability for the repayment of the purchase money may be enforced under the provisions of that section, or the aggrieved purchaser may recover it by suit (*Sham Karan* v *Piari* (6)) It appears to me that no such option would be open to the judgment-creditor or judgment-debtor seeking to recover from a defaulting purchaser the loss occasioned by a re-sale The section says distinctly that the money shall be recoverable under the rules contained in Chapter XIX In this respect the language of the 293rd section agrees with that of the 411th If the decision already cited with regard to the latter section is correct, I fail to see why similarly, under the 293rd section, the purchaser should not be treated as a party to the suit. The effect of the whole section, as I read it, is to make the certificate of the officer conducting the sale equivalent to a decree and to put the aggrieved person and the defaulter in the position of decree-holder and judgment-debtor Unless this construction is put upon the section, the anomaly results that in the case of the judgment-debtor complaining of default made by the decree-holder who has had leave to bid there is an appeal and a second appeal, while in the case of the creditor complaining of default made by a third person there is no appeal, and no other remedy open to the judgment-creditor

The present case appears to me to fall within the principle of the decision of the Privy Council in *Prosunno Coomar Sanyal* v *Kasi Das Sanyal* (7). There it was held that the 244th section was applicable notwithstanding that the purchaser against whom the sale was sought to be set aside had been no party to the former suit It was observed

(1) 9 A 64
(2) 16 C 535
(3) 12 M 454
(4) 14 A 201 (208)
(5) 12 A 397
(6) 5 A 596
(7) 19 I. A 166

1895 AUG. 6. — APPELLATE CIVIL. — 18 M. 439=5 M. L. J. 206.

that "Their Lordships are glad to find that the Courts in India have not "placed any narrow construction on the language of Section 244, and that "when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was "passed, the fact [443] that the purchaser who is no party to the suit is "interested in the result has never been held a bar to the application of "the section." Here I conceive there can be no doubt that the question is one relating to the execution, discharge or satisfaction of a decree.

Holding, therefore, that an appeal does lie against an order passed under Section 293, I would reverse the order of the Lower Appellate Court and remand the application for disposal on the merits. Costs to be provided for in the revised order.

BEST, J.—I concur.

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18 M. 443.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

IN THE MATTER OF THE MADRAS DOVETON TRUST FUND.*

[10th September, 1895.]

Trusts Act—Act II of 1882, Section 34—Application for directions by trustees—Questions of detail and difficulty—Procedure

The management of the Doveton charities is vested in a committee of management, who are empowered under the trust deed to require the trustees of the funds of the charities to invest the trust funds in excess of two lakhs of rupees "in the purchase or building of any additional land, building and premises." Certain buildings having been erected under these provisions of the trust deed were now stated to be in urgent want of repair. The current income of the charities was not sufficient to meet the cost of carrying out the repairs, and the committee of management and the trustees were agreed that a sum of Rs. 8,700 in the hands of the latter (in excess of two lakhs of rupees) should be employed in carrying out this work. The trustees now applied to the High Court under Trusts Act, Section 34, for its opinion on the question whether this should be done.

Held, that the question was not one with which the Court could deal under Trusts Act, Section 34.

Per curiam: I am inclined to hold that the proposed expenditure could, on the Court being satified of its necessity, be sanctioned, if the matter comes before it in the form of a suit in its original jurisdiction that in the exercise of such jurisdiction the Court has power to deal with a case like this seems hardly to admit of doubt.

APPLICATION for directions under Trusts Act, Section 34, by the trustees of the Doveton Trusts.

The trustees presented to the High Court the following petition:—

[444] 1. That on or about the 13th day of March 1844, one John Doveton formerly a captain in the service of His Highness the Nizam of Hyderabad, but subsequently residing in London, made his will and died without revoking the same in London on or about the 15th day of October 1853, of which will one Peter Carstairs was the sole surviving executor with probate in the year 1856.

2. That by an indenture made the 1st day of March 1856 the said Peter Carstairs as such executor as aforesaid by virtue of the authority vested in him in that behalf by the said will and with the consent and approval of the committee for the time being of the Madras Doveton

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* Application under Trusts Act, Section 34.

Protestant College testified by their being parties executant to the said indenture transferred and paid to five trustees mutually agreed upon between himself and the said committee, which trustees were also parties executant to the said indenture certain securities of the East India Company and cash to be held by such trustees on the specific trusts set out in such indenture hereinafter referred to as the Instrument of Trust

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3. That by the said instrument of trust it was provided that all vacancies in the office of trustee shall be filled up by the committee of management for the time being of the said Madras Doveton Protestant College and that your petitioners have each and all been duly appointed trustees in exercise of such provision

4 That the said instrument contains the following amongst other provisions :—

" The trustees or trustee for the time being of these presents " shall stand and be possessed of . " the funds and securities upon which the said trust monies shall for the " time being be invested Upon trust to " keep the said trust monies and funds henceforth and at all times " hereafter invested in some or one of the stocks funds or securities " of the East India Company or the Government of India in the names " of all the trustees hereof for the time being with power nevertheless " to the said trustees to vary and transpose the said securities for and " into any other securities of a like nature as often as occasion shall require " and to pay the annual interests and dividends arising from the said " trust funds and securities unto the committee of management for the " time being of the said institution to be by them applied and expended " as part and parcel of the annual income of the said institution and for " the purposes thereof in accordance with the rules and constitution " [446] thereof . the receipts in writing " of the committee of management for the time being of the said institu- " tion or of any party duly authorized in that " behalf . . for the interest and dividends arising from " the said trusts funds and securities as and when the same shall accrue " due shall be complete discharges to the trustees for " . all income paid on such receipts and shall " exonerate the trustees from all liability to see to the application of the " monies therein mentioned

5 That your petitioners and their predecessors in office have been and are paying the said income to the said committee of management in terms of the lastly hereinbefore recited provisions of the said instrument of trust

6. The said instrument of trust contains also these further provisions.—

" That it shall be competent either to the committee or management " for the time being of the said institution or to a general meeting of " subscribers to the said institution by formal requisition in writing to " direct the application by the trustees hereof for the time being of such " portion of the trust monies and securities for the time being subject to " the trusts hereof (calculating such securities at par) as for the time being " shall exceed the full sum of two hundred thousand Company's rupees, " or any part or parts of such excess in the purchase or building of any " additional land buildings and premises within the town or local limits of " Madras to be used for the general purposes of the said institution and " that the trustees hereof for the time being shall be bound forthwith to

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"comply with such requisition of such committee of management of such "general meeting as the case may be."

"Provided always that the full principal sum of two hundred thou-"sand Company's rupees parcel of the said trust monies and securities "shall be for ever hereafter kept intact and shall be in no way trenched "upon or disposed of."

7. That the buildings and premises now in use for the purposes of the said institution were erected out of a part of the said trust monies which were for the time being in excess of the said sum of two hundred thousand rupees so directed to be kept intact as above recited, and are thus with the securities and monies now representing the said trust fund now in the possession, custody and control of your petitioners as such trustees as aforesaid.

[446] 8. That these buildings and premises have now been in constant use for educational purposes for nearly forty years, and are much in need of exhaustive and substantial repair.

9. That as appears from the audited statements of accounts appended to the annual reports of the committee of management of the said institution from time to time a reasonable and proper sum has been expended each year out of the income at the disposal of the said committee upon the preservation of the said buildings and premises, the average annual expenditure thereon for the past twenty years having been some Rs. 865.

10. That it is apprehended by your petitioners as also by the said committee (of which your petitioners are each and all members) that unless the said buildings and premises are now put into a thorough and substantial state of repair they will rapidly deteriorate in value and in time fall into such a state of dilapidation as to impair the efficiency of the institution for educational purposes.

11. That your petitioners are now possessed as such trustees as aforesaid of securities of the Government of India representing (calculating such securities at par as directed by the said instrument of trust) the sum of Rs. 8,700 in excess of the said sum of Rs. 2,00,000 directed by the said instrument to be kept intact.

12. That your petitioners are strongly of opinion that the said sum of Rs. 8,700 or such part thereof as may by the estimate of their Engineer, Mr. J. H. Stephen, an Assistant Engineer in the Public Works Department, be found necessary should be spent upon such thorough reparation of the said buildings and premises as aforesaid, in which opinion the other members of the said committee of management for the time being fully concur, but your petitioners are advised that it is doubtful whether the general authority given to trustees by Section 36 of the Indian Trusts Act, 1882, will justify their making any expenditure upon repairs of the said buildings and premises out of the capital representing the said sum of Rs. 8,700, being the excess over and above the Rs. 2,00,000 now in their hands.

13. That your petitioners are therefore desirous of availing themselves of the right conferred upon them by Section 34 of the said Act to apply by petition to this Honourable Court for its opinion, advice and direction on the questions raised by the fore-[447]going statement of facts respecting the management or administration of the said trust property.

14. That the present application is made with the consent and approval of the said committee of management which passed the following resolution at a meeting held on the 22nd day of July 1895, *viz.*, "That "this committee having perused the draft petition to be filed in the High

"Court by the trustees for the time being of the Madras Doveton Fund "fully approves of the same in token whereof it directs that such petition "shall be countersigned by the chairman and the secretary of this committee"

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Your petitioners therefore humbly pray —

That this their petition may be received and that it may be declared that they are entitled to advice and direction in the premises.

That the Court will be pleased to declare that your petitioners are empowered by Section 36 of the Indian Trusts Act, 1882, to apply the whole or such part of the sum of Rs 8,700 hereinbefore indicated and specified upon the repairs of the abovementioned buildings and premises at their discretion as the trustees for the time being of the said indenture of the 1st day of March 1856

Or that your petitioners as such trustees as aforesaid and heir successors in office may and shall be directed by the Court construe the hereinbefore recited provision of the said instrument of trust as to the application of trust monies in excess of the said sum of Rs 2,00,000 as giving them authority upon requisition made in writing by the said committee or a general meeting as by the said instrument provided, to spend any such excess or any part thereof upon old buildings belonging to the institution by executing repairs thereto which are too great to be met out of the expenditure of the annual income of the institution by the committee of management

Mr *R F Grant*, for petitioners

JUDGMENT

This is an application with reference to the Madras Doveton Charities, a well-known educational institution in this city The management of the charities is vested in a body of persons called the committee of management; but the funds of the institution are vested in another body called the trustees By a provision in the trust deed the committee of management is empowered to require the trustees to invest such portion of the trust [448] moneys and securities as for the time being shall exceed Rs 2,00,000 or any part or parts of such excess "in the purchase or "building of any additional land, buildings and premises" Under this provision the buildings now in use for the purposes of the said institution were erected out of moneys which were for the time being in excess of the prescribed two lakhs and under the terms of the trust deed they are in the possession, custody and control of the trustees

It is stated that the buildings in question require "exhaustive and "substantial repair," and unless such repair is now executed the buildings "will rapidly deteriorate in value and in time fall into such a state of "dilapidation as to impair the efficiency of the institution for educational "purposes."

The committee of management as well as the trustees are of opinion that the sum of Rs 8,700, which is now in the hands of the latter over and above the Rs 2,00,000 required by the trust deed to be kept intact as principal or such portion thereof as may be found necessary, should be used in executing the said repair inasmuch as the current income of the institution is insufficient to meet the cost of carrying out such work Hence the present application, the question asked therein is whether the said sum of Rs. 8,700 may be properly used for the purpose just mentioned.

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Now, notwithstanding the difference in their phraseology, Section 34 of the Indian Trusts Act, under which this petition is presented, is substantially the same as 22 and 23 Vict., Cap. 35, Section 30. Moreover the words "other than questions of detail, difficulty or importance, not "proper in the opinion of the Court for summary disposal" to be found in the first paragraph of Section 34, seem to have been inserted therein with reference to the decisions upon Section 30 of the English Statute referred to Mr. Stokes in note 3 at page 854 of volume I of the Anglo-Indian Codes. *Re Barrington's Settlement* (1), which is one of the cases cited in the said note, is somewhat similar to the present. There the trustees of a settlement having power to purchase lands on being requested by tenants for life desired the opinion of the Court as to the propriety of applying £1,200 on such request in repairs and permanent improvements. Vice-Chancellor Sir W. Page Wood held that that was not a case in which he could properly give an [449] opinion under 22 and 23 Vict, Cap. 35, Section 30. The Vice-Chancellor said:—"My reason for not giving an express opinion is, that the "case goes into details, with which the Court cannot effectually deal, "without having a superintending power and being informed by affidavits, "whereas, under this statute, the facts must be taken to be as they are stated in the petition of the trustees, who take the risk of misstatement; "and the Court has no means of exercising any controlling power over "the subject-matter." For similar reasons it appears to me that the present is not a case in which I can authoritatively advise and direct the trustees to lay out the money referred to in the petition on repairs. which, it is alleged, the buildings stand in need of.

However, I have no objection to state my view upon the principle involved, and to indicate what appears to me to be the proper course for the trustees to adopt.

In *Caldecott* v. *Brown* (2) Wigram, Vice-Chancellor, referring to questions like the present said:—"I do not mean to lay it down as an imperative rule, that no case could arise in which the Court would sanction "the expenditure of monies by a tenant for life for the benefit of the "inheritance by making such expenditure a charge upon the inheritance. "The case may be suggested, of a devise of lands in strict settlement, "and a direction to lay out personal estate to the same use: it might be "more beneficial to the remainder-men that a part of the trust fund "should be applied to prevent buildings on the settled estate from going "to destruction, than that the whole should be laid out in the purchase "of other lands. Other like cases might, perhaps, be supposed." And in *Re Barrington's Settlement* (1), already cited, Sir W. Page Wood observes:—"My view is in accordance with the suggestion of Vice-Chan-"cellor Wigram in *Caldecott* v. *Brown* (2) that there can be no difficulty "about laying out a portion of the fund, under the sanction of the Court, "in permanent and substantial improvements. The repairs may require "separate consideration; but if they are upon farm buildings they would "seem to fall under the same principle." Latter authorities, however, are not quite uniform. The cases of *In re Nether Stowey Vicarage* (3), and *Brunskill* v. *Caird* (4), lay down that under special powers authorising investments in land or buildings repairs of existing buildings [450] will not be allowed; whilst *Re Pearson* (5), (cited in Seton on

(1) 1 J & H 142 (143). (2) 2 Hare 144 (145, 146)
(3) L. R. 17 Eq. 156 (4) L. R 16 Eq. 493. (5) 21 W. R. Eng. 401.

Judgments and Orders, 5th edition, page 1004) and *In re Lord Hotham's Trusts* (1) are decisions to the contrary. **1895 SEP. 10.**

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In some of the instances referred to above the point was complicated by the circumstance that the parties entitled to the property, such as tenants for life and remainder-men, had conflicting interests so far as the matter of repair was concerned In such cases it is of course necessary to see that the expense of executing the work is so met as not to make it inequitable to any of the parties interested. And vigilance on the part of the Court is perhaps necessary to prevent applications for which there are not adequate grounds being made to the Court (see the observations of Chitty, J , in *In re De Teissier's Settled Estates* (2) But that class of cases is distinguishable from the present which, in my opinion, is analogous to the case of *In re Jackson* (3), where Kay, J , directed an inquiry as to what repairs were necessary to certain houses to the beneficial interest in which an infant was absolutely entitled subject to certain trusts And I do not see any reason why a similar course should not be taken here in the interests, of the charity, the absolute beneficial owner, and why the sum of Rs 8,700 or a portion thereof should not be laid out in carrying out such repairs as may be found to be really and clearly necessary to prevent the buildings in question from becoming so dilapidated as to be unfit for the purposes of the institution, (compare *Ex-parte Vicar of St Botolph, Aldgate* (4), which illustrates the practical way in which a case, not dissimilar to this, was very recently dealt with

I am, therefore, inclined to hold that the proposed expenditure could, on the Court being satisfied of its necessity, be sanctioned, if the matter comes before it in the form of a suit in its original jurisdiction That in the exercise of such jurisdiction the Court has power to deal with a case like this seems hardly to admit of doubt *Conway* v *Fenton* (5) is a direct authority in favour of this view There, land and money were vested in the trustees of the settlement for the benefit of the husband and wife for themselves, and after their deaths for their children The buildings on a farm land were so much out of repair as to make the farm untenantable [**451**] Kekewich, J , held that the Court had power under its original jurisdiction to sanction the expenditure of a part of the money in repairing the said buildings This decision is strongly supported by the observations made by the Judges in the case of *In re Hotchkys* (6), particularly by those at page 420, where Lindley, L J , states —"I quite agree with " what Lord Justice Cotton has said, that if it is shown that it is judicious " to make repairs, and the trustees come to the Court for authority to make " them, that authority will be given "

Having regard to the nature of the present application and the circumstances in which it is made, I have thought it right to express my opinion as to the principle involved and the procedure to be followed in the case and, as Sir W Page Wood did in *Re Barrington's Settlement* (7) already cited, I must leave the trustees to file a plaint, if they should be so advised, to obtain the sanction of the Court

There will be no answer to this petition

The costs incurred in making this application will be paid out of the trust funds

Rowlandson, attorney for applicants

(1) L R 12 Eq 76 (2) (1893) 1 Ch 153 (165) (3) 21 Ch D 786
(4) (1894) 3 Ch 544 (5) 40 Ch D 512
(6) 32 Ch. D 408 (420) (7) 1 J & H 14- (14?)

1895 MARCH 5.

APPEL-LATE CIVIL

18 M. 451.

18 M. 451.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

KUNHAPPA NAMBIAR AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Appellants v.* SHRIDEVI KETTILAMMA (*Plaintiff*), *Respondent.**
[1st and 5th March, 1895.]

Malabar law—Partition of tarwad—Decree against karnavan on tarwad debt before partition—Execution after partition

The karnavan of a Malabar tarwad borrowed money for purposes which rendered the debt binding on the tarwad. The creditor obtained a decree against the karnavan in 1879. In 1882 a partition of the tarwad property took place In 1891 property which had fallen on partition to the present plaintiff's share was attached and brought to sale in execution of the decree of 1879 He was not joined as a party in the execution proceedings:
Held, that the Court sale did not bind the plaintiff

[R., 18 M L J 132=3 M L T. 189]

[452] SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 476 of 1893, affirming the decree of B, Cammaran Nayar, District Munsif of Tellicherry, in original suit No. 416 of 1892.

Suit to have set aside a sale of certain land which had taken place in 1891 in execution of a decree passed in 1879 against the defendant No. 1 and since transferred to defendant No. 2. Defendant No. 3 was the purchaser at the Court sale. Defendant No. 1 had been the karnavan of the tarwad, of which the plaintiff was a member, and it was found that the debt on account of which the decree was passed had been contracted by him for a purpose binding on the tarwad, but it appeared that in 1882 a partition had been entered into whereby the land in question had become the property of the plaintiff. The plaintiff had not been joined as a party in the execution proceedings.

The District Munsif held that the sale was not binding on the plaintiff and passed a decree accordingly. The District Judge affirmed his decision.

Defendants Nos. 2 and 3 preferred this second appeal.

Ryru Nambiar, for appellants.

Sankra Menon, for respondent.

JUDGMENT.

The appellants' vakil has brought to our notice the decision in *Krishnan Nambiar* v. *Krishnan Nair* (1), in which it [453] was held that the state of things at the time when the debt was contracted must be

* Second Appeal No 1746 of 1894.

18 M. 452 N.

(1) Second Appeal No 1323 of 1894 (unreported)
In this case the plaintiff, who was the appellant in the High Court, sued for a declaration that certain property was not liable to be attached in execution of a decree obtained in 1880 His case was that the judgment-debtor had not been sued in his capacity as karnavan of the plaintiff's tarwad so as to render the decree binding on the plaintiff as alleged by the defendants, that the debt for which the decree was passed had been incurred in 1878 for purposes not binding on the tarwad, that under a razinamah, dated 1877 and a karar or partition deed dated March 1882

1895 MARCH 5.

APPELLATE CIVIL

18 M. 451.

looked to, and that a creditor cannot be affected by any subsequent arrangement in the family to which he was not a party, and that consequently subsequent partition in a tarwad is no ground for holding the divided members and their property not liable for the decree obtained against the karnavan, as such, prior to the partition We see no reason to doubt the correctness of the above decision But it is no authority for holding to be valid the sale of partitioned property in the absence of the parties to whom it has been apportioned

For a sale to be binding on such persons, they should be expressly included as parties to the execution proceedings in which case they will have an opportunity of paying the debt and thus saving the property from sale As they have ceased to be members of the tarwad, the original karnavan can no longer be held to represent them The decision above referred to and relied on for appellant is therefore reconcilable with that in *Sankara* v *Kelu* (1), which the Judge has followed

This appeal fails and is dismissed with costs

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the lands of the tarwad had been divided and the lands now in question had been allotted to the plaintiff's branch of the tarwad.

The second appeal came on for hearing on the 10th of December 1894 before MUTTUSAMI AYYAR and BEST, JJ —

JUDGMENT

It is not denied that first defendant was the karnavan when he was sued The description of him as Valia Nambiar is sufficient for holding that he was sued as karnavan The Judge has also found that the debt was a tarwad debt

It is contended that the evidence on which this finding is come to is contradictory This is an objection we cannot allow in second appeal, the Judge's opinion being conclusive as to the weight due to evidence

It is next argued that, though the karar B is subsequent to the date on which the debt was contracted, the razi J is prior to it and it shows that the parties agreed in 1877 to a division to be effected within two months and that the community of interest between the tarvaries was to cease We find however that the [453] razi remained incomplete and the karnavan declined to act upon it In consequence of which there was a fresh suit which resulted in the karar B

Moreover, there is nothing to show that the creditor knew of the razi J, nor is it referred to in the plaint

Under these circumstances, we are unable to say that the Judge is not warranted in holding that the razi J did not alter the status of first defendant as karnavan

It is further argued that even though razi J were incomplete as the attachment was subsequent to karar B and the debt is due under a money decree merely, the property cannot be held liable

We do not consider this contention to be valid We have to look to the state of things at the time when the debt was contracted and at that time first defendant as karnavan was competent to bind all his anandiravans Any subsequent arrangement in the family cannot affect their obligation to the creditor who was no party to it.

This appeal fails and is dismissed with costs.

[R., 18 M L J 132=3 M L T 189, D., 18 M 451]

(1) 14 M. 29

1895
FEB. 14.

APPELLATE CIVIL.

18 M. 454=5 M. L. J. 92.

18 M. 454=5 M.L.J. 92.

[454] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

SUBRAMANIAM (*Plaintiff*), *Appellant v.* PERUMAL REDDI AND ANOTHER (*Defendants*), *Respondents*.*
[8th and 14th February, 1895.]

Registration Act—Act III of 1877, Sections 17, 18—Transfer of Property Act—Act IV of 1882, Sections, 8, 54—Assignment of debts secured on land—Unregistered instrument of assignment

In 1879 the defendants executed a hypothecation deed, which was registered to secure the repayment with interest of a loan of Rs 87. In 1884 the obligee transferred his rights to the plaintiff in consideration of Rs 70 under an instrument which was not registered At the date of the transfer the debt amounted with interest to Rs 137 The plaintiff now sued to recover Rs. 129 being the principal and interest due on the hypothecation bond at the date of suit·

Held, that the plaintiff was not precluded from proving the instrument of transfer and establishing his rights thereunder to a personal decree and to a charge on the land by reason of its not having been registered

[**Diss.**, 24 M 449; **N.F.**, 10 A L.J 167=15 Ind Cas. 853 (854); 11 Ind Cas 673=14 O C 161; **R.**, 25 M 396, **D.**, 1 P.R. 1906=190 P L R. 1905]

SECOND appeal against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 209 of 1891, confirming the decree of V. Kuppusami Ayyar, District Munsif of Sholinghur, in original suit No. 388 of 1891.

Suit to recover principal and interest due on a registered hypothecation bond, dated the 30th of June 1879, and executed by defendant No. 1 and his deceased father to Ayyasami Mudali to secure the repayment of a loan of Rs. 87, together with interest at 12 per cent. The plaintiff sued as the assignee of Ayyasami Mudali under an instrument, dated 17th May 1884, under which the secured debt then amounting, together with interest, to Rs. 137-14-0, had been assigned to him for Rs. 70. The last-mentioned instrument was not registered and the District Munsif held that it was invalid for that reason and dismissed the suit. The District Judge affirmed his decree.

The plaintiff preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Narasimhachariar, for respondents.

JUDGMENT.

We are of opinion that what was sold by Exhibit A was a debt secured by a charge upon immoveable property. [455] Such a debt is an actionable claim and the assignee will be entitled to a personal decree for the debt as well as to the charge. Under Section 8 of the Transfer of Property Act, the operation of the transfer of the debt is to pass to the transferee the securities for the debt, but what is sold is primarily not the charge but the debt. So far as the sale creates a charge in favour of the plaintiff it is a charge for Rs. 70 only, and falls within the provisions of Section 18 of the Registration Act. See *Satra Kumaji* v. *Visram Hasgavda* (1).

* Second Appeal No. 1551 of 1894.
(1) 2 B. 97.

1895 FEB. 14. — APPELLATE CIVIL. — 18 M. 454=5 M. L. J. 92.

Though it is true that the term "other intangible thing" in Section 54 of the Transfer of Property Act might include a charge, the expression must be construed with reference to its context and to the heading of the chapter The chapter relates to "sales of immoveable property," and the context classes "other intangible things" with "reversions" in contradistinction to tangible immoveable property

Though the language is not very clear it seems to us probable that the Legislature intended to distinguish between vested and contingent interests in immoveable property In the case of the latter all sales were made compulsorily registerable, but in the case of the former only sales of the value of Rs 100 and upwards The effect of this was to preserve the distinction created by Sections 17 and 18 of the Registration Act, and Section 54 was no doubt enacted with reference to those provisions

It would be very anomalous if the transfer of an hypothecation should require registration when the original hypothecation did not require it

Taking this view, we are of opinion that the registration of Exhibit A was not compulsory We reverse the decrees of the Courts below and remand the suit to the Court of first instance to be heard on the merits The District Munsif will provide for all costs hitherto incurred in his final decree

18 M 456.

[456] APPELLATE CIVIL

Before Mr Justice Muttusami Ayyar

KAILASA PADIACHI (*Plaintiff*), *Petitioner* v PONNUKANNU ACHI AND ANOTHER (*Defendants*), *Respondents* *

[1st and 2nd November, 1894]

Limitation Act—Act XV of 1877, Section 20—Payment of interest on a debt—Authority of a previous guardian of a debtor remaining in management after the debtor's majority.

The mother and guardian of an infant borrowed money for his expenses and executed a bond in 1886 to secure the repayment In a suit by the obligee in 1892 it appeared that the mother had remained in management of her son's affairs, and had paid interest on the debt, after he had attained majority and less than three years before the institution of the suit

Held, that the suit was not barred by limitation

[**R**, 30 A 422 (**F.B.**)=5 A L J 375=A W N (1908) 175=4 M L T 49, 11 C L J 484 (486)=14 C W N 741=5 Ind Cas 484, **D.**, 26 A 598=1 A L J 302=A W N (1904) 137]

PETITION under Provincial Small Cause Courts Act 1887, Section 25, praying the High Court to revise the proceedings of V Srinivasa Charlu, Subordinate Judge of Kumbakonam, in small cause suit No 1086 of 1892

Suit on a bond executed in 1886 by defendant No 1, the mother and guardian of defendant No 2, to secure a loan contracted for the expenses of defendant No 2 In bar of limitation the plaintiff relied on payments made by defendant No 1, which were evidence by endorsements on the bond, which were signed by her. These payments were made by her after her son attained majority, but while she still continued in the control and management of his affairs

* Civil Revision Petition No 928 of 1893

1894 Nov. 2. — APPELLATE CIVIL. — 18 M. 456.

The Subordinate Judge held that the claim is barred by limitation and dismissed the suit.

The plaintiff preferred this petition.

Krishnaswami Pillai, for petitioner.

Sankaranarayana Sastri, for respondent.

JUDGMENT.

It is conceded that but for the payment of Rs. 10 on account of interest made on the 22nd December 1889, the suit would be clearly barred; but it is contended that the Subordinate Judge is in error in holding that first counter-petitioner had no authority to make such payments. This contention, I consider, is well founded. The Subordinate Judge relies on the decision in [457] *Wajibun* v. *Kadir Buksh* (1), but that decision was dissented from *Chinnaya* v. *Gurunatham* (2), *Sobhanadri Appa Rau* v. *Sriramulu* (3) and *Bhasker Tatya Shet* v. *Vijalal Nathu* (4). The principle laid down in these cases is that a guardian is legally competent, in the ordinary course of management, either to acknowledge a debt due by his or her ward, or to make a part-payment, or to pay interest. This being so, the only question that arises for decision is whether the first counter-petitioner can be treated upon the facts found as a person duly authorized to pay interest on behalf of the second within the meaning of Section 20 of the Limitation Act. It is true that the second counter-petitioner had attained majority when the payment was made, but the Subordinate Judge finds that he allowed his mother to continue in management for sometime after he had become a major, and that the payment was made when she was so managing her son's affairs. The payment of interest accuring on an existing debt being an ordinary incident of management, I think it must be taken that the authority from the son to manage his affairs included an authority to make the payment. I may observe that Section 20 of the Limitation Act only requires that the payment should be made by an agent duly authorized. It is therefore immaterial that no special authority was given to her. I set aside the decree of the Subordinate Judge and direct that the second defendant do pay the plaintiff the amount sued for with interest at 6 per cent. per annum from date of plaint till date of payment and with costs.

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18 M. 457=5 M.L.J. 61.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SUBBANNA AND OTHERS (*Counter-Petitioners*), *Appellants v.* MUNEKKA (*Petitioner*), *Respondent*.* [29th and 30th October, 1894.]

Succession Certificate Act—Act VII of 1889, Section 4, sub-Section (2)—Debt—Unliquidated claim.

X, a Hindu, left some sheep with Y, who failed to return them. X having died, his widow applied for a succession certificate to enable her to sue Y for damages for wrongful detention of the sheep:

[458] *Held*, that no debt was owing by Y to X within the meaning of Succession Certificate Act, Section 4, sub-Section (2).

[R., 7 C.L.J. 658=12 C.W.N 145.]

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* Appeal against Order No. 86 of 1893

(1) 13 C. 292 (295). (2) 5 M 169. (3) 17 M. 221. (4) 17 B. 512.

APPEAL against the order of E J Sewell, District Judge of North Arcot, in miscellaneous petition No. 181 of 1892

1894 Oct. 30.

APPELLATE CIVIL.

18 M. 457 = 5 M. L. J. 61.

Petitioner was the widow of deceased Mobbu Venkataramanna and claimed a certificate to enable her to collect a debt due by one Beera Gowdoo to her husband on account of some sheep The petition was opposed by the brother and nephews of the deceased, who claimed that there had been no division of family property, and that petitioner was not entitled to a certificate It was also alleged that there is no debt due to Beera Gowdoo The petitioner alleged that four or five years before the death of her husband he left some sheep with Beera Gowdoo which were not returned, and now she set up a claim on account of her husband's estate for the value of the sheep

The District Judge directed a certificate to be issued to the petitioner as prayed

The brother and nephews of the deceased preferred this appeal

Narasimhacharìar, for appellants

Respondent was not represented

JUDGMENT

It is urged in support of this appeal that the money claimed from Beera Gowdoo by the respondent was not a debt due to Venkataramanna within the meaning of Act VII of 1889 This contention appears to me to be well founded The word ' debt ' is described in sub-Section 2 to Section 4 as including any debt except rent, revenue or profit payable in respect of lands used for agricultural purposes Though to constitute a debt it is not necessary that there should be a loan, still it is necessary that there should be a sum of money due by Beera Gowdoo to the deceased In the case before me the deceased left some sheep with Beera Gowdoo Beera Gowdoo failed to return the same. There is nothing in the evidence to show that the original transaction was any thing more than entrustment of the sheep for safe custody, and that Beera Gowdoo was under any obligation to pay a liquidated sum as the value of the sheep Any promise made to respondent to pay Rs 45 for its value would not make him a debtor to Venkataramanna The respondent was at liberty to sue Beera Gowdoo for damages either for wrongful detention of the sheep or, treating him as her debtor, sue him for the money promised to be paid to her as the value of the sheep Beera Gowdoo never [459] became a debtor to Venkataramanna within the meaning of the Act No certificate can, therefore, be granted to respondent under the Act (See *Narayan Bhau Bartake* v *Tatia Gonpatrao Deshmukh* (1))

I set aside the order of the Judge and dismiss the application for a certificate with costs.

(1) 15 B. 580

1894
DEC. 13.

APPELLATE CIVIL.

18 M. 459.

18 M. 459.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

DAIVACHILAYA PILLAI AND OTHERS (*Plaintiffs*), *Appellants v.* PONNATHAL AND OTHERS (*Defendants Nos.* 1, 3 *to* 29 *and* 31 *to* 48), *Respondents.** [13th December, 1894.]

Court Fees Act—Act VII *of* 1870, *Section* 17—*Suit by reversioners to declare various alienations by a Hindu widow to be invalid against them.*

When reversioners sue to have declared invalid as against them alienations made by a Hindu widow, a Court fee of Rs 10 must be paid in respect of each of the alienations in question

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 56 of 1893, confirming the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 15 of 1893.

The plaintiffs sued as reversionary heirs to have it declared that certain alienations made by defendant No. 1, the widow of the last male holder, were invalid as against them. The alienations in question were 42 in number, but a Court Fee stamp of Rs. 10 only was affixed to the plaint.

The Subordinate Judge rejected the plaint, an order by him to the effect that a Court fee should be paid in respect of each of the alienations in question not having been complied with. The District Judge concurred in his view of the Subordinate Judge.

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar, for appellants.

Mr. *E. Norton*, for respondents.

JUDGMENT.

[460] We are of opinion that the Judge's decision is correct. The point now raised as to whether a single fee of Rs. 10 is sufficient was not argued and considered in *Narayana* v. *Muttayan* (1).

We agree with the lower Courts that each separate alienation is a different subject within the meaning of Section 17 of the Court Fees Act. Though all such alienations may be included in one suit, according to the course of decisions in this Presidency, it does not follow that each alienation is not a separate subject requiring a separate Court fee. Each alienation creates a distinct right vesting in the alienee, and, therefore, when the reversioner seeks for a declaration that a number of distinct alienations are invalid, he must be held to be suing for that number of declarations. The test indicated in *Moti Singh* v. *Kaunsilla* (2) appears to us to contain the correct principle on which should be determined the question as to the number of declarations which are sought to be obtained in any particular suit.

We dismiss this appeal with costs.

* Second Appeal No 1256 of 1894

(1) 7 M. 134.

(2) 16 A. 308.

18 M 460.

APPELLATE CIVIL.

Before Mr Justice Best and Mr Justice Subramania Ayyar.

1895 March 20.

APPELLATE CIVIL.

18 M 460.

NARAYANASAMI GRAMANI (*Defendant*), *Appellant* v PERIATHAMBI GRAMANI (*Plaintiff*), *Respondent* *

[18th and 20th March, 1895]

Will—Devise of one kani out of an estate—Selection by the devisee

The owner of land, measuring one kani and three-quarters, died, leaving a will by which he devised one kani thereof to the plaintiff, who now sued to recover one kani selected by him out of the land in question

Held, that plaintiff had the right to make his selection and was entitled to a decree

SECOND appeal against the decree of W F Grahame, District Judge of South Arcot, in appeal suit No 297 of 1893, affirming the decree of K Rangamannai Ayyangar, District Munsif of Villupuram, in original suit No 76 of 1893

[461] Suit for possession of land described in the plaint and claimed under the devise quoted in the judgment of the High Court

The District Munsif passed a decree for the plaintiff which was affirmed on appeal by the District Judge

The defendant preferred this second appeal

Krishnaswami Ayyar, for appellant

Madhava Rau, for respondent

JUDGMENT

The plaintiff (respondent) is a devisee The clause of the will under which he claims runs thus —" one kani punja land in Ambili Mottu " Palla punja should be given to Periathambi (plaintiff), my elder sister s " son " The said plot Ambili Mottu Palla punja measures one and a three-quarters kanis The plaintiff sued for the possession of a particular portion measuring one kani out of the plot in question The District Munsif decreed the claim On appeal the District Judge, after rejecting the contention raised by the defendant, that the devise was void for uncertainty, confirmed the decree He, however, observed in his judgment that the plaintiff cannot be allowed to choose which particular part of the field he shall have, that the field must be divided into two portions, one containing one kani and the other containing the remainder of the field with reference to quality of soil and the plaintiff shall have the portion containing one kani

It is argued before us that the lower Courts should have dismissed the suit, as the plaintiff had no right to select and ask for a specific portion of the land as he does in the plaint

We think that the District Judge was in error in saying that the plaintiff was not entitled to ask for the particular portion of the land mentioned in the plaint In a case like the present the devisee has clearly the right to choose It has been long settled that " if a man " devises two acres out of four acres that lie together, this is a good " devise and the devisee shall select " (Jarmon on Wills, 5th Edition

* Second Appeal No 1520 of 1894

1895 MARCH 20. — APPELLATE CIVIL. — 18 M. 460.

page 331). In *Hobson* v. *Blackburn* (1) Leach, M.R., held that where a general grant was made of ten acres adjoining or surrounding a house, part of a larger quantity, the choice of such ten acres adjoining or surrounding was in the grantee and that a devise to the like effect was to be considered as a grant. In *Jacques* v. *Chambers* (2) Knight Bruce, V.C., laid down that where a testator leaves a number of articles of the same [462] kind to a legatee and dies possessed of a greater number, the legatee and not the executor has the right of selection. The same view was taken in *Tapley* v. *Eagleton* (3) where the testator who possessed three lease-hold houses in King Street, bequeathed two houses in that street without mentioning which two houses the legatee should take. Jessel, M.R., held that the legatee was entitled to elect which two he will take.

There is thus clear authority for holding that the decree of the Courts below is correct. The appeal fails and is dismissed with costs.

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18 M. 462=5 M.L.J. 187.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

KRISHNA PILLAI AND OTHERS (*Defendants Nos* 1, 3 *and* 6). *Appellants v.* RANGASAMI PILLAI AND OTHERS (*Plaintiff and Defendants Nos.* 2, 4, 5 *and* 7 *to* 13), *Respondents.**
[15th February, 1895.]

Mortgage—Redemption—Mortgage sued on not proved—Admission by defendants of mortgage by right

The plaintiff sued to redeem a kanom of 1859. The kanom was not proved, but it appeared that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. The Subordinate Judge held that the kanom to which the admissions related could not have been executed before 1823 which was less than sixty years from the date of some of the admissions and he passed a decree for redemption:

Held, that the plaintiff having failed to establish the kanom on which the suit was based should not have been allowed to fall back upon some other as to which the defendants had made the admissions in question.

[**F.**, 13 M.L.J. 274; 17 M.L.J. 122=2 M.L.T. 65; **R.**, 18 A. 403; 22 M. 259; 19 A.W.N. 132; **D.**, 19 M. 160.]

SECOND appeal against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 657 of 1893, reversing the decree of V. Kelu Eradi, District Munsif of Palghat, in original suit No. 452 of 1892.

Suit to redeem a kanom for Rs. 25 dated 1859. The District Munsif found that the land was held on kanom and that the plaintiff was the assignee of the jenm title: but he was of opinion [463] that the kanom of 1859 was not proved, and also that there was no proof that the kanom under which the defendants held the land had been granted within sixty years of the date of the suit. On the last-mentioned finding he dismissed the suit as barred by limitation. The Subordinate Judge agreed with the District Munsif except as to the last-mentioned finding. He held that the kanom under which the defendants held the land must have been dated not earlier than 1823 and that it had been admitted by the

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* Second Appeal No. 1480 of 1894.

(1) 1 My. and K. 571. (2) 2 Col., 435, 441. (3) L. R. 12 Ch. D. 683.

defendants within sixty years of that date, and therefore ruled that the suit was not time-barred He passed a decree as prayed

1895 FEB. 15.

APPELLATE CIVIL.

18 M. 462=5 M. L. J. 187.

The defendants preferred this second appeal

Subramanya Sastri, for appellants

Sankaran Nair, for respondent No. 1.

JUDGMENT.

The Subordinate Judge has agreed with the District Munsif in finding that the kanom sued on is not proved to be genuine. But he has, nevertheless, given plaintiff a decree on the ground that Exhibits A, B, C and D contain admissions of first defendant and his brother being kanomdar under those through whom plaintiff claims, and that these are admissions made within the statutory period so as to prevent the plaintiff's claim to redeem being time-barred We agree with West, J, in *Govindrav Deshmukh* v. *Ragho Deshmukh* (1) in holding that a plaintiff failing to establish the mortgage on which the suit was based should not be allowed to fall back upon some other as to which admissions may have been made by the defendants in other proceedings. In *Unnian* v. *Rama* (2), the decree was passed on a mortgage expressly pleaded and relied on by the defendant, so also in *Kunhi Kutti Nair* v *Kutty Maracar* (3).

We therefore set aside the decree of the Lower Appellate Court and restore that of the District Munsif.

Respondents must pay appellants' costs in this Court and in the Lower Appellate Court.

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18 M. 464.

[464] APPELLATE CIVIL

Before Mr Justice Parker

MUTHUSAMI AYYAR (*Plaintiff*), *Appellant* v NATESA AYYAR AND OTHERS (*Defendants Nos* 2, 3, 10 *and* 16), *Respondents* * [15th and 19th November, 1894.]

Civil Procedure Code—Act XIV of 1882, *Section* 231—*Application for partial execution of a decree*

A decree provided that the plaintiff should pay Rs. 304 for the costs of thirteen out of eighteen defendants Two of the defendants now sought to execute the decree in respect of their proportionate share of the sum so awarded Besides the plaintiff, two only of the other defendants were joined as parties to the proceedings

Held, that the application was not maintainable and should be dismissed

[R., 25 M 431, 1 N L R. 24]

APPEAL against the order of J. P. Fiddian, Acting District Judge of Trichinopoly, on execution petition No 178 of 1892

The applicants were defendants Nos. 2 and 3 in original suit No 50 of 1891, and they applied in execution to recover their share of the sum decreed to be paid by the plaintiff for the costs of these and certain others of the defendants. The other parties to these petitions were the plaintiff and defendants Nos 10 and 16 The other defendants entitled to share in the costs awarded by the decree were not parties to these proceedings

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* Appeal against Order No 125 of 1893

(1) 8 B 543. (2) 8 M 415. (3) 4 M. H. C. R. 359.

1894 Nov. 19.

APPELLATE CIVIL.

18 M. 464.

The District Judge ordered execution to be issued for Rs. 134 part of the sum claimed.

The plaintiff preferred this appeal.

Pattabhirama Ayyar, for appellant.

Seshagiri Ayyar, for respondents.

JUDGMENT.

The decree in original suit No. 50 of 1891 allowed one set of costs and vakil's fee (Rs. 304-6-3) to defendants Nos. 1-3 and 10-18, and this is an application by defendants Nos. 2 and 3 to execute for Rs. 152-2-0, which, they say, is their share of the vakil's fee. The application is resisted by defendants Nos. 10 and 16, who say that they have received the sum (Rs. 304-6-3) from plaintiff, and that the decree is satisfied and satisfaction recorded.

The District Judge stated that satisfaction of the decree had not been recorded, and all that had been done was to record the [465] petition of defendants Nos. 10 and 16. Refusing to recognize the alleged payment by plaintiff to defendants Nos. 10 and 16, he allowed defendants Nos. 2 and 3 to obtain fractional execution for Rs. 134, which he held to be their share.

Plaintiff appeals.

In support of the contention that defendants Nos. 2 and 3 are entitled to execute for their fractional share. I am referred to *Tarruck Chunder Bhuttacharjee* v. *Divendro Nath Sanyal* (1) and *Sultan Moideen* v. *Savalayammal* (2). On the other side *Kuthath Haji* v. *Bavotti Haji* (3) is referred to.

Section 231, Civil Procedure Code, is the only provision which enables one of several joint decree-holders to execute a decree without the rest joining in the application, and all that it enables him with the leave of the Court to do, is to apply to execute the whole decree for the benefit of them all. The Court can pass such order as is necessary for the protection of the interests of those who have not joined. In the two cases quoted—*Tarruck Chunder Bhuttacharjee* v. *Divendro Nath Sanyal* (1) and *Sultan Moideen* v. *Savalayammal* (2)—the application was to execute the whole decree. These two cases are authority for the proposition that if payment has been made out of Court to one of the joint decree-holders for the benefit of them all, the Court will recognize the payment and record satisfaction to the extent of that decree-holder's share, allowing the applicants to execute for the balance only.

In this case defendants Nos. 2 and 3 do not admit that any payment has been made out of Court. Had they applied for execution of the whole decree it might have been open to the Judge to determine what proportion of the amount was due to defendants Nos. 10 and 16 and record satisfaction of that amount, allowing petitioners to execute for the balance. But the decree does not award any specific sum as due to defendants Nos. 2 and 3, and it must be executed as a joint decree or not at all.

On this ground it appears to me that the order of the Judge allowing fractional execution was wrong.

The order must be set aside and the execution petition dismissed with costs.

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(1) 9 C. 831. (2) 15 M. 343. (3) 3 M. 79.

18 M. 466=5 M.L.J. 189.

[466] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar

1895 April 2.

APPELLATE CIVIL.

18 M. 466=5 M. L. J 189.

PETHAPERUMAL CHETTI (*Plaintiff*), *Petitioner* v. MURUGANDI SERVAIGARAN AND OTHERS (*Defendants*), *Respondents* *

[20th February, 12th March and 2nd April, 1895]

Civil Procedure Code Act XIV of 1882, *Sections* 13, 158—*Dismissal of suit for want of heirship certificate*—Res judicata

In a suit to recover principal and interest due on a bond executed by the defendants in favour of the plaintiff's father (deceased), it appeared that the plaintiff had previously brought a similar suit which was dismissed for the reason that the plaintiff produced no succession certificate

Held, that the previous proceedings did not bar the present suit

PETITION under Provincial Small Cause Courts Act, 1887, Section 25, praying the High Court to revise the proceedings of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in small cause suit No 1211 of 1893

The facts of the case are stated above sufficiently for the purpose of this report.

The Subordinate Judge held that the previous proceedings constituted bar to the present suit which he accordingly dismissed

The plaintiff preferred this petition.

Krishnaswami Ayyar, for petitioner

Tiagaraja Ayyar, for respondents

JUDGMENT.

The Subordinate Judge, being of opinion that the dismissal of the plaintiff's (petitioner's) previous suit No. 1158 of 1892 for non-production of a certificate of heirship was a dismissal under Section 158, Civil Procedure Code, has held that the plaintiff's present suit on the same cause of action is barred

The Subordinate Judge's decision is questioned on behalf of the plaintiff on two grounds —

The first is that, assuming, for argument's sake, that the dismissal was on account of the plaintiff's omission to produce a certificate, the case did not fall under Section 158, Civil Procedure Code

[467] Now the rejection of a suit to operate as a bar to the entertainment of a subsequent suit on the same cause of action must rest either on a statutory prohibition similar to that contained in Section 103, Civil Procedure Code, or on the principle of *res judicata*. But there is no specific provision in the Code laying down that a dismissal under Section 158 shall be a bar to a second suit on the same cause of action. It has, however, been held that when a Court, acting properly under Section 158, dismisses a suit, such dismissal is tantamount to *res judicata;* see *Venkatachalam* v. *Mahalakshmamma* (1) which was decided with reference to Section 148 of Act VIII of 1859, corresponding to Section 158 of the present Code. In that case Muttusami Ayyar and Parker, JJ , observed thus:—" As to the " contention that Section 148 did not expressly prohibit a second suit, it " should be remembered that it directed that the Court might proceed to " decide the suit notwithstanding the default constituting thereby the

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* Civil Revision Petition No. 125 of 1894.

(1) 10 M. 272.

1895 APRIL 2. — APPELLATE CIVIL. — 18 M. 466=5 M.L.J. 189.

" decision on the imperfect material on the record into a decree on the " merits, which, under Section 13, would bar a second suit. No express rule " of prohibition is inserted, because the decision is a decree on the merits " and not a mere judgment by default." Whether Handley and Weir, JJ., in *Shaik Saheb* v. *Mahomed* (1) intended to throw any doubt on *Venkatachalam* v. *Mahalakshmamma* (2) is not quite clear. However that may be, I must follow the construction adopted in the latter* case. Now, as a decision under Section 158, though passed on imperfect materials, is yet to be treated as one on the merits, no decision can be held to have been arrived at under that section unless the circumstances of the case were in point of law, such as to permit the Court to pronounce on the merits, had the necessary materials for doing so been before it. But the non-production of a certificate of heirship is not failure to adduce evidence in a case where a Court is at liberty to determine the merits, but an omission to do that without which the tribunal is precluded from entering into the merits at all. Consequently the dismissal of a suit for such a cause cannot be taken as a decree under Section 158. The present case is analogous to *Putali Meheti* v. *Tulja* (3), where West and Pinhey, JJ., ruled that the rejection of a previous suit for the plaintiff's omission to produce a certificate of the Collector under Section 6 of the Pensions Act did not [468] bar a second suit on the same cause of action, West, J., said:—" When a suit has " failed through a formal defect, and the merits have not been so pronoun- " ced on as to constitute a legal relation resting on the act of the Court, " another suit is not, by the English law, barred. This rule is consonant " to justice and agrees with the law as set forth in the Code of Civil " Procedure."

It cannot be said that the analogy between a case where a plaintiff omits to produce the Collector's certificate under the Pensions Act and a case where he fails to produce a succession certificate required by Act VII of 1889 is incomplete, because in the former case the absence of the Collector's certificate prevents a Court from taking cognizance of the claim (Section 6 of Act XXIII of 1871), whereas in the latter, a Court is precluded from passing a decree except on the production of a certificate (Section 4, Act VII of 1889). For, in *Nawab Muhammad Azmat Ali Khan* v. *Mussumat Lalli Begam* (4), it was held by the Privy Council that a suit relating to a grant of property within the meaning of the Pensions Act need not be dismissed, because no certificate had been obtained before the commencement thereof. And even this decision apart, it appears to me that the real effect of a failure to produce a certificate in either case, whether such production should take place at the institution of a suit or at some later stage, is to prevent a Court from pronouncing on the merits so as to render its decision an adjudication having the force of *res judicata*. I think, therefore, that the dismissal of the petitioner's suit of 1892, assuming that it was due to his omission to produce a succession certificate, is not a bar to the present claim.

This being my view it is unnecessary to consider the other contention raised by the petitioner, *viz.*, that the Subordinate Judge was wrong in holding that time had been granted to him within the meaning of Section 158,—even if that section were held applicable to the circumstances of the suit of 1892.

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* [" latter " seems to be a misprint for " former "—ED.]

(1) 13 M. 510 (2) 10 M. 272. (3) 3 B. 223. (4) 9 I.A. 8.

The decree of the Subordinate Judge is set aside and the suit should be restored to the file and dealt with according to law. The costs of this petition will abide and follow the result and be provided for in the revised decree.

1895 April 2

Appellate Civil.

18 M. 466=5 M.L.J. 189.

18 M. 469.

[469] APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

TIRUMALAYAPPA PILLAI AND OTHERS (*Plaintiffs Nos 1 and 3 to 5*), *Appellants v* SWAMI NAIKAR (*Defendant*), *Respondent.**
[22nd August, and 13th November 1894]

Revenue Recovery Act (Madras)—Act II of 1864, Section 38—Revenue Recovery Amendment Act (Madras)—Act III of 1884, Section 1 (5)—Revenue sale—Benami purchaser—Suit by benamidar to eject tenants

Land forming part of the endowment of a chattram was brought to sale for arrears of revenue and was purchased by the plaintiffs who now sued to eject the tenants who were in occupation of the land·

Held, (1) that the defendants were entitled to plead that the plaintiffs had purchased *benami* from the managers of the chattram,

(2) that the above plea having been substantiated, the plaintiffs were not entitled to maintain the suit.

[F., 28 M 526=15 M L J. 419, 29 M. 473=16 M.L.J 505=1 M L T. 234; **Expl.**, 25 M 655]

SECOND appeal against the decree of S Gopalachariar, Subordinate Judge of Tinnevelly, in appeal suit No 512 of 1891, affirming the decree of V Swaminadha Ayyar, Additional District Munsif of Tinnevelly, in original suit No 272 of 1890.

The plaintiffs sued to eject the defendants from certain land in their occupation The land in question was, up to the date of the revenue sale hereinafter mentioned, part of the endowments of a chattram having been constituted such by the ancestor of a family referred to as the Dalavoy Mudaliars, and the patta for the land stood in the name of the hakdars or managers of the chattram, who were the descendants of the founder, The defendants were in occupation as tenants of the hakdars The revenue due on the land having fallen into arrears, the land was brought to sale under the Revenue Recovery Act on 22nd June 1879 and purchased by Appasami Mudaliar who sold it on 4th September 1888 to Kuthalalinga Mudaliar, and the plaintiffs claimed title from the latter under a sale-deed, dated 19th February 1890

The defendants pleaded that they had a right of permanent occupancy and also that the purchase by Appasami Mudaliar was *benami* for the hakdars who had fraudulently permitted the kist to fall into arrears and purchased the land in the name of one of [470] their defendants, and further that the subsequent conveyances under which the plaintiffs claimed title were also fraudulent.

The District Munsif found that the purchase at the revenue sale was *benami* as pleaded, and with regard to the subsequent sale-deeds he said:— "I entertain no doubt that they were passed only nominally." On

* Second Appeals Nos 1008 to 1027 of 1893.

1894 Nov. 13. — APPELLATE CIVIL. — 18 M. 469.

these findings he ruled on the authority of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sen* (1) and *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (2) that the plaintiffs were not entitled to maintain the suit. He also held that the defendants had a right of permanent occupancy and he passed a decree dismissing the suit.

On appeal the Subordinate Judge expressed his concurrence in the finding that the purchase at the revenue sale was *benami* and held that the alleged subsequent vendees had paid no consideration for their respective conveyances. He ruled that the plaintiffs were precluded by these circumstances from maintaining the suit, as to which question he cited *Gopeekrist Gosain* v. *Gungapersaud Gosain* (3), *Dharani Kant Lahiri Chowdhry* v. *Kristo Kumari Chowdhrani* (4) and *Chinnan* v. *Ramachandra* (5).

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar, for appellants.

Rangachariar, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—In these connected appeals, appellants are the ostensible purchasers at revenue sales or their nominal vendees, and respondents are tenants in possession of the lands put up to sale. The lands in question are Karisal punja in the village of Theevasilapuram, which is one of the ten villages forming the endowment of a chattram founded at Seenalpari by an ancestor of the Dalavoy Mudaliars. They are separately assessed and registered in the Collector's accounts in the names of the managers or hakdars of the chattram, who are descendants of its founder. The plaintiffs' case was that, as purchasers at revenue sales or as persons claiming under them, they were entitled to eject the tenants in possession. On the other hand, the tenants contended, *inter alia*, that the plaintiffs purchased *benami* for the hakdars; that as mere *benamidars*, they were not entitled to maintain the suits in their own names; that the tenants had a right of [471] permanent occupancy and that the revenue sales were the result of a fraudulent conspiracy between the hakdars and the purchasers designed to procure the eviction of the tenants. The District Munsif upheld the tenant's contention and dismissed the suits with costs. On appeal, the Subordinate Judge confirmed his decision, but rested it on the sole ground that the plaintiffs were mere *benamidars* and that, as such, they could not maintain the suits. To this decision five objections are taken. The first of them is, that there is no evidence on record to show that the purchases were made *benami*. I attach no weight to it, as there is ample evidence on the point and as the Subordinate Judge discusses it at some length in his judgment. Another objection is that the onus of proof was erroneously thrown on the plaintiffs. This is also not tenable as the Subordinate Judge distinctly states in paragraph 8 of his judgment that the onus of proof is on the defendants.

The next objection is that, assuming that the purchases were made *benami*, still it is competent to plaintiffs to sue in their own names, but, as observed by the Subordinate Judge, a *benamidar* could not maintain the suit, there being no intention that the property—the subject-matter of the suit—should vest in him. It must also be noted that these suits

(1) 3 W. R. 159. (2) 16 C. 364. (3) 6 M.I.A. 53 (72).
(4) 13 C. 181=13 I.A. 70. (5) 15 M. 54.

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were instituted on their own account Nor is there any foundation for the contention that Exhibit XXIV has been misconstrued. The substantial question is, whether respondents are entitled to plead that the purchase, at a revenue sale, is made *benami*. It is provided by Act III of 1884 that a certificate issued to the purchaser under the Revenue Recovery Act shall be conclusive evidence of the fact of the purchase in all Courts and tribunals. But a greater effect cannot be given to this provision than is given to a similar provision in the case of *benami* purchases at execution sales. With reference to them it has been held that though the true owner cannot maintain a suit against a certified purchaser under Sections 316 and 317 of the Code of Civil Procedure, yet third parties are not thereby precluded from urging their claims against the true owner in respect of the property purchased as *benami* The Subordinate Judge is therefore right in holding that the *benamidars* and their nominal vendees are not entitled to maintain these suits which are in the nature of ejectments on their own account

These second appeals fail and I would dismiss them with costs.

SHEPHARD, J —I concur.

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18 M. 472.

[472] ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

IN THE MATTER OF NAGAPPA CHETTI, AN ALLEGED LUNATIC *

[14th August, 1895]

Lunatic—Act XXXIV of 1858*—Enquiry into alleged lunacy—Degree of unsoundness of mind*

A Hindu, who had acquired considerable assets without any ancestral property, lived with one of his wives and his eldest son who managed the property A younger son, who lived apart with his mother, made an application to the High Court alleging that his father was a lunatic and praying that he be declared to be so, and that a committee be appointed under Act XXXIV of 1858, and that the eldest son be directed to deliver the property to the committee It was found on the enquiry held under the above Act, that the alleged lunatic had for many years now and then been for short periods in such a state of mind as to render it right to detain him at home, and that he now had about him that which when aroused by the recollection of past losses or by the recurrence of family quarrels might produce mental derangement, but that he was of sound mind at the dates of the above application and of the enquiry

Held, that the application should be dismissed

Per curiam. The eldest son should give to those who would be co-heirs with him to his father a fair opportunity of satisfying themselves that his management is open to no question and that nothing is done to their detriment

Distinction between lunacy with lucid intervals, and a state of sound mind, subject to occasional unsoundness arising from accidental and temporary causes, considered.

PETITION under Act XXXIV of 1858 for a declaration of lunacy and the appointment of a committee.

The petitioner was one Singaravelu Chetti, and the prayers of his petition were as follows.—

" (a) That an enquiry be held into the lunacy of Mandi Nagappa Chetti residing at No. 4, Sivaraman Street, Triplicane.

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* Application under Act XXXIV of 1858

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(*b*) That it be declared that the said M. Nagappa Chetti is of unsound mind and incapable of managing his affairs.'

(*c*) That a committee be appointed to take charge of the estate and effects of the said M. Nagappa Chetti.

(*d*) That M. Kuppusami Chetti, a son of the said lunatic, now in charge and managment of all the real and personal estate of the said lunatic, be removed and he be directed to deliver to the committee so appointed all the immoveable properties, cash, books [473] of account, documents and papers of any kind whatsoever relating to, or any way connected with, the said estate.

(*e*) The said M. Kuppusami Chetti be also directed to give a true account to the said committee of the managment by him for the past several years since the said M. Nagappa Chetti became lunatic.

(*f*) The Court will be pleased to declare the persons entitled to be provided for from and out of the said estate and their respective amounts payable to them from time to time for their maintenance."

Mr. *G. P. Johnstone*, for petitioner.

Seshagiri Ayyar, for the alleged lunatic.

JUDGMENT.

This is an application under Act XXXIV of 1858 for a declaration that one Nagappa Chetti is of unsound mind incapable of taking care of himself and his property, and for the appointment of a committee to take charge of his person and his estate

Nagappa married two sisters, of whom the mother of the petitioner is the second wife. whilst the mother of the counter-petitioner is the first wife. The petitioner is the second of Nagappa's three sons, of whom the counter-petitioner is the eldest.

The petitioner called three witnesses, who are some of the neighbours of Nagappa. The first witness, Muttusami Naidu, stated that the witness has known Nagappa for the last ten or twelve years, that he has for many years been subject to periodical mental derangement, that on such occasions he goes about interfering with people passing along the streets and behaving otherwise in an eccentric manner, that when this is the case he is locked up in his house until he gets better again, and that the last time he was so confined was about twenty days ago when the witness found Nagappa near the Triplicane Tank giving trouble to the people there and took him to the counter-petitioner, who kept him in confinement for two or three days. In cross-examination the witness admitted that he and the counter-petitioner have been on unfriendly terms for about a year, that the counter-petitioner obtained a decree against him for Rs. 17-8-0 and took out a warrant for his arrest, and that the witness still owes Rs. 15 under the decree, though the counter-petitioner had allowed him to pay at the rate of Rs. 5 a month. With reference to the last occasion when the witness said he took part in seeing Nagappa placed under restraint, he [474] contradicted himself and stated that this was not twenty days ago as he stated in the examination-in-chief, but more than a year ago. The witness' description of what Nagappa did on the occasions when he suffered from his malady appears to be exaggerated. The second witness Loka Razu, stated that Nagappa has been for the last ten years suffering from periodical attack of insanity, that it appears once or twice in a month and lasts for a few days, during which time he is shut up in the house. The witness admitted that he got a loan of Rs. 560 through the intervention of the counter-petitioner some time ago, that

he was called upon to return the money, but he has not yet repaid it. The third witness, Kandasami Mudali, stated that during the last six years Nagappa has been conducting himself as if he was not altogether of sound mind, and that he has noticed Nagappa making a noise, singing songs, distributing fruits and cocoanuts to people passing in the street, and taking them back All the three witnesses admitted that when Nagappa is not labouring under the periodical attacks, he is of sound mind. This is the whole of the evidence in support of the application.

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Now Nagappa himself appeared before me and was examined at considerable length by Mr Johnstone who appeared on behalf of the petitioner. Nagappa's answers were clear and perfectly natural, and not even the slightest trace or indication of any unsoundness of mind could be detected during the whole time Nevertheless I have no doubt that Nagappa has during many years now and then been for short periods in such a state of mind as to render it prudent and advisable on such occasions to detain him in the house, and this seems to be practically admitted in paragraph 22 of the counter-petitioner's affidavit

There is nothing in the evidence to throw any light on the origin of the distemper from which Nagappa has been suffering But I infer from Nagappa's own statements that the losses which he had sustained in connection with certain speculative transactions in Government paper carried on by him many years ago affected his mind Domestic troubles, which a man indulging in the folly of having more than one wife at a time thereby sometimes brings upon himself, may have had something to do with some of the attacks he has had (see paragraph 6, counter-petitioner's affidavit)

In dealing with a matter like this, assuming that the party alleged to be a lunatic is really so, the evidence may be considered [475] firstly, with reference to the circumstances connected with his health and personal comfort and the way in which those with whom he has been residing up to the time of the application have been treating him, and, secondly, with reference to the existing arrangements as to the management of his property As to the former, Nagappa is a strong man, apparently in the enjoyment of excellent health, though he is now sixty years of age He lives with his first wife and his eldest son in one house, whilst the petitioner and his mother live in the adjoining house, due provision having been made by Nagappa for the proper maintenance of both the households There is absolutely no evidence that Nagappa's personal wants have not been carefully attended to On the other hand, he stated, and I think truly, that under the protection of those with whom he lives he feels quite comfortable As to the second point, it is admitted on both sides that Nagappa started without any ancestral property and acquired the large estate which now belongs to him. This itself is very good evidence of Nagappa's natural shrewdness and capacity He is able to read and write, and informed me that he could, if necessary, look into the management of his affairs and ascertain for himself whether it was going on all right. He further stated that his reasons for allowing the counter-petitioner to manage his property are that he is trustworthy and has had experience, having been associated with (Nagappa) himself for many years in looking after the business which they together carried on before. He complained that the petitioner has been instigated to prefer the present application by persons who wished to create dissensions in the family, and wished that nothing should be done to disturb the present

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arrangements. In this connection I may also observe that there is not a title of evidence to show that the counter-petitioner has betrayed the trust reposed in him by his father; or has done anything to the prejudice of the petitioner.

In these circumstances the question is whether there is ground for my interference under the Act. The present case appears to be somewhat like *In the matter of J. B.* (1), where a distinction was drawn by Lord Cottenham, L. C., between lunacy with lucid intervals which presupposes a continuing melady, and a state of mind subject to occasional unsoundness arising from accidental [**476**] and temporary causes. There one of the witnesses, under whose care the supposed lunatic lived for twenty years and who was called against the issue of the commission, stated "there has been no delusion of late, but I think him liable to a relapse at "any moment; also that, since the year 1822, there have been long lucid "intervals, but there were seeds of the disease which might have "readily existed and which would have rendered his discharge impru-"dent." Another witness stated:—"I should suppose B to be a man of "sound mind from my observation of him. . . . . ' but "strong excitement, particularly from liquor, would no doubt produce "mania." Notwithstanding these statements, the Lord Chancellor refused to issue a commission, observing as follows:—"That Mr. B. is a person of "weak understanding is clear; that he has got that about him which, "when he is in liquor or labouring under other excitement, is readily "roused into mental unsoundness, there seems no doubt: but that he is "at this moment, and that even at the date of inquisition, he was free "from such affection and was of sound mind is, I think, the fair result "of the evidence before the jury and shall more of the affidavits now "before the Court."

In like manner, I here arrive at the conclusion, that Nagappa has about him that which, when aroused by the recollection of his past losses or by the recurrence of family quarrels, may produce mental derangement, but that he is now of sound mind, and that the evidence produced does not show that he was otherwise when this application was filed.

I must, therefore, disallow the petition, and, in doing so, I wish to observe that it is but just and proper that the counter-petitioner should give his brothers a fair opportunity of satisfying themselves by inspecting the accounts or otherwise, that his own management is open to no question, and that nothing is done by him to the detriment of those who would be co-heirs with him to Nagappa's estate: (see *In the matter of the petition of Bhoopendra Narain Roy* (2)).

I dismiss the petition, but, in the circumstances, without costs.

Narasimhachariar, attorney for petitioner.

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(1) 1 Myl. & Cr. 538. (2) 6 C. 539 (543).

18 M. 477.

[477] APPELLATE CIVIL.

Before Mr Justice Shephard and Mr Justice Best

1895 JULY 26. APPELLATE CIVIL. 18 M. 477.

RANGASAMI NAIDU (*Defendant*), *Appellant v.* VIRASAMI CHETTI (*Purchaser*), *Respondent.** [26th July, 1895]

Civil Procedure Code—Act XIV of 1882, Section 310A—Civil Procedure Code Amendment Act—Act V of 1894,—Application of Act V of 1894 when proceedings in execution had commenced before its enactment

A house of the judgment-debtor, having long previously been attached in execution of a decree, was brought to sale on the 9th of March 1894, that is, shortly after the enactment of Act V of 1894. The judgment-debtor now applied under Civil Procedure Code, Section 310A, that the sale be set aside

Held, that the provisions of Act V of 1894 whereby the above-mentioned section was added to the Civil Procedure Code were applicable to the case.

[R., 23 B 450 (452)]

APPEAL against the order of P Srinivasa Rau, Judge of the Madras City Civil Court, dated the 26th of April 1892, and made on civil miscellaneous petition No 160 of 1894.

A decree having been passed in original suit No 4528 of 1892 on the file of the Small Cause Court, Madras, a house, the property of the judgment-debtor, having been attached long previously was brought to sale in execution on the 9th of March 1894. Act V of 1894 having been passed on the 2nd of March 1894, the judgment-debtor now applied under Section 310A, added by that Act to the Code of Civil Procedure, that the sale should be set aside and brought into Court the amount payable to the decree-holder as well as the percentage due to the purchaser The purchaser alone resisted the application The Judge dismissed the application on the ground that Act V of 1894 was inapplicable to the case under the rule "*nova constitutio futuris formam imponere debet non præcritis,*" and he referred to *Chinto Joshi* v *Krishnaji Narayan* (1) and *Narandas* v *Bai Manchha* (2)

The defendant preferred this appeal

Balaji Rau, for appellant

Sundaram Sastri and *Kumarasami*, for respondent.

JUDGMENT

[478] In our opinion there is in this case no question of a retrospective effect being given to a new provision of law When the Act V of 1894 came into effect there was no purchaser in existence The new law was passed before the purchase was made and the purchaser must take subject to its provisions

We agree with the opinion expressed by Petheram, C. J., at the end of his judgment in *Girish Chundra Basu* v *Apurba Krishna Dass* (3)

We must reverse the order of the Judge and remand the matter for disposal.

The respondent must pay the appellant's costs.

* Appeal against Order No 94 of 1894

(1) 3 B. 214. (2) 3 B. 217. (3) 21 C. 940 (955)

1895 JULY 12. APPEL-LATE CIVIL. 18 M. 478.

18 M. 478.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

NARASIMHA NAIDU (*Defendant No.* 2), *Appellant v.* RAMASAMI AND OTHERS (*Plaintiffs and Defendant No.* 1 *and First Plaintiff's Representative*), *Respondents.**

[12th July, 1895.]

Limitation Act—Act XV of 1877, Schedule II, Article 12—Suit to set aside Court sale—Suit for land sold in execution as property of third parties.

The plaintiffs sued in 1893 to recover possession of land of which their family had been in possession till 1884. The land had been sold to the defendant in 1881 in execution of a decree against the plaintiff's cousins, but the sale had not been confirmed. A decree was passed as prayed in respect of a moiety of the land which represented the plaintiffs' share.

Held, that the decree was right.

Quære:—whether the suit would have been barred under the one year's rule of limitation if the sale had been confirmed. *Suryanna* v. *Durgi* (7 M. 258) doubted.

[F., 1 L.B.R. 53 (54): R., 14 O.C. 343 (351)]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 328 of 1893, affirming the decree of K. Rama Rau, District Munsif of Bezwada, in original suit No. 96 of 1892.

[479] Suit for possession of land. The land in question had belonged to the family of the plaintiffs which remained in possession till 1884. In 1881 it was attached and brought to sale in execution of a decree against some members of the family who were cousins of the plaintiff and was purchased by defendant No. 2 to whom defendant No. 1, a tenant on the land attorned in 1884. The sale to defendant No. 2 was not confirmed and no certificate was issued to him.

The District Munsif held that the plaintiffs were entitled to a moiety of the land in question and passed a decree accordingly. The District Judge affirmed this decree.

The defendant preferred this second appeal.

Pattabhirama Ayyar, for appellant.

Narayana Rau, for respondent No. 4.

JUDGMENT.

We think it must be taken to be found that the property originally belonged to the plaintiffs' family and that it remained in their possession till 1884. It is true that there is no explicit finding on this latter point by the Lower Appellate Court, but this objection is not taken in the memorandum of appeal to this Court, and even in the Lower Appellate Court the contention raised in the fourth ground of appeal is consistent with the facts above stated. In 1881 in execution of a decree against some members of the plaintiffs' family the property was sold and purchased by the defendant who now appeals, and it is contended that the suit falls under the 12th Article of the Limitation Act, and is therefore barred by limitation. We are referred to *Suryanna* v. *Durgi* (1) in which

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* Second Appeal No. 1298 of 1894.

(1) 7 M. 258.

it seems to have been held that a stranger to the decree whose property is sold in execution of it must bring his suit within the year. If it were necessary to decide the question, we should refer it to a Full Bench, for the decision seems to us doubtful and we are inclined to think that the reasoning in *Parekh Ranchor* v *Bai Vakhat* (1) is more correct. A stranger whose property is sold behind his back without any authority does not need to have the sale set aside.

1895 JULY 12 — APPEL-LATE CIVIL. — 18 M. 478.

There is, however, nothing to show that the sale was ever confirmed and therefore the point does not arise

The appeal is dismissed with costs.

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18 M. 480.

[480] APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt., Chief Justice and Mr Justice Parker

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BARU KUTTI (*Appellant in Second Appeal No* 968 *of* 1894), *Petitioner v.* MAMAD AND ANOTHER (*Respondents in Second Appeal No* 968 *of* 1894), *Respondents.** [18th March and 2nd April, 1895.]

Civil Procedure Code—Act XIV of 1882, Section 623—Review of judgment on second appeal—Alleged discovery of new and important documentary evidence.

In a suit on a mortgage it was held by the Lower Appellate Court and by the High Court, on second appeal that the properties comprised therein were under attachment at the time of its execution, and that it was accordingly void under Civil Procedure Code, Section 276, as against the claims of judgment-creditors enforceable under the attachment The plaintiff, who was the appellant on second appeal, sought a review of the judgment pronounced therein on the ground of the discovery of new and important documentary evidence from which it would appear that the properties in question were not under attachment at the date of the mortgage:

Held, that the application for review could not be entertained for the reason that the ground relied upon could not be successfully relied upon on a second appeal.

[F., 31 M. 415, 10 M L J. 134 (136). R., 32 A. 71 (73)=6 A L.J 979=4 Ind Cas 809.]

PETITION under Civil Procedure Code, Section 623, for a review of the judgment of the High Court in second appeal No 968 of 1894 preferred against the decree of A Thompson, District Judge of North Malabar, in appeal suit No 302 of 1893, reversing the decree of V. Raman Menon, District Munsif of Quilandy in original suit No. 262 of 1892.

The petitioner was the appellant in the second appeal. He sought a review of judgment averring that that case was decided against him for the reason that that Court held that an instrument of mortgage, under which he claimed as plaintiff and appellant, was executed during the continuance of an attachment on the land comprised therein, and was therefore invalid under Civil Procedure Code, Section 276, as against the claims of the judgment-creditors enforceable under the attachment, and alleging that he had since discovered new and important documentary evidence from which [481] it would appear that the property in question was not under attachment at the date of the mortgage in question.

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* Civil Miscellaneous Petition No. 1339 of 1894.

(1) 11 B. 119 (123).

1895 APRIL 2. — APPELLATE CIVIL. — 18 M. 480.

Mr. *H. G. Wedderburn* and Mr. *C. Krishnan*, for the petitioner.

Mr. *K. Brown* and *Govinda Menon*, for respondent.

JUDGMENT.

This is an application to review the judgment of this Court in second appeal No. 968 of 1894 on the ground of the discovery of new and important evidence. It is objected that the application cannot be entertained inasmuch as the ground relied upon in the application for review could not be successfully relied on in the second appeal itself. (*Jackammal* v. *Palneappa Chetti* (1)).

That decision was passed in 1870 under the old Procedure Code VIII of 1859, but the High Court of Calcutta took the same view and on the same grounds; see *Bhyrub Nath Toee* v. *Kally Chunder Chowdhry* (2), *Panchanan Mookerji* v. *Radha Nath Mookerjee* (3) also *Ex-parte Bashyagarulu Nayudu* (4).

The decision in *Pandu* v. *Devji* (5) was passed under the Procedure Code of 1877, which is identical with the present Code. It was pointed out that Section 376 of Act VIII of 1859 was practically similar to the present Section 623; but, as the second appeal was pending and had not been decided, the Court permitted it to be withdrawn in order that application might be made to the Lower Appellate Court for a review founded on the discovery of the new evidence.

But in this case the second appeal has been heard and decided, and we can no longer permit the appeal to be withdrawn. Nor could we in second appeal admit evidence of fact which was not before the Lower Appellate Court, whether it would be still open to the petitioner now to move the Lower Appellate Court to admit the new evidence is not a point which it is necessary for us here to decide.

We see no ground to question the correctness of the decisions quoted above which appear to us to be based on sound reason and good law.

The other grounds put forward appear to relate to matters already decided in the appeal We must dismiss the petition with costs.

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18 M. 482.

[482] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KUPPU AMMAL (*Plaintiff*), *Appellant v.* SAMINATHA AYYAR (*Defendant No.* 3), *Respondent.** [13th March, 1894.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 179, *Clause* (6)—*Application for execution of maintenance decree—Previous applications held to be barred by limitation—Civil Procedure Code—Act XIV of* 1882, *Section* 13—Res judicata.

On an application made in 1891 for the execution of a decree passed in 1870, it appeared that the decree directed the payment of maintenance to the plaintiff annually on a specified date, and the present application related to the period of three years from 1888 to 1891. There had been an application for execution in 1873. The next application was made in 1879 and it was dismissed as being barred by limitation:

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* Appeal against Appellate Order No. 73 of 1892.

(1) 5 M.H.C.R. 464. (2) 16 W.R. 112. (3) 4 B.L.R. App. Cases, 213.
(4) 1 M.H.C.R. 254. (5) 7 B. 287.

Held, (1) that the question whether the application was barred by limitation was not *res judicata;*

(2) that the application was not barred by limitation.

1894 MARCH 13. APPELLATE CIVIL. 18 M. 482.

SECOND appeal against the order of J A. Davies, District Judge of Tanjore, in appeal against order No. 70 of 1892, affirming the order of P. Subramania Pillai, District Munsif of Mayavaram, in execution petition No. 70 of 1892

This was a petition under Civil Procedure Code, Sections 234 and 269, praying that defendant No. 3 be brought on to the record of original suit No. 2 of 1869 as the representative of defendant No 1, deceased, and applying for the execution of the decree in that suit in respect of Rs 103-14-0, being the amount of maintenance payable under its terms to the petitioner, who was the decree-holder, for the period of three years, from the 26th February 1888 to the 26th February 1891

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

The application was dismissed in the Lower Courts as being barred by limitation

The petitioner preferred this second appeal.

Krishnaswami Ayyar, for appellant.

Seshagiri Ayyar, for respondent

JUDGMENT

[483] The decree sought to be executed directed payment of maintenance annually on a specified date It was passed in 1870 when Act XIV of 1859 was in force There was an application for execution in 1873, which was within three years from date of the decree The next application was not made till 1879 The Limitation Act then in force was No XV of 1877 That application was dismissed as being time-barred The present application was made in 1891 It has been held by the Courts below that the question of limitation is *res judicata* by the previous decisions and also that this application is barred by lapse of time Therefore the questions are·

(1) Whether the question is *res judicata*, and (2) whether this application is time-barred.

As to the first question we are of opinion that the present claim is not *res judicata*, as the relief now claimed is distinct from that previously claimed The two appilcations are for money payable for two distinct periods The former decision is not sufficient to render the present claim *res judicata;* it can only affect the relief then claimed The present application is clearly governed by Act XV of 1877, the law in force when it was made. It is an application falling under Article 179, Clause 6 of Schedule II of the present Act, which allows of execution for maintenance accruing due on specified dates within three years.

Our attention has been drawn to the decision of the Privy Council in *Mungul Pershad Dichit* v *Grija Kant Lahiri Chowdhry* (1), and to that of the Bombay High Court in *Manjunath Badrabhat* v *Venkatesh Govind Shanbhog* (2). But as pointed out in *Jugmohun Mahto* v *Luchmeshur Singh* (3) *and Beoharam Dutta* v. *Abdul Wahed* (4), the decision of the Privy Council proceeded solely on the language of Section 1 of Act IX of 1871, which was repealed by Act XV of 1877. This latter Act contains no

(1) 8 I A 123 (2) 6 B 54 (3) 10 C. 748 (4) 11 C. 55.

1894 March 13. — Appellate Civil. — 18 M. 482.

language excluding from its operation proceedings in suits instituted prior to its coming into force.

We set aside the order of the Courts below, and remand the case for disposal according to law.

The respondent must pay appellant's costs in this Court and in the Lower Appellate Court.

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18 M. 484.

[484] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

THURAI RAJAH (*Appellant, in Appeal No. 23 of* 1884), *Petitioner v.* JAINILABDEEN ROWTHAN (*Respondent, in Appeal No. 23 of* 1884), *Respondent.** [25th February and 7th March, 1895.]

Limitation Act—Act XV of 1877, Sections 7, 12, Schedule II, Article 177—Civil Procedure Code—Act XIV of 1882, Sections 596, 598, 599—Application to admit appeal to Privy Council—Disability by reason of minority—Deduction of time.

In 1885 the High Court in appeal passed a decree to which a minor under the Court of Wards was a party. Having attained his majority in 1894 he sought to appeal to Her Majesty in Council and presented an appeal within six months of the date when he attained majority. On an application under Civil Procedure Code, Section 598:

Held, that the application was barred by limitation.

[**Rel.,** 4 Ind. Cas. 1002 (1003)=144 P.W.R. 1909; **R.,** 3 C.W.N. 24.]

PETITION presented under Civil Procedure Code, Section 598, praying for the grant of a certificate to enable the petitioner to appeal to Her Majesty in Council against the decree of the High Court in appeal No. 23 of 1884, modifying the decree of A. J. Mangalam Pillai, Subordinate Judge of Tanjore, in original suit No. 85 of 1882.

The appellant in that case was a minor under the Court of Wards at the date of the decree, namely the 20th of January 1885, and he did not attain majority until less than six months before the presentation of the appeal to which the present application related. The application was resisted on the sole ground that it was barred by limitation.

Ramachandra Rau Saheb and *Ramakrishna Ayyar,* for petitioner.

Bhashyam Ayyangar and *Desikachariar,* for respondent.

JUDGMENT.

This is an application to admit an appeal to Her Majesty in Council from the decree of this Court in appeal No. 23 of 1884. The decree was passed on January 20th, 1885. The appellant was at that time a minor under the Court of Wards. No appeal was preferred by the Court of Wards or by any other [485] person on the minor's behalf, but this appeal is presented within six months of the minor's attaining majority. It is objected that the application to admit the appeal is barred, though not denied that in other respects the requirements of Section 596, Civil Procedure Code, would be satisfied.

Article 177, Schedule II of the Limitation Act prescribes a period of six months for the admission of such an appeal, and the contention of the

* Civil Miscellaneous Petition No. 1272 of 1894.

appellant's pleader is that he is entitled to the benefit of Section 7 of the Limitation Act, since in January 1885 the appellant was under a legal disability to make the application in consequence of his minority. To the argument that Section 7 grants no indulgence to a minor entitled to prefer an appeal, but only grants the indulgence in the case of suits or applications he urges that the present is an application, and is classed as such in the third division to Schedule II of the Limitation Act We were referred to the decisions in *In the matter of petition of Sita Ram Kesho* (1) and *Moro Sadashiv* v *Visaji Raghunath* (2), in support of the contention that the petition should be regarded not as an appeal, but as an application for leave to appeal, and that the general principle that time does not run against a minor should be held to apply

We are unable to accede to these arguments The present application is not for leave to appeal, but to declare an appeal admitted

The admission of the appeal is not a matter as to which the High Court has any discretion, provided that the requirements of the law are satisfied

All that the High Court has to do is to see that the requirements of Section 596 are satisfied If they are, an appeal lies under Section 595 as a matter of right The application for a certificate that these requirements are satisfied is merely preliminary and ancillary to the admission of the appeal

It was held in *Anderson* v *Periasami* (3), that the provisions of Section 12 of the Limitation Act did not apply to an application under Article 177 to admit an appeal to Her Majesty in Council, and the same arguments would exclude the applicability of Section 7 The same view as to Sections 12 and 5 was apparently taken by the Allahabad High Court *in the matter of petition of Sita Ram* [486] *Kesho* (1) though apparently the learned Judges would have taken a different view as to the applicability of Section 7 We can see no reason, however, why the legislature should have intended to allow a minor on attaining majority to appeal to the Privy Council but not to any other appellate tribunal The omission of appeals in Section 7 can hardly have been unintentional

There is, however, another technical ground on which we must hold the application to be barred By the old Procedure Code, X of 1877, Section 599, it was enacted that an application to appeal to Her Majesty in Council must ordinarily be made within six months from the date of the decree. This section was repealed by the Limitation Act, XV of 1877 in which Article 177 was enacted But the present Code, XIV of 1882, re-enacted the old Section 599, but without expressly repealing Article 177 This may probably have been a mistake, since the legislature again repealed Section 599 by Act VII of 1888, Section 57. At the date of this decree, however, January 20th, 1885, and for more than six months afterwards Section 599 was in force and we must take it that the latter enactment superseded Article 177 It follows from this that in 1885 appeals to the Queen in Council were governed by the special rules laid down in Chapter XLV of the Civil Procedure Code and were not affected by the general provision of the Limitation Act; hence Section 7 could not apply to them—*Vide* the decision of the Full Bench in *Veeramma* v *Abbiah* (4)

For the reasons above given we must dismiss the application with costs.

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(1) 15 A 14 (2) 16 B. 536 (3) 15 M. 169 (4) 18 M 99.

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18 M 487=2 Weir 165, 597.

18 M. 487=2 Weir 165, 597.

[487] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

QUEEN-EMPRESS (*Petitioner*) *v.* SUBBARAYA PILLAI (*Respondent*).*
[27th February, 1895.]

Criminal Procedure Code—Act X of 1882, Sections 195, 407, 476—Application for sanction to prosecute—Offence committed before second-class Magistrate—Court to which appeals ordinarily lie—Application by letter for sanction to prosecute—District Magistrate's order sanctioning prosecution and prescribing the Court in which the prosecution should take place.

The District Forest officer applied by letter to the District Magistrate to take such action as he deemed fit against one Subbaraya Pillai, who, for reasons stated by the District Forest officer, was suspected of having abetted the offence of giving false evidence in the course of proceedings instituted on behalf of the Forest Department in the Court of a Second-class Magistrate The District Magistrate had previously directed that all appeals from the Second-class Magistrate should be heard by the Deputy Magistrate, but he passed an order himself whereby he (1) sanctioned the prosecution of Subbaraya Pillai, and (2) directed that it should take place in the Court of the Head Assistant Magistrate·

Held, (1) that the District Magistrate had no jurisdiction to sanction the prosecution for the reason that he was not the ordinary appellate authority,

(2) that the second part of his order was irregular for the reasons that it was not authorized by Criminal Procedure Code, Section 195, and he had no jurisdiction to act under Section 476, since the alleged offence was not brought to his notice in the course of a judicial proceeding.

[**Appr.**, 2 Bom L.R 530 (540); **D.**, 26 M. 656=2 Weir 202.]

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the order of W. F. Grahame, Sessions Judge of South Arcot, on criminal miscellaneous petition No. 9 of 1894.

The petitioner in the Sessions Court sought the cancellation of an order of the District Magistrate granting sanction for his prosecution on a charge of abetment of the offence of giving false evidence in a case instituted on behalf of the Forest Department in the Court of the Second-class Magistrate of Kallakurichi. That case having terminated, reasons for supposing the petitioner to have committed the above offence were communicated to the District [488] Forest officer, who thereupon forwarded to the District Magistrate a report from the Forest Ranger stating these reasons, together with a letter in which he asked the District Magistrate to take such action as he deemed fit against Subbaraya Pillai, the petitioner The District Magistrate called for reports from the Second-class Magistrate and from the Divisional Magistrate, and then issued a notice to the petitioner to show cause why his prosecution should not be sanctioned. The District Magistrate then made an order by which he sanctioned the prosecution and directed that it should take place in the Court of the Head Assistant Magistrate.

The Sessions Judge cancelled this order on the ground that it was *ultra vires*. He said:—" It must, I think, on the authority of *Queen-*" *Empress* v. *Kuppu* (1), be held that in this matter the action of the " District Magistrate cannot be upheld. It is clear that the District " Magistrate did not act under the provisions of Section 476, Criminal

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* Criminal Revision Case No. 643 of 1894
(1) 7 M. 560.

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18 M. 487-2 Weir 165, 597

"Procedure Code, for the matter was not brought before him in any "judicial proceeding Therefore it was not an order under that section "There remains only Section 195 According to that section and having "regard especially to the language of the penultimate paragraph, the only "authorities which can give sanction are the Court before which the "offence has been committed and the Court 'to which appeals' from "the former Court ordinarily lie' Appeals from the Kallakurichi Second-"class Magistrate ordinarily lie to the Tirukoilur Divisional Magistrate "The Public Prosecutor has argued that the Kallakurichi Second-class "Magistrate's Court is subordinate to the Court of the District Magistrate "and that the District Magistrate has in this matter jurisdiction under "the provisions of Section 191, Criminal Procedure Code But the penul-"timate paragraph of Section 195, Criminal Procedure Code, already "quoted, shows that, although the Kallakurichi Second class Magistrate "may be, and doubtless is, subordinate to the District Magistrate, the "Second-class Magistrate's Court is subordinate to the Court of the Tirukoi-"lur Divisional Magistrate As to Section 191, Criminal Procedure Code, "the law expressly lays down that no such offence as the one now in ques-"tion shall be tried except under a sanction to be given after certain "specified steps shall have been taken either under Section 476 or under "[489] Section 195, Criminal Procedure Code, and this provision of law "ousts in this case the authority conferred by Section 191 The District "Magistrate was indubitably not acting under the provisions of Section "476 And as regards Section 195, even if the District Magistrate could "be held to have power to give sanction, a view which seems to be exclud-"ed by the express words of Section 195, there was no application made "for sanction to prosecute I am unable to hold that a letter from an "officer who was not concerned in the case, in which that officer requests "the District Magistrate to take against a certain person such steps as "the District Magistrate may deem fit, is an application for sanction to "prosecute that person for a specific offence

"My opinion is that an application for sanction to prosecution ought "to have been made to the Second class Magistrate who tried the case, "or to the officer to whom appeals from the Second-class Magistrate "ordinarily lie, and that, on the authority of the decision already quoted, "the District Magistrate had no power to grant sanction even if a regular "application had been made to him In this case no regular application "has been made to any one for sanction to prosecute the petitioner for "abetment of the offence of giving false evidence, and the order passed "by the District Magistrate is *ultra vires*"

The present petition was preferred on behalf of the Crown on the grounds that the letter of the District Forest officer, dated the 26th of June 1893, was equivalent to an application for sanction to prosecute and that the District Magistrate was competent to give the sanction

The Public Prosecutor (Mr *E B Powell*), for the Crown

Respondent was not represented

JUDGMENT

Section 195, Criminal Procedure Code, does not make any particular form of application for sanction necessary, nor does it enact that application shall be made by any particular person The section merely provides that no Court shall take cognizance of certain offences without a sanction,

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In the present case the sanction might have been given by the Second-class Magistrate or by some other Court to which his Court is subordinate, and for the purpose of Section 195 that other Court is defined to be the Court to which appeals from the Second-class Magistrate ordinarily lie.

[490] Under Section 407, Criminal Procedure Code, an appeal lies to the District Magistrate, but, if the District Magistrate has directed that all appeals from Second and Third-class Magistrates in the Kallakurichi taluk shall be heard by the Deputy Magistrate—and we understand this to be the case—it follows that all appeals from their decisions shall be presented to the Deputy Magistrate, and the Deputy Magistrate's Court is the Court to which the appeals ordinarily lie.* Had the sanction been granted by the Second-class Magistrate the appeal would, in the ordinary course of things, have been presented to the Deputy Magistrate as the Magistrate having jurisdiction to entertain the appeal. For this reason we consider that the view of the Sessions Judge was correct.

We may point out that the order of the District Magistrate was irregular on another ground. His order directs that the accused be prosecuted before the Head Assistant Magistrate. No such order could be passed under Section 195 which must be confined to a grant of sanction, as the District Magistrate had no jurisdiction to act under Section 476, since the alleged offence was not brought to his notice in the course of a judicial proceeding. We must therefore decline to interfere and dismiss this petition.

Ordered accordingly.

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18 M. 490=1 Weir 31, 909.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker

QUEEN-EMPRESS *v.* RAPPEL.† [9th August 1895.]

Penal Code—Act XLV of 1860, Sections 40, 64—Towns Nuisances Act (Madras), Act III of 1889, Sections 3, 11—Imprisonment in default of payment of a fine.

Where a conviction has taken place under Towns Nuisances Act (Madras), 1889, Section 3, a Magistrate has jurisdiction to impose a fine and also to pronounce a sentence of imprisonment in default of payment of the fine.

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by H. Moberly, Acting District [491] Magistrate of Malabar, being calendar cases Nos. 80 and 114 of 1895 on the file of the Sheristadar-Magistrate of Cochin.

The case was reported as follows:—

"The accused in the two cases were convicted of having committed nuisances in a public place, punishable under Section 3 of Act III of 1889 and sentenced in the one case to a fine of one rupee or, in default, to two days' simple imprisonment, and in the other case to a fine of eight annas, or in default two days' simple imprisonment.

The legality of the alternative sentences of imprisonment is open to argument.

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* Overruled by 2 Weir 202. Ed.

† Criminal Revision Cases Nos 175 and 176 of 1895

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18 M. 490 = 1 Weir 31, 909.

Section 11 of Madras Act III of 1889 says that Sections 3 and 4 of this Act shall be read with and form part of Act XXIV of 1859, and in its proceedings, dated 7th December 1866 (1), (see Weir, page 574), the High Court ruled that a sentence of imprisonment in default of payment of a fine imposed under Section 48 of Act XXIV of 1859 was illegal.

"On the other hand, Section 40 of the Indian Penal Code, as amended by Act VIII of 1882, says that the word 'offence' as used in Section 64 denotes a thing punishable under this Code, 'or under any special or local law, as hereinafter defined,' and Section 64 of the Penal Code says that 'in every case of an offence punishable with 'imprisonment or fine or with fine only, in which the offender is sentenced 'to a fine, it shall be competent to the Court which sentences such 'offender to direct by the sentence that, in default of payment of the fine, 'the offender shall suffer imprisonment for a certain term'

"Madras Act III of 1889 was passed after the Penal Code was amended by Act VIII of 1882, but Madras Act XXIV of 1859 was passed before the Penal Code became law Madras Act V of 1865 lays down a special procedure for the recovery of fines imposed under the Police Act, and it has not been repealed As Sections 3 and 4 of Madras Act III of 1889 form part of Act XXIV of 1859, I am of opinion that Section 64 of the Penal Code does not apply to them"

The Public Prosecutor (Mr *E B Powell*), for the Crown.

The accused was not represented

JUDGMENT

The High Court Proceedings of 7th December 1866 (1) and 24th April 1873 (2) were passed before the Penal Code was amended by Act VIII of 1882, and the effect of the amendment is to make Sections 40 and 64, Indian Penal Code, applicable to [492] offences under the Police Act XXIV of 1859 The incorporation of Sections 3 and 4 of Madras Act III of 1889 in Act XXIV of 1859 does not, therefore, now render the provisions of Sections 40 and 64, Indian Penal Code, inapplicable.

We think the sentences are not open to any legal objection.

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18 M. 492.

APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar.

AJIJUDDIN SAHIB (*Petitioner*), *Appellant* v SHEIK BUDAN SAHIB (*Counter-Petitioner No* 2), *Respondent* *

[26th and 30th April, 1895]

Transfer of Property Act—Act IV of 1882, Section 43—Subsequently acquired interest of mortgagor—Mortgage—Decree against mortgagor's unascertained shares—Subsequent inheritance by the mortgagors of the share of a co-owner—Property belonging to a Muhammadan woman and her four children mortgaged by her and one of her sons to secure the repayment of a loan

A Muhammadan woman together with her eldest son executed a mortgage comprising the whole of an estate in which her younger children were also entitled to certain shares The mortgagee brought his suit on the mortgage joining as defendants the younger children as well as the mortgagors and obtained a decree, whereby the mortgage amount was made payable "on the responsibility

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* Appeal against Appellate Order No 9 of 1894

(1) 3 M H C.R App. ix (2) 7 M H C R App xxii.

1895 April 30.

of the "shares" of the co-mortgagors; the suit was otherwise dismissed and no personal decree was passed. Subsequently the shares of the co-mortgagors were increased by inheritance from one of the other defendants who died before the decree was executed:

Appellate Civil.

Held, that the increased shares of the mortgagors were *liable* to be sold in execution of the decree.

18 M. 492.

[F., A.W.N. (1908) 155, R., 89 P R. 1903.]

Appeal against the order of W. C. Holmes, District Judge of South Canara, in appeal against order No. 40 of 1893, modifying the order of S. Raghunathayya, District Munsif of Mangalore, on execution petition No 160 of 1893.

Application by the assignee of the decree-holder for execution of the decree in original suit No. 76 of 1890

A Muhammadan woman and her eldest son mortgaged the whole of certain land in which her three younger children were also entitled to certain shares. The mortgagee filed original suit [493] No. 76 of 1890 against the mortgagors as defendants Nos. 1 and 2 and the three other children of the first mortgagor. He obtained a decree which provided that the debt sued for should be recovered "on the responsibility of the first and second defendants' shares" in the land in question. The suit was dismissed as against the three last-mentioned defendants and no personal decree was passed. One of the younger defendants having died, the assignee of the decree now sought to bring to sale in execution the shares of the mortgagors in the property including such rights as they acquired by inheritance from the deceased. The mother did not oppose the application and objections raised by the second defendant were overruled by the District Munsif who passed an order as prayed. This order was modified on appeal by the District Judge, who held that the share of the judgment-debtor inherited from the deceased was not liable to satisfy the decree.

The judgment-debtor preferred this second appeal.

Ramachandra Rau Saheb, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

Best, J.—The appellant is assignee of the decree in original suit No. 76 of 1890, which directed that the amount decreed should be recovered on the responsibility of the first and second defendants' shares in the land mortgaged by the bond on which that suit was brought

That bond was executed by the first and second defendants (mother and son) on account of a debt contracted by the former's deceased husband, the father of second defendant. Three other children of first defendant were also joined as defendants in that suit, but they and their shares in the property were exonerated from liability for the debt.

Since the passing of the decree, one of those three children of first defendant has died and the decree-holder applied to have attached and sold in execution of his decree not only the $\frac{9}{24}$ share in the mortgaged property to which the first and second defendants were entitled at the date of the decree, but also the shares which have now devolved on the above two defendants out of the share of the deceased fifth defendant.

The District Munsif ordered attachment as prayed by the decree holder, but, on appeal by second defendant, the District Judge has ordered the release from attachment of the share inherited by second defendant in consequence of his brother's death.

1895 April 30. — Appellate Civil. — 18 M. 492.

[494] First defendant has not appealed from the District Munsif's order. The question, therefore, is confined to the share inherited by second defendant from his deceased brother, and the answer to the question depends upon whether the decree must be held to limit the liability of second defendant to the share possessed by him in the mortgaged property at the date of the decree.

In support of appellant's contention that such is not the case, we have been referred by his Vakil to Section 43 of the Transfer of Property Act, and to the decision of the High Court of Calcutta in *Deolie Chand* v *Nirban Singh* (1)

Both Section 43 of the Transfer of Property Act, and the case in *Deolie Chand* v *Nirban Singh* (1) are noticed by the District Judge, but he apparently thinks the latter case not in point, as he presumes the decree in that case was for the fourteen annas share mortgaged, or at any rate for the mortgaged property But on a careful perusal of the judgement in that case it is seen that the two annas share then sought to be taken in execution of the decree was, at the date of the mortgage, held by the decree-holder, and obviously could not be subject to the mortgage at the date thereof That two annas share was in fact only acquired by the judgment-debtors in that case in June 1865, the decree having been passed against them in October 1863 It is further clear that the fourteen annas share that had been mortgaged was made up of the twelve annas share, already purchased by the decree-holder in execution of another decree, *plus a* two annas share which was subsequently found to belong to one Ajoodhya Pershad.

The report and the judgment are not quite consistent as to the facts, but that the understanding of the facts on which the learned Judges proceeded was as above stated, is apparent from the opening sentence of the judgment from which I have quoted above, and that such was also the contention of the judgment-debtors is apparent from page 254 where it is stated, that the " judgment-debtors contended objecting that the two annas share in question was altogether distinct from the fourteen annas share mortgaged, yet it was held that the decree-holder was equitably entitled to have security, as far as it is possible for the debtor to, give it, up to the extent of the fourteen annas for which he contracted "

In the case before us it is not denied that the additional share now sought to be taken in execution was included in the mortgage [495] executed by the respondent (second defendant) and his mother for the debt contracted by respondent's father, and it seems to me that there is nothing in the decree to prevent so much of the share of fifth defendant in such property as has subsequently devolved on first and second defendants being taken in execution of the decree; and the words of Section 43 of the Transfer of Property Act " at any time during which the contract of transfer subsists " are, in my opinion, wide enough to cover the present case, the contract has no doubt merged in the decree; but it must be held to subsist all the same, till the mortgage is satisfied and the mere fact of the share in question having devolved on respondent subsequent to the decree appears to me to be no reason for holding Section 43 of the Transfer of Property Act to be inapplicable I would, therefore, allow this appeal and setting aside the order of the lower appellate Court restore that of the District Munsif.

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(1) 5 C 253.

1895 APRIL 30. — APPEL-LATE CIVIL. — 8 M. 492.

Respondent must pay appellant's costs in this Court and also in the lower appellate court.

SUBRAMANIA AYYAR, J.—Considering that the respondent and another originally mortgaged to the appellant the whole of the land specified in the schedule attached to the decree and not merely the shares which belonged to the mortgagors at the date of the mortgage I am unable to say, with confidence, that the intention of the District Munsif, who passed the decree was, so far as the mortgagors themselves were concerned, to render nothing more than their shares liable for the decree amount. I agree therefore in holding that the order of the District Judge should be set aside and that of the District Munsif restored.

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18 M. 496=5 M.L.J. 63.

[496] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

SUBBAYYA (*Plaintiff's Representative*), *Appellant v.* SAMINADAYYAR (*Defendant*), *Respondent*.*

[16th January, 1895.]

Civil Procedure Code—Act XIV *of* 1882, *Sections* 366, 367—*Dispute as to right to represent a deceased plaintiff—Right of his adopted son to continue the suit—Appeal against orders rejecting claim of alleged representative of deceased, plaintiff and declaring suit abated*

The plaintiff in a partition suit in which his brother was defendant died, and an application was made on behalf of a boy alleged to have been adopted by the widow of the deceased under his authority that his name be brought on to the record as plaintiff. This application was made within six months of the death of the original plaintiff. The Court of first instance rejected the application which the defendant opposed on the ground that the boy had not been adopted, and dismissed the suit on the ground that it had abated.

Held, that appeals lay against the rejection of the above application, and also against the dimissal of the suit.

Per curiam: A dispute within the meaning of Civil Procedure Code, Section 367, need not be between persons claiming to represent the deceased plaintiff.

[**F.**, 30 A. 348=5 A.L.J. 363=A.W.N. (1908) 139; 3 M.L.T. 327; 10 O.C. 121 (125; **R.**, 27 B. 162 (168, 176, 177); 5 Bom. L.R. 1041 (1044); 2 N.L.R. 7 (9) O.C. 354 (356); 121 P.R. 1907=51 P.W.R. 1907; 21 T.L.R. 191 (193); **D.**, 26 M. 224 (228)=12 M.L.J. 380]

SECOND appeal against the decree of H. H. O'Farrell, District Judge of Tanjore, in appeal suit No. 349 of 1893, and against his order in appeal against order No. 46 of 1893, dismissing appeals against the decree of A. Ramasami Ayyar, District Munsif of Tiruvalur, in original suit No. 413 of 1892, and against his order made in that suit on petition No. 623 of 1893.

The appellant in second appeal preferred also a petition under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of the District Judge in appeal against order No. 46 of 1893.

"One Mahadevayyar instituted original suit No. 413 of 1892 against his brother Saminadayyar for partition and died. At the time of his death, he had no heir except Saminadayyar in existence. But it was said that he left an authority to his widow to adopt, and that an adoption was made of the minor Subbayya, the present appellant, who claimed to be the

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Second Appeal No. 1389 of 1894 and Civil Revision Petition No. 30 of 1894.

representative of the plaintiff. The adoption took place, and an application (petition No 623 of 1893) under Section 365, Civil Procedure Code, was made to the [497] District Munsif within six months from the date of the plaintiff's death that Subbayya's name should be entered on the record in the place of that of the deceased On that application, the District Munsif held that, at the date of the plaintiff's death, his share passed by survivorship to the defendant, no adoption admittedly having taken place then, that the right to sue did not survive, and consequently that the applicant could not be admitted as representative of the plaintiff for the purpose of continuing the suit. He, therefore, dismissed his application on the 10th June 1893, and on the same date made an order dismissing the suit on the ground that it had abated

1895 JAN. 16. APPELLATE CIVIL. 18 M. 496=5 M. L. J. 63.

Appeals having been preferred on behalf of the alleged adopted son, the District Judge held with reference to *Ahmad Ata* v *Mata Badal Lal* (1) that no appeal lay against the order declaring that the right to sue had not survived, because there was no representative of the plaintiff on the record who could appeal, and as to the appeal against the District Munsif's refusal to bring the alleged adopted son on to the record, he concurred in the opinion of the lower Court

This second appeal and revision petition were preferred on behalf of the alleged adopted son.

Pattabhirama Ayyar, for appellant

Rama Rau, for respondent

JUDGMENT

In our opinion the order of the District Munsif of the 10th June 1893 and his decree dismissing the suit were wrong in point of law It is quite clear that the adopted son is the legal representative of the person to whom he is adopted This being so, Section 371 would prevent the institution by him of any fresh suit An application was made on his behalf within due time claiming to be the legal representative, and therefore under Section 366 it was not competent to the Court to order that the suit should abate The order of the District Munsif above-mentioned must be taken to be an order within the meaning of Section 367; for we agree with the Judge that a ' dispute ' within the meaning of that section need not be between persons claiming to represent the deceased plaintiff The title to represent being denied, there is in the present case a dispute between the claimant and the defendant We therefore think the District Judge ought to have entertained the appeal We also think that an appeal lay [498] against the decree dismissing the suit—*Bhikaji Ramchandra* v *Purshotam* (2)

We must set aside the decrees of the Courts below, and also the order of the District Munsif, and remand the case to the Court of first instance for disposal

The costs incurred in the lower appellate Court and in this Court must be paid by respondent, the other costs must be provided for in the fresh decree

(1) 3 A 844

(2) 10 B. 220.

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APPELLATE CIVIL.

18 M. 498.

18 M. 498.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

RAMACHANDRA RAU AND OTHERS (*Plaintiffs*) *v.* KANDASAMI CHETTI AND OTHERS (*Defendants*).* [25th and 27th March, 1895.]

Companies Act—Act VI of 1882, Section 187—Powers of liquidator after dissolution of company

Suit on a promissory note of the defendant in favour of a company The note was payable to the company or order The company had gone into liquidation and a liquidator had been duly appointed. The plaintiffs had purchased, together with certain other assets of the company, the note sued on, but did not obtain the liquidator's endorsement of the note until after the dissolution of the company was completed.

Held, that the liquidator had no power to endorse the note to the plaintiffs

CASE stated for the opinion of the High Court under Provincial Small Cause Court's Act IX of 1887, Section 17, by S. Krishnaswami Ayyar, District Munsif of Erode, in small cause suit No. 995 of 1893.

Suit on a promissory note payable to a certain company or order and endorsed to the plaintiffs on the 10th of August 1893 by one Seshayyar. The company being in course of liquidation, certain of its assets, including the note in suit, were sold to the plaintiffs. In January 1892 a general meeting of the shareholders was held under Companies Act VI of 1882, Section 186, at which it was, *inter alia*, resolved that Seshayyar be appointed sole liquidator in the place of others who had sent in their resignations, [499] that after the lapse of three months from the date of the "registration of this account of this meeting this company shall be "considered as being dissolved, and also that these resolutions be sent "to the Joint Stock Companies' Registrar and be distributed to all the "shareholders."

After stating the above circumstances, the District Munsif continued as follows:—

"Seshayyar, now appointed sole liquidator under resolution No. 2, "communicated the above resolutions to the Registrar of the Joint Stock "Companies two days after the resolutions were passed On the 6th "February 1892 the resolutions communicated by him were registered by "the Registrar, who informed him of the fact And on the 6th May 1892, "three months, from the date of the registration, the company was and "became dissolved, Section 187.

"The winding up of the company and its dissolution having thus "been complete, and the duties of the sole liquidator now appointed under "Section 184 having been fixed by the resolution No. IV, had Seshayyar "power to do anything more than what had been resolved upon?"

Ramachandra Rau Saheb, *Pattabhirama Ayyar*, *Kasturiranga Ayyangar* and *Venkatarama Sarma* for plaintiffs.

The Advocate-General (Hon. Mr. *Spring Branson*), *Mahadeva Ayyar* and *Narasimha Chariar* for defendants.

JUDGMENT.

It has been argued on behalf of the plaintiffs that there has been no final and valid dissolution of the nidhi or company, but that is not a point that has been referred for our consideration.

* Referred Cases Nos. 13 to 24 of 1894.

The question referred assumes there was a dissolution and asks whether subsequent to such dissolution Seshayyar had power to endorse the notes.

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18 M. 498.

Our answer to this question must be in the negative, as, with the dissolution to the nidhi, the powers of the liquidator also come to an end *Cf In re Pinto Silver Mining Company* (1) and *In re London and Caledonian Marine Insurance Company* (2)

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18 M. 500=5 M.L J 197

[500] APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

RAMANADHAN CHETTI (*Defendant*), *Appellant* v ALKONDA PILLAI (*Plaintiff's Representative*), *Respondent* * [27th February, and 14th March, 1895.]

Mortgage of joint property—Subsequent mortgage of unascertained shares—Partition—Rights of purchasers in execution of decrees on the two mortgages

Joint property belonging to an undivided Hindu family constituted of five branches was mortgaged to A in 1876, and the share of one branch was mortgaged to B in 1880 A partition took place in 1881 when the mortgagors of B had their share allotted to them

In 1888 A sued on his mortgage not joining B as a defendant and obtained a decree, in execution of which he brought to sale the property comprised in his mortgage and purchased it in September 1889 In 1889 B sued on his mortgage not joining A as defendant and obtained a decree, in execution of which he brought his mortgagors' share to sale and purchased it and obtained possession in August 1889 A, in taking possession of the property purchased by him, was obstructed by B, but an order was made in his favour B now sued for the cancellation of this order and for an injunction restraining A from taking possession of the property from him

The lower courts decreed that the plaintiff might redeem the land on payment of one-fifth of the amount of the defendant's decree The defendant appealed against this decree, the plaintiff taking no objections to it

Held, on second appeal, that the decree was wrong and that a decree as asked for by the plaintiff should be substituted for it

[R, 32 C 891=1 C L J 371=9 C W N 728]

SECOND appeal against the decree of C Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No 142 of 1893, confirming the decree of A Kuppusami Ayyangar, District Munsif of Negapatam, in original suit No 128 of 1890

The facts of the case are stated above sufficiently for the purpose of this report The defendant preferred this second appeal

Pattabhirama Ayyar, for appellant

Sankaran Nayar, for respondent

JUDGMENT

It is found by both the Courts that the mortgage to plaintiff under Exhibit A was *bona fide* and for consideration, and this is a finding of fact not open to question in second appeal

[501] The other facts of the case are —Plaintiff obtained a decree on Exhibit A against his mortgagor in original suit No 18 of 1889, and in execution of that decree purchased the property on 29th June 1889 and

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* Second Appeal No 1499 of 1894

(1) 8 Ch. D 273

(2) 11 Ch. D 140.

1895 MARCH 14, — APPELLATE CIVIL. — 18 M. 500=5 M. L. J. 197.

was placed in possession on the 28th August 1889. See Exhibits F, G and H. The property mortgaged to plaintiff was only his mortgagor's share which was unascertained till partition took place in June 1881 (Exhibit B), the date of A being 9th January 1880. Defendant is the assignee of a prior mortgage (Exhibit I, dated 28th October 1876), which comprised the whole of the family property including the portion subsequently mortgaged to plaintiff under Exhibit A (by one of the branches of the undivided family). Defendant as such assignee sued in original suit No. 30 of 1888, and in execution of the decree obtained by him purchased the property of his mortgagor on 27th September 1889. Neither was plaintiff made a party to defendant's suit No. 30 of 1888, nor was defendant made a party to plaintiff's suit No. 18 of 1889.

On plaintiff's advertising the property for sale in execution of his decree, the defendant presented a petition objecting that the decree had been obtained collusively and that the sale notification made no mention of the prior mortgage. This petition was rejected on the 21st June 1889, see Exhibit E.

After defendant purchased the property in execution of his decree, he filed a second petition complaining of plaintiff's obstruction to his taking possession of the plaint property, on which was passed the order J, allowing his claim to possession of it.

It was in consequence of this order J, (dated 21st March 1890) that the present suit was instituted by plaintiff (on the 23rd idem) for setting aside the order J and for an injunction restraining defendant from taking possession.

Both the Courts below have treated the suit as one for redemption and have given a decree allowing plaintiff to redeem on payment of one-fifth of the defendant's decree debt and costs and interest.

Hence the present appeal by the defendant, in which objection if taken in the first place to the decree for redemption as being "a relief which was not prayed for;" and, secondly, to plaintiff being allowed to redeem a portion only of the mortgaged property.

[502] The first of these objections must be held to be valid. Cf. *Venkatanarasammah* v *Ramiah* (1), such being the case, it is unnecessary to consider the other objection

The question then is, what should be our decree? It is contended on behalf of the appellant that, as plaintiff has not appealed, or filed objections, as respondent, under Section 561 of the Code of Civil Procedure, the only course open to us is to dismiss the suit. But, in the circumstances, this does not appear to be the proper course to adopt. It is necessary for us to consider and decide what is the decree, if any, to which plaintiff is entitled with reference to the relief asked for in the plaint.

From the facts stated above, it will be seen that plaintiff purchased and got into possession of the plaint land prior to the sale to defendant. Consequently, at the date of this latter sale, there remained in the mortgagors no right or interest in the plaint land that could be sold Therefore, defendant, as purchaser of the right and interest of the mortgagors acquired no fresh right in this land over and above that already possessed by him as mortgagee. Cf. *Venkatanarasammah* v. *Ramiah* (1), *Nanack Chand* v. *Teluckdye Koer* (2), *Dirgopal Lal* v. *Bolakee* (3). As such mortgagee, defendant may be entitled to a decree against the plaint land for

(1) 2 M, 108. (2) 5 C. 265. (3) 5 C. 269.

the balance remaining unpaid under his prior mortgage, after deducting the amount realized by sale of the portions purchased by him But that is not a question for decision in the present suit 1895 MARCH 14.

For the purposes of this suit, the fact that, by reason of plaintiff's purchase of the plaint land, the mortgagors' interest therein had ceased to exist prior to the defendant's purchase is sufficient for holding that plaintiff is entitled to the declaration and injunction asked for in his plaint APPELLATE CIVIL

In lieu, therefore, of the decree appealed against plaintiff will be given a decree setting aside the Subordinate Judge's order J, of 21st March 1890, and declaring plaintiff entitled to retain possession of the plaint land and enjoining defendant from disturbing such possession 18 M. 50 5 M.L.J 197.

The decree now passed by us will not, however, affect the right of plaintiff to sue for redemption or of defendant to enforce his rights as prior mortgagee.

Plaintiff is entitled to his costs throughout

18 M. 503.

[503] APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Best

DEVALJI RAU (*Plaintiff*) v PRESIDENT, MUNICIPAL COMMISSION, MADRAS, (*Defendant*) * [1st July, 1895]

City of Madras Municipal Act (Madras)—Act I of 1884, *Section* 433—*Notice of action.*

In a suit against the president of the Municipal Commission, Madras, to recover damages for the demolition of a house which had been built by the plaintiff without previous notice given by him under Madras Municipal Act, 1884, Section 265, the plaintiff proved, by way of notice of action, the delivery of a letter signed by him and dated from his place of residence, which did not state where the house in question had stood, nor the date of its demolition, nor state positively that an action would be brought

Held, that the letter was not a sufficient notice of action

CASE stated for the opinion of the High Court under Civil Procedure Code, Section 617, and Presidency Small Cause Court's Act 1882, Section 69, by V P DeRozario, Third Judge of the Madras Court of Small Causes.

The case, so far as it is pertinent to the purposes of this report, was stated as follows

" The plaintiff built a house within municipal limits, which the defendant, the president of the Municipal Commission, caused to be demolished The plaintiff claims Rs. 600 as damages.

" The defendant denies liability, states that the damages claimed are excessive, and pleads that the plaintiff has not given sufficient and legal notice of the action according to the provision of Section 433 of the City of Madras Municipal Act, 1884

" This section is as follows :—

" No action shall be brought against the Commissioners, or any of ' their officers, or any person acting on their behalf or under their direction, ' for any thing done or intended to be done under or in pursuance of the ' powers of this Act until the expiration of one month next after notice ' in writing has been left at the Municipal office or at the place of abode

* Referred Case No 30 of 1894.

1895 July 31. — Appellate Civil. — 18 M. 503.

'of such person not [504] later than six months from the date on which the cause of action arose. Such notice shall state explicitly the cause of 'action and the name and the place of abode of the intended plaintiff 'and of his attorney or agent, if any, and shall be signed by the intended 'plaintiff or his attorney or agent.'

"The notice given by the plaintiff (Exhibit A) gives his name and address, states that his house has been demolished by the municipal executive, and that he has sustained a loss of Rs. 600, and that a suit will be filed if the compensation claimed is not awarded.

"The notice A is in the following terms:—

107, Chella Pillayar Kovil Street,
Pudupaukam, Triplicane,
16*th June* 1894.

To

The President,
Municipal Commission,
Madras.

Sir,

I beg to bring the following few lines to your kind consideration. My past ignorance of the municipal regulation concerning building of houses silenced me into looking sorrowfully at the work of demolition of my house by the municipal executive; but my present knowledge of the provisions of the Act incites me to claim from you compensation for my loss of Rs. 600, and also to bring a suit for damages if you don't intend to grant me a compensation.

I beg to remain,
Your most obedient servant.
Devalji Rau.

"Mr. Morgan, the defendant's attorney, contends that the notice is defective, as it does not state the time when and where the cause of action arose, and in support of his contention cites *Breese* v. *Jerdein* (1). But in *Jones* v. *Bird* (2) and *Smith* v. *West Derby Local Board* (3) it was held that it was quite sufficient if the notice affords plain and substantial information of the cause of action; that it is not necessary to describe in specific words precisely how the injury took place, nor is it in all cases material to state precisely where the [505] cause of action arose. The object of giving notice is 'that if a public body or officer entrusted with 'powers happens to commit an inadvertence, irregularity, or wrong, before 'any one has a right to require payment in respect of that wrong, he shall 'have an opportunity of setting himself right, making amends, restoring 'what he has taken, or paying for the damages he has done.' *Shahebzadee Shahunshah Begum* v. *Fergusson* (4); see also Section 435 of the Municipal Act. If, therefore, the notice conveyed sufficient information to the defendant as to the wrong for which he was to be sued (it is not alleged that any other house of the plaintiff was destroyed by the municipality or that the defendant had any doubt as to the particular wrong for which he was to be sued), it appears to me that any informality, if it has not prejudiced the defendant, will not vitiate it. In *Osborn* v. *Gough* (5) it was held that if the information given is sufficiently specific and sufficiently accurate to enable the defendant to avail himself of the privileges and advantages that the

(1) 4 Q. B. 585; 12 L. J. Q. B. 234. (2) 5 B. & Ald. 837
(3) 3 C. P. D. 423. (4) 7 C. 499. (5) 3 B. & P. 550.

Act intended to confer upon him, it will be sufficient, and it is for the defendant to show that the error or misstatement or insufficient description in the notice has deprived him of the opportunity of taking advantage of the statute In *Eales* v *The Municipal Commissioners of Madras* (1) the notice was objected to by the defendants on the ground that it did not show the place of abode of the intended plaintiff and of his attorney The High Court held the notice to be valid, and, adopting the language of Pollock, C B in *Jones* v *Nicholls* (2), remarked ' we must import a little commonsense into notices of this kind '

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" I am of opinion that the notice is valid '

The rest of the case as stated is immaterial for the purpose of this report The question submitted were the following —

(i) " Whether the notice given in this case is valid

(ii) " Whether the President of the Madras Municipality was justified in demolishing the plaintiff's house on the mere ground that it was constructed without previous notice to the municipality under Section 265 of the Municipal Act "

The Judge was of opinion that both questions should be answered in favour of the plaintiff

[**506**] *Ambrose*, for plaintiff

Mr *K Brown*, for defendant

JUDGMENT

We are of opinion that the letter of the plaintiff is not a sufficient notice within the meaning of the 433rd Section of the City of Madras Municipal Act of 1884

It is insufficient because it omits to state the place or street in which the house alleged to be demolished stood, as also the time of the alleged demolition Further the letter does not positively state that an action will be brought See *Brees* v *Jerdein* (3) and *Mason* v *Birkenhead Improvement Commissioners* (4)

It is unnecessary to answer the second question

Barclay, Morgan & Orr, attorneys for defendant

(1) 14 M 386
(2) 13 M & W 36
(3) 4 Q B. 585; 12 L J. Q B. 234.
(4) 6 H & N 72

19 M. 1.

APPELLATE CIVIL

Before Mr Justice Parker and Mr Justice Subramania Ayyar

1895 AUG. 21.

APPELLATE CIVIL.

19 M. 1.

IMBICHI KANDAN AND OTHERS (*Plaintiffs*), *Appellants v* IMBICHI PENNU AND OTHERS (*Defendants*), *Respondents* *
[19th and 21st August, 1895]

Malabar Law—Makkatayam rule of inheritance—Tiyans of South Malabar

On the death of a Tiyan of South Malabar following the Makkatayam rule of inheritance, his mother, widow and daughter are entitled to succeed to his property (acquired by himself and his father) in preference to his father's divided brothers

SECOND appeal against the decree of A Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No 434 of 1893, reversing the decree of U. Achutan Nayar, District Munsif of Calicut, in original suit No 578 of 1890

The plaintiffs sued to establish their right to certain property left by one Changaran, deceased, as against the defendants, who were his mother, widow and daughter. Changaran was the son of Kelukutti, a deceased brother of the plaintiffs, with whom, it was found, they had no common property and had not lived as members of a joint family The parties were Tiyans of South Malabar following the Makkatayam rule and the property in question had been acquired by Changaran and his deceased father

The District Munsif passed a decree for the plaintiff On appeal, the Subordinate Judge reversed this decree

The plaintiffs preferred this second appeal

[2] *Sundara Ayyar*, for appellants

Ryru Nambiar, for respondents

JUDGMENT

The District Munsif clearly found that plaintiffs were divided from the late Changaran and had no community of interest with him This finding was not questioned in the grounds of appeal to the Lower Appellate Court, and the Subordinate Judge was, therefore, right in laying down that the question was whether, according to the law and custom followed by Makkatayam Tiyans of Calicut, the property of a deceased person goes to his father's brothers who are not joint in interest with him rather than to his mother, widow and daughter.

The decision of the Subordinate Judge is entirely in accordance with the principles laid down in *Ranchan* v *Perachi* (1) and *Raman Menon* v *Chathunni* (2) It has been decided that the rule of impartibility applies to Makkatayam Tiyans of Calicut, and in *Ranchan* v *Perachi* (1) following the principle that self-acquired property lapses to the tarwad, it was held

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* Second Appeal No 1800 of 1894

(1) 15 M 281 (2) 17 M. 184.

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that the undivided brother succeeded in preference to the widow. But the case is quite different when the brothers are divided and have no community of interest as in this case. Here it is found that the only property in which plaintiffs and Kelukutti ever had a common interest is in the family burying place, which will certainly not constitute them an undivided tarwad. That being so, the mother, wife, and daughter of Changaran who certainly belong to his tarwad are preferential heirs to his uncles who did not belong to his tarwad at all and had no community of interest with him.

We think the decision of the Subordinate Judge is correct and dismiss the second appeal with costs.

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19 M. 3=1 Weir 86=2 Weir 40.

[3] APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Jusice Best.

QUEEN-EMPRESS *v.* SUBBARAYAR.* [15th and 21st August, 1895.]

Criminal Procedure Code—Act X of 1882, Sections 87, 88, 89, 439, 537—Proclamation for person absconding—Attachment of his property—Irregularity in publication of proclamation—Revisional Powers of High Court.

An accused person for whose arrest a warrant had been issued having absconded, a proclamation was issued and affixed to the Court house on the 6th of November requiring him to appear on the 11th of December 1893, and his property was attached The proclamation was not published at the village where the accused resided until the 15th of November. The accused surrendered on the 25th of June 1894 and applied for restoration of the property under Criminal Procedure Code,, Section 89, and an order was made by which the restoration of his property was refused. The accused preferred a petition to the High Court for the revision of that order:

Held, that there was no legal proclamation under Criminal Procedure Code, Section 87, and that the order should be set aside and the attachment declared void.

[R., 1 Bom Cr C 104 (106)=14 Bom. L R 163=13 Cr. L. J. 293=14 Ind. Cas. 757.]

PETITION under Criminal Procedure Code, Section 439, praying the High Court to revise an order of E. J. Sewell, Acting Sessions Judge of Tanjore, in criminal appeal No. 93 of 1894, modifying the order of R. B. Clegg, Joint Magistrate of Kumbakonam, in magisterial case No. 6 of 1893.

On the 14th October, 1893 a warrant was issued by the Joint Magistrate for the arrest on a criminal charge of one Kuthur Subbarayar. The warrant was not executed and it was reported that the accused had absconded. A proclamation under Criminal Procedure Code, Section 87, was issued on the 6th November, the date fixed for the appearance of the accused being the 11th of December 1893. The proclamation was published by the affixing of a copy on the Court house on the 6th of November, but it was not published in the place where the accused resided until the 15th of November. The property of the accused was attached under Criminal Procedure Code, Section 88, after the issue of the [4] proclamation. The accused surrendered on the 25th of June 1894 and he was then heard to show cause under Criminal Procedure Code, Section 89, why his property should be restored to him. The Magistrate held that the accused had been absconding, that the want of completeness in the publication of the proclamation was a mere irregularity which

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* Criminal Revision Case No. 135 of 1895.

he regarded as immaterial with reference to Criminal Procedure Code, Section 537, and he made an order that the property should be sold and the sale-proceeds credited to Government. The Sessions Judge on appeal concurred in the finding that the accused had been absconding, but altered the order appealed against into one refusing to restore the property to the accused.

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APPELLATE CRIMINAL

19 M. 3 1 Weir 86=2 Weir 40.

The accused preferred this petition.

Mr. K Brown and *Sivaswami Ayyar*, for petitioner

The Government Pleader and the Public Prosecutor (Mr *E B Powell*), for the Crown

JUDGMENT

The only point argued on behalf of the petitioner was that any proceeding under the 88th Section of the Criminal Procedure Code was vitiated by the fact that the proclamation had not been published in due accordance with the provisions of the previous section The 87th Section authorizes the issuing of a proclamation requiring the absconding person "to appear at a specified place and at a specified time not less "than thirty days from the date of publishing such proclamation" The section then proceeds:—

"The proclamation shall be published as follows —

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides,

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides, or to some conspicuous place of such town or village, and

(c) a copy thereof shall be affixed to some conspicuous part of the Court house"

The proclamation requiring the petitioner to appear on the 11th December was issued on the 6th November and on that day affixed to the Court house It was not published in the village in which the petitioner resides till the 15th November

[5] Clearly therefore there was a failure to comply with the provisions of the section The minimum allowance of thirty days was not allowed to the petitioner as from the date of the proclamation in the village

Apart from the provisions of the 537th Section of the Code which were invoked by the Magistrate, there can be no question that the proclamation was vitiated by the defect

Section 87 prescribes certain rules with regard to time and with regard to place In respect of these matters the section is imperative and the neglect of the rule with regard to time is no more execusable than would be the neglect of the rule requiring publication in two places Suppose that the petitioner had, in consequence of his failure to attend in obedience to the proclamation, been charged under the 174th Section of the Indian Penal Code, could it be said that he was legally bound to attend in obedience to the proclamation, when it appeared that the proclamation had not been duly made and published under the 87th Section of the Procedure Code? Clearly not.

In the ordinary case of a summons it is necessary in order to establish a charge under the 174th Section of the Penal Code to prove that the summons was duly served on the person charged In the case of a proclamation personal service being impracticable, other modes of

1895 Aug. 21. — Appellate Criminal — 19 M. 3=1 Weir 86=2 Weir 40.

bringing the order to the notice of the person addressed are prescribed. It appears to us that whether personal service or substituted service has to be proved, equally strict proof should be demanded in order to establish a charge under the 174th Section of the Penal Code. If a charge under that section had been brought against the petitioner, it could never have been suggested that the provisions of the 537th Section of the Criminal Procedure Code should be used to supplement the deficiency of proof, nor can we understand how the Magistrate could imagine that he had any right to utilize that section in the actual proceedings. He was not sitting as a Court of appeal or revision, but as a Magistrate enforcing the penal consequences of alleged disobedience to a proclamation.

It may be suggested that, although the Magistrate was not at liberty to refer to the 537th Section, it was competent to the Sessions Judge on the appeal or is competent to this Court to consider whether the provisions of that section should be applied. It was contended that the defect in the proclamation was an error, [6] omission or irregularity within the meaning of the section. If it were necessary to decide the point we should hesitate to accede to this contention. But the present case is peculiar. The Magistrate had to consider whether a legal proclamation had been legally published. It was his duty in considering this to have regard to the actual facts as they appeared before him. Instead of confining himself to the facts he exercises a dispensing power which he does not possess, and by the aid of it holds that the proclamation was a legal one. In our opinion the proceedings of the Magistrate was wholly illegal.

There was no legal proclamation. The petitioner could not have been convicted on a charge of disobedience to the proclamation and for the same reason the other penal consequences of disobedience cannot be visited on the petitioner.

The order of the Sessions Judge who adopts the reasoning of the Magistrate is wrong and must be set aside, as also that of the Joint Magistrate and the attachment declared void.

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19 M. 6.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

KANDASAMI PILLAI (*Plaintiff*) *v.* MURUGAMMAL (*Defendant*)*
[3rd October, 1895.]

Hindu law—Wife's right of maintenance among Sudras—Continued unchastity and misconduct.

In 1887 a suit was instituted against a Sudra by his wife and a decree was passed for her maintenance. The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child. The wife denied the adultery and stated that her husband had become reconciled to her and that her child was legitimate. It was found that the plaintiff's case was established and that the defendant's misconduct had been recent, open and continuous:

Held, that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance.

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* Civil Suit No. 143 of 1895.

[7] *Quære* Whether apart from the other circumstances in the case, the fact of having given birth to an illegitimate child would have constituted a bar to the wife's claim to bare maintenance

1895 OCT 3.

ORIGINAL CIVIL

19 M. 6.

[R., 34 B 278=12 Bom L R 196=5 Ind Cas 960, 16 Ind Cas 389=23 M L J 289]

THE facts of the case are stated above sufficiently for the purpose of this report

Mr. *J Adam*, for plaintiff

Gurusami Chetti, for defendant.

JUDGMENT

The plaintiff in this case seeks to set aside the decree passed in original suit No. 129 of 1887 in favour of the defendant, his wife, awarding to her a maintenance of ten rupees per mensem The suit is founded on the allegation that in 1893 the defendant committed adultery with one Velayuda Asari The defence is a simple denial of the case set up in the plaint

The only issues to be determined are—has the plaintiff made out the case set up by him, and, if so, to what relief is he entitled?

[His Lordship recorded an admission that the parties had separated in 1886 and had never since resided together, and, after discussing the evidence, stated, as his finding thereon, that the defendant had in 1893 become pregnant by Velayuda Asari and had given birth to a child by him The judgment continued as follows —]

I have no hesitation in finding that the plaintiff has made out his case.

As to the relief prayed, it has been contended on behalf of the defendant, that she is entitled under any circumstances to at least bare maintenance *Honamma* v *Timannabhat* (1) relied upon in support of this contention has been dissented from in *Valu* v *Ganga* (2) In *Roma Nath* v *Rajonmoni Dasi* (3), Petheram, C J , and Banerjee, J , however, seem inclined to hold that the view taken in the earlier Bombay case is warranted by the texts of Hindu law, and further that it has the support of reason, inasmuch as the allowance of mere food and raiment to an unchaste woman is prescribed in order that she may have a *locus pœnitentiœ*, and that she may not be compelled by sheer necessity to continue to lead a life of shame and misery However, in *Nagamma* v *Virabhadra* (4) recently decided by this Court, the learned Chief Justice and Shephard, J , observe — "We must follow the decision in *Valu* v [8] *Ganga* (2) and *Vishnu Shambhog* v *Manjamma* (5), and hold that unchastity of a widow deprives her "wholly of her right to maintenance. No text has been cited in favour of "the theory that a bare maintenance can be allowed " In the above cases it will be seen that the question related to the provision to be made for widows, whilst here it is as to the maintenance of a wife Referring to the existence of a distinction between the two classes of cases, Sargent, C. J., in *Valu* v *Ganga* (2) already cited observes thus —" The only analogous cases in which such a distinction is to be found, are those of an "adulterous wife and mother for which special texts are provided The "close and tender relations which exist between husband and wife and "mother and son may well account for the ancient law-givers laying "down, as a rule of conduct, for a husband and son, that even the wife "or mother who has been guilty of unchastity should not be left in a state "of perfect destitution; but it has still to be determined how far these

(1) 1 B 559 (2) 7 B. 184 (3) 17 C 674 (679).
(4) 17 M. 392 (5) 9 B 108

1895 Oct. 3. — Original Civil. — 19 M. 6.

"texts will be regarded as mandatory and not merely preceptive; and if "the former, in what cases and to what extent the Court will enforce them. It must be admitted that the point is one of some difficulty. For although the doctrine of the ancient law-givers enunciated in the texts in question is grounded on the sound considerations adverted to by Petheram, C. J., and Banerjee, J., yet it is not easy to formulate precisely the cases in and the extent to which that doctrine is to be applied. But assuming that the texts are not mere moral precepts but mandatory, I think—following the view adopted by the Calcutta Court in *Roma Nath* v. *Rajonimoni Dasi* (1) in the case of the widow—it be safely laid down that maintenance, however small, ought not to be awarded by Courts, even to a wife when it appears that she, about the time of the litigation, persists in a vicious course of life. To hold otherwise would be contrary to all morality and principle; and I have little doubt that before a decree for maintenance is given to a wife who has once been guilty of infidelity, she must show, not only that at the time of the plaint and the trial she was leading a chaste life, but also that she had done so for a sufficient period previously so as clearly to lead to the conclusion that she has completely renounced her immoral course, and that, in fact, she is a reformed woman. In the present case, however, there is not a [9] particle of evidence to prove such is the case with the defendant. On the contrary the defendant appears to be so strongly addicted to vice, and her misconduct has been so recent, open and continuous, that I am unable to say that I am satisfied that even the idea of definitely changing her present mode of life has occurred to her. Her case seems moreover to be complicated by the fact that she is the mother of an illegitimate child; since a text of Yajnavalkya treats conception by unlawful commerce to be such an aggravation of a disloyal wife's offence as to justify complete desertion by the husband, though it should be added that Vijnaneswara appears to restrict the text to the case of the three regenerate classes—Colebrooke's Digest, Book IV, Chapter I, Verse LXXVII; and therefore, by implication, to hold it to be inapplicable to Sudras, to which caste the parties in the present case belong. But whether even among Sudras the existence of an illegitmate issue born to the wife before she changed her life would not, under certain circumstances, be an obstacle in the way of her claiming even bare maintenance is rather a delicate question. However this may be, and although no doubt a mere false defence by itself would not deprive the party setting it up of her legal right, the attempt which the defendant has made in this case to fasten upon the plaintiff as his legitimate issue the fruit of adultery is clear proof that she is far from a penitent wife who may be allowed to seek the benefit of the humane provision mentioned in the texts referred to in *Valu* v. *Ganga* (2) and *Roma Nath* v. *Rajonimoni Dasi* (1).

The plaintiff is, therefore, entitled to the relief claimed. I set aside the decree in original suit No. 129 of 1889 and the execution proceedings taken therein subsequent to this suit. The defendant must pay the costs of the plaintiff.

Ramanujachariar, attorney for plaintiff.

(1) 17 C. 674 (679). (2) 7 B. 84.

19 M. 10.

[10] APPELLATE CIVIL

Before Mr Justice Shephard and Mr Jutice Best.

MUNICIPAL COUNCIL, NELLORE (*Defendant*), *Petitioner* v RANGAYYA (*Plaintiff*), *Respondent* * [7th and 13th August, 1895]

District Municipalities Act (Madras)—Act IV *of* 1884, *Sections,* 72, 97, 262

The plaintiff built a house at Nellore, the construction of which was completed on the 15th of August 1893 The municipal authorities of that place, being governed by Madras District Municipalities Act, gave notice of assessment on the 11th of September, levied the tax as assessed, and credited it as the tax due for the half year ending on the 30th of September 1893 The plaintiff now sued to recover the amount paid by him as having been illegally levied

Held, that under the provisions of District Municipalities Act, Section 262, the suit was not maintainable

[Expl. 23 M 523 (526), R., 24 M 205 (213), D., 21 M 367 (368)]

PETITION under Provincial Small Cause Courts Act IX of 1887, Section 25, praying the High Court to revise the decree of W Gopalachari, District Munsif of Nellore, in small cause suit No 552 of 1894

Suit to recover Rs 3-6-0, being the amount of the tax alleged to have been illegally levied from the plaintiff by the defendant on account of house-tax The defendant, which was a Municipal Council constituted under the Madras District Municipalities Act (Act IV of 1884), admitted that the tax had been levied from the plaintiff and credited as the tax due for the half-year ending the 30th of September 1893 in respect of a house, the building of which was completed on the 15th of August 1893 It was pleaded that the tax was levied in accordance with law, and also that the suit was not maintainable with reference to Section 262 of the Act above referred to This section is as follows —

Assessment, &c not to be impeached if Act substantially complied with.

" 262 (1) No assessment, charge or demand of a tax made under the " authority of this Act shall be impeached or affected " by reason of any mistake in the name, residence, " place of business or occupation of any person liable " to pay the tax, or in the description of any pro- " perty or thing liable to the tax, or of any mistake " in the amount of assessment [11] or tax, or by reason of any clerical " error, provided the directions of this Act shall have been in substance " and effect complied with, and no proceedings under this Act shall, for " want of form, be quashed or set aside in any Court of Justice

" (2) No action shall be maintained in any Court to recover money " paid in respect of any tax, toll or fee assessed or levied, or any payment " collected, under this Act, or to recover money or damages by reason of " any assessment made, tax, or toll or fee levied, or any payment under " this Act, provided that the provisions of this Act relating to the assess- " ment and levy of taxes, tolls and fees, and to the collection of payments " have been in substance and effect complied with

Distress not unlawful for want of form.

" (3) No distress or sale under this Act shall be deemed unlawful, " nor shall any person making the same be deemed a " trespasser on account of any error, defect or want of " form in the bill, notice, schedule, form, summons, " notice of demand, warrant of distress, inventory, or " other proceeding relating thereto; nor shall such person be deemed a

* Civil Revision Petition No 518 of 1894.

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"tresspasser *ab initio* on account of any irregularity afterwards committed "by him.

Special damage actionable.

"Provided that every person aggrieved by such "irregularity may recover satisfaction for any special "damage sustained by him."

The District Munsif overruled both of the pleas above referred to and passed a decree as prayed.

The defendant preferred this petition.

Pattabhirama Ayyar, for petitioner.

Subramania Ayyar, for respondent.

JUDGMENT.

SHEPHARD, J.—This action is brought to recover the sum paid by the plaintiff in respect of the first instalment of the tax on a house for the year ending with March 1894. The construction of the house not having been completed till August 1893, it is contended for the plaintiff that the tax was not leviable for the first-half of the year and must, therefore, be recoverable by action. On the other hand it is argued on the defendant's behalf that any such action is barred by the 262nd Section of the Act of 1884. Unless it can be shown that the plaintiff is, under the circumstances, saved by the proviso to that section, this defence must clearly prevail.

[12] It is said that the provisions of the Act relating to the assessment and levy of taxes have not been in substance and effect complied with, because according to the right construction of the Act a house not completed at the beginning of the year cannot be made the subject of taxation. It is not said that in any other respect there has been a departure from, or neglect of, the provisions of the Act relating to the assessment of the property.

For the purpose of any argument regarding the construction of the 262nd Section, it must be assumed that money paid and sought to be recovered is money which was not legally payable by the plaintiff.

The second clause of the section is one of a group of provisions designed to give special protection to the Municipal Council.

The 261st Section provides for notice of action; the first clause of the 262nd Section provides for certain specified cases of mistake.

The second clause provides that no action shall be maintained to recover money paid in respect of any tax assessed or levied under it. Then follows the proviso. It is clear that this clause is not intended to be restricted to those cases in which there has been a mistake such as is provided for in the first clause.

The second clause presupposes a case in which a tax has been illegally levied and only requires that the provisions of the Act relating to assessment and levy shall have been complied with.

Assuming that the commissioners have made a mistake, and ought not to have levied a tax on the plaintiff's house for the first half-year, I think they are entitled to the protection which they claim under the 262nd Section. It cannot be said that the house-tax was not in legal existence in Nellore; the *modus operandi* presented by the Act was adopted, and all that can be charged against the defendants is that they made a mistake of law, or, of fact, in assessing this particular house of the plaintiff. Such a mistake does not, I think, bring the case within the proviso which, as I read it, is aimed at illegal exactions made by a council or its officers arbitrarily and without any regard to the provisions of the Act.

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The case is not in my opinion distinguishable from that cited on the defendant's behalf (*Kamayya* v *Leman* (1)) The plaintiff's remedy is by appeal under the 97th Section of the Act In this [13] view of the case it is unnecessary to consider whether in the sections relating to the tax on buildings the existence of the building at the beginning of the period for which the tax may be charged is presupposed

I would reverse the decree of the District Munsif and dimiss the suit with costs throughout

BEST, J.—The question is whether this suit for recovery of a sum of Rs 3-6-0 collected by the Municipal Commissioners of Nellore as house-tax for the half-year (March to September 1894) is maintainable

The District Munsif has held that it is on the authority of *Tuticorin Municipality* v *South Indian Railway* (2) In that case the money sued for was money that had been collected by the Tuticorin Municipality, in direct violation of Section 60 of the Act, which exempts a person who has paid profession tax in one municipality from liability to pay for the same half-year in another municipality It was therefore clearly a case in which the provisions of the Act relating to the assessment and levy of the tax had not been in substance and effect complied with, and therefore within the proviso of Section 262

The present case is different, as no express provisions of the Act can be held to have been contravened That it never could have been intended that a newly-built house that only became habitable six weeks before the expiry of the half-year should be taxed for the whole half-year may be inferred from Section 72, which provides for remission of the tax on vacant buildings, but clearly there is no ground on which it can be held in the present case that tax has been imposed or levied in contravention of any express provision of the Act, and such being the case *Kamayya* v *Leman* (1) is authority for holding that the suit is not maintainable

It must, therefore, be dismissed and the Lower Court's decree set aside

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19 M. 14=2 Weir 143

[14] APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr Justice Parker

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QUEEN-EMPRESS v VENKATARATNAM PANTULU *

[2nd October, 1895.]

Criminal Procedure Code—Act X of 1882, Sections 161, 172

At the beginning of a trial in the Court of a Presidency Magistrate, an application was made, on behalf of the accused, for a copy of the Police charge-sheet which contained the whole of the prosecution as set forth by the Police and extracts from, if not copies of, the Police diary The application was rejected by the Magistrate

Held, that the High Court should not on revision interfere with the order of the Magistrate.

[R., 20 M. 189=2 Weir 763 (F.B)]

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*Criminal Revision Case No 510 of 1895

(1) 2 M. 37.

(2) 13 M 78

1895 Oct. 2. — Appellate Criminal — 19 M. 14=2 Weir 143.

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the order of O. R. Jones, Chief Presidency Magistrate, Madras, dated 30th September 1895, in calendar case No. 25834 of 1895.

The facts of the case and the reasons for the order sought to be revised was stated by the Chief Presidency Magistrate as follows:—

"On calendar No. 25834 of 1895, wherein Venkataratnam Pantulu is charged by the Police with theft in a building, being called on for hearing, Mr. L. Gordon applied, on behalf of the accused, for a copy of the Police charge-sheet. This was refused for the following reasons:—

"I do not know of any provision of law in the Criminal Procedure Code or elsewhere which entitles the defence to call for a copy of the charge-sheet. I am willing to give a copy of the charge preferred by the Police, though the defence is not legally entitled to that until the charge has been framed by the Court under Section 210 of 255, Criminal Procedure Code.

"Police charge-sheets put in by the Madras City Police contain a good deal of information for the use of the Magistrate, and are certainly extracts from if not copies of the Police diary which, [15] under Section 172, Criminal Procedure Code, the defence is not allowed to call for or to see.

"To allow the defence to see the whole of the prosecution evidence before the enquiry or trial would simply amount to placing the whole case for the prosecution at their disposal. The witnesses would be liable to bribery and intimidation, and with ignorant witnesses who might be induced to omit or include one single statement while otherwise telling all the truth this would very often cause a true case to break down.

"I am unable to see how a prior knowledge of what the prosecution witnesses are going to say can benefit the accused, unless he makes an unfair and illegal use of that knowledge. As the evidence of each witness is given and recorded, the accused is given ample opportunity to cross-examine, or if he desires it, he may reserve his cross-examination until the prosecution is closed. Again, when called upon for his defence, he can re-call and cross-examine any witnesses he likes.

"For these reasons I consider that to give the accused a copy of the charge-sheet before the trial would give him a most unfair advantage, if inclined to use the knowledge thus gained improperly, and would be of no benefit to him if not so inclined and therefore, in the absence of any provision of the Criminal Procedure Code entitling him to it, I refuse to grant the copy applied for."

The accused preferred the petition.

The grounds on which the above order was sought to be revised were stated in the petition as follows:—

"(1) Because the Police cannot extend the privilege given by Section 172, Criminal Procedre Code, to documents other than diaries by incorporating the contents of a diary into such documents.

"(2) Because an accused person is entitled to inspection of the charge-sheet in Court, and if a copy is not granted beforehand, delay may be occasioned by necessary adjournments.

"(3) Because the ruling of the Magistrate is contrary to the principle laid down in *Sheru Sha* v. *The Queen-Empress* (1) and *Bikao Khan* v. *The Queen-Empress* (2)."

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(1) 20 C. 642. (2) 16 C. 610.

Mr *H G Webderburn*, for petitioner 1895 Oct. 2.
The Crown was not represented

JUDGMENT

APPELLATE CRIMINAL

[16] We are not prepared to hold that the Chief Presidency Magistrate was wrong in refusing a copy of the charge-sheet to the prisoner's attorney at the present stage of the proceedings

The petition is dismissed

Gordon, attorney for petitioner

19 M. 14=2 Weir 143

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19 M. 16.

APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Best

EACHARAN PATTER AND ANOTHER (*Appellants*) v APPU PATTER AND OTHERS (*Respondents*) * [26th and 31st July, 1895]

Court Fees Act—Act VII of 1870, Sections 6, 7 (ix), 17—Redemption suit against mortgagee in possession—Arrears of rent covenanted for, to be deducted from the mortgage amount

In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for, and the plaintiff asks for an account in taking which the arrears or rent should be deducted from the mortgage amount

Held, that the Court fee should be computed according to the principal sum expressed to be secured by the mortgage

CASE stated for the opinion of the High Court under Civil Procedure Code, Section 617, by R. S Benson, District Judge of South Malabar, in appeal suit No 512 of 1894

The case was stated by the District Judge as follows —

" Under Section 617, Civil Procedure Code, and following the precedent of the reference in *Venkappa* v *Narasimha* (1) and *Rama Varma Rajah* v. *Kadar* (2), I have the honour to refer the following question as to Court fees for orders of the High Court —

" In a suit for redemption of land demised on kanom, the plaintiff also claims arrears of rent due under the demise and prays for the recovery of the land on payment of the amount of the kanom *minus* the arrears of rent What is the Court fee payable on the plaint? Is it to be calculated on the kanom amount, or on that sum *plus* the arrears of rent claimed?

[17] " The question is of much importance in this district both from a fiscal point of view and also as affecting the distribution of work in the Courts, as it is believed that the valuation of the suit for purposes of jurisdiction would follow the valuation arrived at for the purpose of the Court Fees Act

" Unfortunately neither the practice nor the rulings of the Courts on the point appear to be altogether clear and consistent

" The question came before me recently in civil miscellaneous appeal No 42 of 1894, and the conclusion I arrived at was that the claim for redemption and the claim for rent were distinct causes of action, and that a suit like that under consideration embraced two distinct subjects, in regard to either or both of which relief might be given or refused, and

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(1) 10 M 187. *Refered Case No. 34 of 1894 (2) 16 M. 415

1895 JULY 31. — APPELLATE CIVIL. — 19 M. 16.

that therefore under Section 17 of the Court Fees Act, the institution fee on the plaint should be calculated on the aggregate of the value of each subject.

"This ruling of mine, however, which is mainly based on the recent ruling in *Konna Panikar* v. *Karunakara* (1) is opposed to what has been the practice of all the Courts of this district (except Shernad) since the case of *Subramanya Bharatengal* v. *Kunnan* (2) in 1889.

"The same question is now pending before me in appeal suit No. 512 of 1894, in which the plaintiff sued to redeem a kanom demise of Rs. 970 and to recover arrears of rent amounting to Rs. 675 on payment of the balance due after deducting the arrears of rent from the kanom. The Lower Court disallowed the prayer for redemption, but gave a decree for a portion of the rent. The appeal is against (1) the disallowance of the alleged right to redeem, and (2) the disallowance of part of the rent claimed. Court fee has been paid in each Court only on the kanom amount, but I am of opinion that it should also be paid on the rent claimed. Many similar cases are pending, and it is highly desirable that the question should be authoritatively settled at an early date."

Counsel were not instructed.

JUDGMENT.

SHEPHARD, J.—As I understand the reference, the suit is an ordinary suit for redemption in which, owing to the fact that the mortgagee in possession has not paid the stipulated rent, the plaintiff asks for an account, in taking which the arrears of rent will be deducted from the mortgage amount.

[18] In my opinion the Court fee ought in such a case to be computed according to the principal money expressed to be secured by the mortgage. In *Konna Panikar* v. *Karunakara* (1), it is distinctly said that the suit was to redeem the land and to recover arrears of rent. On that basis the judgment proceeds. *Subramanya Bharatengal* v. *Kunnan* (2) seems exactly in point.

I would answer the reference by holding that the fee must be computed on the amount of the mortgage.

BEST, J.—The suit is not for redemption and rent, but for redemption on payment of the kanom amount, the arrears of rent due from the kanomdar being deducted.

I am of opinion that the Court fee payable must be calculated on the kanom amount.

(1) 16 M. 328. (2) Civil Revision Petition No. 387 of 1889 (unreported).

19 M. 18=5 M.L.J. 249=2 Weir 94 and 591.

APPELLATE CRIMINAL

Before Sir Arthur J. H. Collins, Kt, Chief Justice, and Mr Justice Parker

1895 Oct. 1

APPELLATE CRIMINAL

19 M. 18=5 M. L. J. 249=2 Weir 94 & 591.

QUEEN-EMPRESS v. TIRUNARASIMHA CHARI *
[2nd and 11th October, 1895]

Criminal Procedure Code—Act X of 1882, Sections 144, 435, 476—Enquiry before issue of an order under Section 144—Judicial proceeding—False evidence

A Magistrate, making an enquiry before issue of an order under Criminal Procedure Code, Section 144, is acting in a stage of a judicial proceeding and has, therefore, jurisdiction to take action under Section 476, if he is of opinion that false evidence has been given before him

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise an order of the Taluq Magistrate of Madurantakam,, dated the 15th May 1895

By the order in question the Taluq Magistrate directed the prosecution of the petitioner for offences under Indian Penal Code, Sections 181, 193 The offences in question were charged to have been committed in the course of an enquiry held under Criminal Procedure Code, Section 144.

[19] The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Mr *H G Wedderburn*, for petitioner

The Government Pleader and Public Prosecutor (Mr *E B. Powell*, for the Crown

JUDGMENT

On April 27th, 1895, an order was issued by the Taluq Magistrate of Madurantakam under Section 144 of the Criminal Procedure Code, forbidding the erection of a stone-cut Vadagalainamam over the entrance of an Odayavar shrine in a certain temple, on the ground that such erection would lead to a riot. The Magistrate took proceedings in the first place on the report of the Village Munsif, which was followed by a police report and a petition from various persons Before passing the order, he took a deposition from the dharmakartha, Tirunarasimha Chari, and several others

Three is no question as to the jurisdiction of the Magistrate to pass the order, and under Section 435, Criminal Procedure Code, his proceedings are not subject to revision by the High Court But after the issue of the order, *viz* , on May 15th, 1895, the Magistrate under Section 476, Criminal Procedure Code, directed the prosecution of the trustee Tirunarasimha Chari for giving false evidence (Sections 181 and 193 of the Indian Penal Code), the alleged false evidence being that the trustee had sworn the namam was an old one, whereas in truth it was an entirely new one The District Magistrate refused to interfere with this order, and the first question for determination is whether the deposition was taken by the Taluq Magistrate " in the course of a judicial proceeding," as, if not, the Magistrate had no jurisdiction to act under Section 476, Criminal Procedure Code.

Under the old Procedure Code X of 1872, similar orders for the prevention of local nuisances were expressly declared to be not judicial proceedings (Sections 518, 529), and were therefore not revisable under Sec-

*Criminal Revision Case No 321 of 1895.

1895 Oct. 11. — Appellate Criminal — 19 M. 18=5 M. L. J. 249=2 Weir 94 & 591.

tion 297. See *Ramanuja Jeeyarsvami* v. *Ramanuja Jeeyar* (1). Section 144 of the present Code corresponds to Section 518, Act X of 1872, and though Section 520 was not re-enacted as a separate section in the corresponding chapter, its purport is repeated in the third clause of Section 435 of the present Code. In making this provision the Legislature had no [20] doubt in view the fact that there might be emergencies in which it was essential for the prompt preservation of the public peace to debar the interference of the High Court, but orders passed under Section 144, have only a temporary duration.

The difficulty arises from the variation in language between Section 297 of the old Code and Section 435 of the present Code. Under the old Code powers of revision were granted to the High Court in judicial proceedings, only, and the enacting of Section 520 would seem to imply that, but for that section orders under Section 518 would be "judicial proceedings," Section 435 of the present Code enables the High Court to call for the record of "any proceeding before any inferior Criminal Court," and, therefore, orders under Section 144 would certainly be subject to revision, were it not for the proviso in the third clause of the section. Under Section 4 of the present Code "judicial proceeding" is defined to be "any proceeding in the course of which evidence is or may be legally taken." It seems to us impossible to deny that a Magistrate acting under Section 144 may legally take evidence before issuing an order. He may, it is true, act on information received or on his own knowledge, without taking evidence, but the proviso in the third clause which in certain cases authorizes the Magistrate to pass an order *ex parte* seems to contemplate that ordinarily an order under the section should not be made, without an opportunity being afforded to the person against whom it is proposed to make it, to show cause why it should not be passed. See *In the matter of Harimohan Malo* (2) and *Queen* v. *Ramchandra Mookerjee* (3). This necessarily implies the power to take evidence before coming to a decision, though a Magistrate is empowered to act upon what is not legal evidence in cases of special urgency.

From this it would appear that both under the old Code and under the present Code these urgent orders were regarded as in their nature "judicial proceedings," the only difference being that whereas under the old Code, Section 520, somewhat inaccurately declared them to be not judicial proceedings for the purpose of ousting the High Court's powers of revision under Section 297, the present Code equally bars the High Court's jurisdiction without making an illogical declaration.

[21] For these reasons we come to the conclusion that a Magistrate, making an enquiry before issue of an order under Section 144, is acting in a stage of a judicial proceeding, and has therefore jurisdiction to take action under Section 476, if he is of opinion that false evidence has been given before him.

We are not prepared to hold that the Taluq Magistrate was bound to make any further preliminary enquiry, and as he had jurisdiction, we cannot set aside his complaint, nor will we now express any opinion as to the defence that may be raised at the trial.

[The petition is dismissed.]*

[*The words in rectangular brackets form a portion of the judgment though left out in the I. L. R.—Ed.]

(1) 3 M. 354. (2) 1 B. L. R. (A. Cr.) 20, (3) 5 B. L. R. 131.

19 M. 21.

APPELLATE CIVIL

Before Mr Justice Parker and Mr. Justice Best

1894 Aug 28.

APPELLATE CIVIL

19 M. 21

SRIRAMULU AND OTHERS (*Respondents*), *Appellants* v SOBHANADRI APPA RAU (*Petitioner*), *Respondent* *

[17th and 28th August, 1894]

Limitation Act—Act XV of 1877, Schedule II, Article 110—Rent Recovery Act, (Madras)—Act VIII of 1865, Sections 7, 9, 10—Suit to recover arrears of rent —Proceedings in Revenue Court to enforce acceptance of patta tendered—Time from which period of limitation is computed

In a suit for rent for a period which had expired more than three years before the date of the plaint, it appeared that proceedings had taken place in a Revenue Court under Rent Recovery Act (Madras), 1865, to enforce acceptance by the defendant of the patta tendered by the landlord These proceedings had terminated on appeal in favour of the landlord less than three years before the institution of this suit

Held, that the period of limitation applicable to the suit was not computable from the date of the termination of the proceedings under the Rent Recovery Act and that the suit was barred by limitation *Sobhanadri Appa Rau* v *Chalamanna,* (17 M 225) overruled

[**Overruled,** 27 M 143 (**P.C.**)=6 Bom L R 241=8 C W N 162=31 I A 17=14 M L J 1=8 Sar P C J 617, **F.,** 22 M 248 (249), **R**, 20 M 392 (394), 27 M 241 (**F.B.**)=14 M L J 67 (68)]

APPEAL under Letters Patent, Section 15, against the judgment of Muttusami Ayyar, J , pronounced on civil revision petition No 51 of 1892, which was presented under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the decree of M B Sundara Rau, Subordinate Judge of Ellore, in small cause suit No 323 of 1891

Suit to recover rent due on land of which the defendant was a tenant of the plaintiff The rent was claimed in respect of [22] the faslis 1295 and 1926, i e , for a period which had expired more than three years before the institution of this suit The plaintiff's father had tendered pattas for those faslis. Proceedings were instituted under Rent Recovery Act (Madras), 1895, before the Head Assistant Collector of Kistna to enforce acceptance by the defendant of the patta tendered by the landlord An appeal was preferred against the decision of the Head Assistant Collector to the District Judge, who disposed of the appeal in favour of the landlord less than three years from the institution of the present suit On these facts it was argued for the plaintiff that the suit was not barred and that the period of limitation applicable to it should be computed from the date of the decree of the District Court, whereby the question was determined whether the form of patta adopted was correct

The Subordinate Judge overruled this argument and dismissed the suit as barred by limitation The petition for the revision of his decree came on for hearing before Muttusami Ayyar, J , who held that the suit was not barred by limitation on the authority of his decision in *Subhanadri Appa Rau* v *Chalamanna* (1)

The defendant preferred this appeal

Mr *Parthasaradhi Ayyangar,* for appellant

Mr *E B Powell,* for respondent

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* Letters Patent Appeals Nos 10 to 14 of 1894

(1) 17 M. 225

1894 Aug. 28. — APPELLATE CIVIL. — 19 M. 21.

JUDGMENT.

Parker, J.—I find myself unable to reconcile the decision of the learned Judge with the decision in *Periyanayagam Pillai* v. *Virappa Naikan* (1) and that in *Easwara Doss* v. *Subbaraya Naicken* (2), to which Mr. Justice Muttusami Ayyar was a party. These decisions do not appear to have been brought to his notice. It is stated that plaintiff's father had tendered pattas for the fasli years for which the rent is now claimed. Having done so he was in a position, under Section 7 of the Rent Recovery Act, to sue for the rent notwithstanding that a suit to determine the terms of the tenancy was pending. The pendency of that suit did not prevent the accrual of the cause of action, though the determination of the suit for rent might have to await the decision in the suit brought to determine the terms of the patta. The period of limitation began to run on the dates on which the rent fell due and the obligation arose on the tender of the patta. The [23] pendency of the other suit could not either postpone the obligation (the patta tendered being correct), or prevent the accrual of the cause of action. The landlord was in a position to sue, though the decision of the suit might possibly have to be postponed. I would set aside the order of the learned Judge and dismiss civil revision petition No. 51 of 1892 with all costs in this Court.

Letters Patent appeals Nos. 11 to 14 follow.

Best, J.—The question for decision in all these appeals is the same, namely, whether the suits are barred under Article 110 of Schedule II of the Limitation Act? The rent sued for in each case is due for faslis which admittedly ended more than three years prior to the institution of these suits and the Court of first instance held in each case that the suit was time-barred. But the learned Judge of this Court, before whom the cases came for revision under Section 25 of Act IX of 1887, has held that the period of limitation must be calculated from the date on which were finally decided the suits brought by the landlord under Section 9 of Act VIII of 1865 (Madras) for enforcement of acceptance by the tenants of pattas tendered, which they had refused to accept.

No doubt Section 7 of the Act makes the tender of a patta such as the tenant was bound to accept, a condition precedent to a suit for recovery of the rent except in cases in which there has been mutual exchange of patta and muchalka, or an agreement to dispense with such.

But this condition does not appear to me to warrant the holding that when a suit is brought to enforce acceptance of such patta, institution of a suit for the rent to which it relates must or can be deferred till disposal of that suit. It seems to me that the landlord is in a position to sue for the rent as soon as he has tendered a proper patta, and it is clear from Section 14 of the Act that rent becomes an arrear and due " at the time " when according to any written agreement or the custom of the country " it ought to have been paid " and that is not later than the end of the fasli for which it is due.

I agree, therefore, in setting aside the learned Judge's order and restoring the decrees of the Court of first instance in each of these cases.

Each of these appellants is entitled to his costs in this Court both of the present appeals and of the revision petitions.

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(1) 7 M. H. C. R. 51.

(2) Civil Revision Petition No. 136 of 1891 (unreported).

19 M. 24.

1895
Sep. 23

APPEL-
LATE
CIVIL.

19 M. 24

[24] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best

KRISHNAYYA (*Plaintiff*), *Appellant* v SECRETARY OF STATE FOR INDIA (*Defendant*), *Respondent*.*
[30th January, 18th April and 23rd September, 1895]

Irrigation-cess Act (Madras)—Act VII *of* 1865—*Lands irrigated under Kistna anicut—Water-cess—Optional or compulsory use of water*

A raiyat occupying land in the Kistna delta made no application for the supply of water, but water from the irrigation channels flowed from time to time on to his land from irrigated lands of a higher level, and he had no option as to whether to accept or refuse the supply No increased benefit was derived from the water by the raiyat A sum having been levied from him on account of water-cess, he now sued to recover the amount

Held, that the plaintiff was entitled to recover

[R., 34 M. 21 (23)=6 Ind Cas 199=20 M L J 766=7 M L T. 407 24 M.L J 365 (385)=13 M L T 235=(1913) M W N 225.]

SECOND appeal against the decree of G T Mackenzie, District Judge of Kistna, in appeal suit No 452 of 1893, reversing the decree of B Virasami Ayya, District Munsif of Guntur, in original suit No 232 of 1892.

The plaintiff was a raiyat occupying land in the Kistna delta, and the plaint alleged that in fasli 1300 he raised on his land a crop of *mosadum* paddy and that the crop was damaged by water which flowed on to it from fields on a higher level which were irrigated under the Kistna anicut, and that he was assessed to pay and paid under protest a certain sum on account of water-cess, which sum he now sought to recover It was pleaded that the suit was barred by Revenue Recovery Act II of 1864 (Madras), Section 59, and that the imposition of a water-cess was rightly made, since the crop of *mosadum* paddy was a wet crop and as such benefited by irrigation, although in a favourable season it is possible to cultivate it with rain water alone

The District Munsif held that *mosadum* paddy was a crop not merely depending on rain, but needing occasional irrigation not inundation, and that the plaintiff was neither a loser nor a gainer by the water flowing on to his land, and that even if he were a gainer thereby he would not for that reason alone have become liable for the water-cess On these findings he passed a decree for the plaintiff as prayed.

[25] The District Judge on appeal stated the circumstances out of which the claim arose as follows:—

" The river Kistna passes through the hills at Bezwada and then becomes a delta-river It flows on a level higher than the surrounding country, which slopes away from each bank of the river and down to the sea with an even slope of about one foot per mile More than thirty years ago Government threw across the river at Bezwada a great transverse dam, called the anicut, and thus provided a constant head of water to irrigate the delta This water was conveyed from each end of the anicut into the delta by the old channels of former flood action or by new channels excavated for the purpose. The system of channels to supply the whole delta is not yet completed and it is a mistake to think that

* Second Appeals No 1438 to 1442 of 1894.

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there is a separate channel to each raiyat's holding, as there is a water pipe to each house in a city. The system is much more rough and ready. The water is let off from the channels into the fields nearest the sluices and from these fields it flows down to other fields. It flows from terrace to terrace of rice fields, or it is led along by small distributary channels kept up by the raiyats themselves or it flows down any natural slope to a lower village with its fields, until finally it passes to the Koleru lake, the Romperu swamp or the sea. The ideal system would be to have a channel and a sluice at each man's holding, with a hydrometer to measure the amount of water issued to him, but the existing system it simply that the water is put into the delta and left to flow down to the fields that require it.

"In 1865 the Secretary of State desired to have separate returns of the receipts from the Kistna and Godavari anicuts and to enable Government to obtain these returns, Madras Act VII of 1865 was passed. The land in the Kistna delta was classed as dry land and a charge per acre was made for the water from the anicut channel, supplied or used. I imagine that Government in passing this Act looked on it as making nominal change in the land revenue accounts and had no idea that the Act would affect the rights of the cultivators. I believe that in those days no officer in the Madras Presidency thought that a raiyat could refuse to take the water when it was supplied.

"In 1885 a raiyat in Zupudi of Bapatla Taluk was compelled to pay water rate on land upon which he had attempted to raise a crop of paddy when the excess water from the higher villages flowed down upon it. I expressed the view that the raiyat had no legal option to refuse the water and must pay, but this view was emphatically set aside by the High Court. The case is reported as *Venkatappayya* v. *The Collector of Kistna* (1). The decision caused a sensation in the district.

"In the present suit the plaintiff has lands on a low level and the excess water from the higher villages flowed upon his lands. He had cultivated the land with *mosadum* paddy. The evidence shows that this paddy can be cultivated with an abundant rainfall, but that if the rain be not sufficient to make water stand on the field, the paddy must be irrigated. The evidence also shows that the rainfall that year was deficient and that plaintiff, by the help of this excess water which flowed to his land, did reap a crop. Plaintiff and his witnesses say that the water was a yard deep and damaged the crop, but I suspect that to be an exaggeration. Plaintiff made no application for water. Upon these facts the question before me is whether the Collector can demand water-rate."

[26] In the result the District Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit.

Pattabhirama Ayyar and *Venkatarama Sarma*, for appellant.

The Government Pleader (Mr. E. B. Powell), for respondent.

JUDGMENT.

SHEPHARD, J.—It seems to me desirable before we decide this appeal, which raises an important question, that we should have before us more distinct findings on the facts. It appears from the District Munsif's judgment that several questions of fact were raised before him and the District Munsif records his opinion upon them. In the judgment of the District Judge there is only one of the fourteen paragraphs of which it consists, which touches the particular facts of the case.

Without any discussion of the evidence, the District Judge finds that

(1) 12. M. 407.

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the rainfall was insufficient and that the water which flowed to plaintiff's field did in fact save the crop and produce a harvest, whereas the Munsif finds that the plaintiff was neither a gainer nor a loser by the water. In my opinion, however, the circumstance that the plaintiff was in fact a gainer is not sufficient to justify the dismissal of the suit, or to distinguish the case from *Venkatappayya* v. *The Collector of Kistna* (1). The facts of that case are not very clearly stated in the report Apparently, the plaintiff there, was, by reason of the submersion of his lands, driven to growing *tiruvarangam* paddy—a crop requiring irrigation. The crop failed, but it is not said that it failed in consequence of the excess water. The *ratio decidendi* appears to be that the plaintiff was practically compelled to use the water in order to obtain any crop According to this decision, the question is not whether in the result the plaintiff derives benefit from the water, but under what circumstances he came to use it. If he had no choice in the matter, then, as I understand the decision, he cannot be said to have used the water within the meaning of the Act. I think the District Judge should be asked to return a finding on the question whether the plaintiff used the water for purposes of irrigation within the meaning of the Act.

BEST, J —The finding of the Judge is that *mosadum* paddy—a crop of which was raised and reaped by the plaintiff—though it can be cultivated with an abundant rainfall, must be irrigated if the rain be not sufficient to make water stand on the field, that in [27] the year in question the rainfall was deficient and that it was by the help of the water that flowed to his land that plaintiff reaped a crop The case is, therefore, distinguishable from *Venkatappayya* v *The Collector of Kistna* (1), where there was a failure of the paddy crop which the raiyat endeavoured to raise, to avert, if possible, the loss that would otherwise be incurred by reason of the land being rendered unfit for dry cultivation The learned Judges who decided that case are careful to limit their decision to the "facts found in the case and upon those facts they held—and rightly so—that to compel the then plaintiff to pay the cess would be to violate the rule that requires the construction to be placed on statutes to be reasonable, for it is clear from the preamble of Act VII of 1865 (Madras) that the cess is only payable on account of the "increased profits" derivable from lands irrigated by the works referred to therein Stress is laid on behalf of appellant on the following passage in the judgment above referred to "The appellants did not apply for the water and "it was not allowed to flow to their land by reason of such application "and we cannot therefore say that water was *supplied* inasmuch as "the expression implies in its ordinary sense a previous request, express "or implied" These last words are significant. It is not necessary that there should have been an actual request for the water, the request can be "implied." Immediately afterwards, in considering the word "used," the learned Judges say "the term ordinarily presupposes freedom either "to use or abstain from using the water and the language of the section "does not suggest an intention to exclude this freedom," and further at p. 410 they say "the reasonable construction is that the use con- "templated by the Act is a voluntary use though not preceded by an "application" A previous request can be implied therefore if there has been a voluntary use of the water. I concur in remitting for trial the issue suggested by my learned colleague.

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The District Judge is requested to submit his findings within one month from the date of receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

In compliance with the above order, the District Judge F. H. Hamnett submitted the following findings:—

" [28] The appellants had no choice but to use the surplus water or to run the risk of serious damage, if not the total loss of any dry crops they might attempt to raise on the lands. The use of the water was not, therefore, optional, inasmuch as the appellants had no freedom to either take or refuse the water.

" I now consider the question whether the appellants had the intention of deriving an increased profit by the use of the water.

" What should, in my opinion, be the real important question is whether the appellants derived any increased profits by the use of the water as compared with the profits they would ordinarily have got by raising dry crops. There is no clear evidence on this point, but it may be presumed that wet crops, if properly irrigated, yield a much larger return than dry crops, otherwise the raiyats would not pay an extra tax of Rs. 4 an acre over the dry assessment for the use of Government water. This would be a legitimate inference to draw if water was obtained in the way it is usually supplied to wet fields. In the present case the tax imposed was eventually reduced to Rs. 2 an acre and I gather from Exhibit III that this tax must have been imposed on the ground that the crops raised were wet crops irrigated by drainage water, of which the Jamabundy officer (or his superior, the Collector) was satisfied, the supply was too precarious to allow of the cultivation of a regular wet crop. We start then with the fact that the supply is a precarious one. It is very doubtful whether wet crops raised with such a precarious supply would be more remunerative than good dry crops raised on the same land. The Revenue Inspector proves that the lands in these particular cases only yielded 2½ tooms an acre as compared with 15 tooms, the average yield of ordinary wet lands. The value of 2½ tooms would not be more than about Rs. 5, and this is not in excess of what the lands might have yielded if cultivated with dry crops, the assessment of the lands (as dry lands) being Rs. 2 an acre and the assessment being supposed to be about half the nett yield of the lands. It is urged that fasli 1300 was a bad year and that the appellants would probably have got no dry crops at all. This might be so, but in June or July when the appellants planted their *mosadum* crops, it was too early for any one to predict whether the rains were going to fall or not. When they planted the crops, therefore, they could have had no intention of deriving an increased profit from the use of Government water, which they could not have realized from dry crops, assuming that dry crops were cultivable in spite of the flow of surplus water over the lands. I find, therefore, that there is no proof that the appellants derived any increased profit or intended to derive any increased profit as compared with the profit which their lands, if capable of cultivation as dry lands, would have yielded in an ordinary season, and that, on this ground, and there was no use of the water for irrigation purposes within the meaning of the Act, which presupposes that the tax is only paid for use of water which is intended to yield increased profits.

" I have also found that the use of the water was not optional but compulsory."

These appeals coming on for final hearing, the Court delivered the following

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JUDGMENT

It is now found that it was practically impossible for the plaintiff to divert the water and prevent it coming [29] over his land and that no increased benefit was derived from the water

The inference drawn by the Judge is that the use of the water was not voluntary. On these findings, following the decision in *Venkatappayya v The Collector of Kistna* (1), we must allow the apeal, reverse the decree of the District Judge and restore that of the District Munsif.

The appellant is entitled to costs throughout

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19 M. 29=5 M.L.J. 153.

APPELLATE CIVIL

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

DAIVANAYAGAM PILLAI, (*Appellant*) v. RANGASWAMI AYYAR, (*Respondent*)* [31st October and 1st November, 1894, and 31st August, 1895.]

Civil procedure Code—Act XIV of 1882, Sections 2, 244, 311, 588—Order refusing to set aside a Court sale—Second appeal

A judgment-debtor, whose property had been sold in execution of a decree and purchased by the decree-holder, applied that the sale be set aside on the ground that the person, at whose instance execution had proceeded, had been improperly brought on to the record. The application was rejected by the Court of first instance and an appeal by the applicant was dismissed.

Held, that no second appeal lay to the High Court

[F., 28 C 4 (6)=5 C W N 124, 8 Ind. Cas 883=9 M L T 171]

APPEAL under Letters Patent, Section 15, against the judgment of Muttusami Ayyar, J, dismissing a second appeal preferred against the order of T. M Horsfall, District Judge of Tinnevelly, in civil miscellaneous appeal No 12 of 1892, which affirmed the order of S Saminatha Sastri, District Munsif of Ambasamudram, in miscellaneous petition No. 1843 of 1892

The petitioner in the District Munsif's Court was one Daivanayagam Pillai, the second defendant in original suit No 90 1890, and the petition stated that his property had been attached in execution of the decree in that suit, that after the date of the [30] attachment one Rangasami Ayyar had applied to be brought on to the record as an assignee from the decree-holder, that his application had been granted after the death of the original decree-holder, no one having been brought meanwhile on to the record as a representative of the deceased and no notice having been served on the second defendant, and that the property, which had been attached was subsequently sold in execution and purchased by the decree-holder. The prayer of the petition was that the sale should be set aside under Civil Procedure Code, Section 311 The District Munsif dismissed the petition for default. The District Judge dismissed the appeal against the order of the District Munsif

The petitioner preferred a second appeal which came on for hearing before Muttusami Ayyar, J.

Ramachandra Rau Saheb and *Ranga Ramanjuchariar*, for appellant.

Srinivasa Ayyangar, for respondent.

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*Letters Patent Appeal No 20 of 1895

(1) 12 M. 407

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APPELLATE CIVIL.

19 M. 29=5 M. L. J. 153.

MUTTUSAMI AYYAR, J.—The preliminary objection is taken that no second appeal lies in this case. I am of opinion that the objection is well founded. I held in *Pechi Chetti* v. *Venkatachellam Chetti* (1) that no second appeal lay against an order made under Section 588. An order refusing to set aside a sale is appealable under Section 588, and it is provided by Act VII of 1888 that the orders passed in appeals under Section 588 shall be final. By Section 2 of the Civil Procedure Code it is expressly declared that an order specified in Section 588 is not a decree. No second appeal can, therefore, be taken to lie under the provisions of the Code relating generally to appeal decrees. It is urged that in the case before me the decree-holder, who was a party to the suit, was the purchaser at the Court-sale and that the order must therefore be taken to be an order passed under Section 244. But it is not enough that the question determined is one mentioned in Section 244, In order that the order may be a decree, it is also necessary that the order should not be one specified in Section 588. Under Section 2 of the Code of Civil Procedure it is immaterial whether a decree holder or a third party is the purchaser at the Court-sale. The same view was taken by the Full Bench at Calcutta in *Nana Kumar Roy* v. *Golam Chunder Dey* (2). My attention is, [31] however, called to the cases—*Vallabhan* v. *Pangunni* (3), *Muttia* v. *Appasami* (4) and *Viraraghava* v. *Venkata* (5). But none of them is in point and this question did not arise in those cases.

I dismiss this appeal with costs.

The appellant prefered an appeal under Letters Patent, Section 15, against the above judgment.

Jivaji, for appellant.

Respondent was not represented.

JUDGMENT.

We agree with the learned Judge that there is no second appeal.

The appeal is dismissed with costs.

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19 M. 31=5 M.L.J. 275.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

RAMASAMI BHAGAVATHAR (*Defendant No. 3*), *Petitioner v.* NAGENDRAYYAN AND OTHERS (*Plaintiff and Supplemental Plaintiff's*), *Respondents.** [4th and 17th September, 1895.]

Companies Act—Act VI of 1882, Section 4—Illegal association—Business carried on for the purpose of gain.

Persons more than twenty in number paid each a certain sum monthly to a stakeholder. The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by casting lots, and he was thereupon required to execute a bond with a surety obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good—that period being as many months as there were subscribers. The bonds in question were executed in favour of the stakeholder and the subscribers. A suit was brought on one of such bonds to recover the amount payable for subscription on account of the period subsequent to its execution.

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* Civil Revision Petition No. 597 of 1894.

(1) Appeal against Appellate Order No. 18 of 1893 (unreported).

(2) 18 C. 422. (3) 12 M.454. (4) 13 M. 504 (5) 16 M. 287.

Held, that the obligees carried on business which had for its object the acquisition of gain within the meaning of Companies Act, 1882, Section 4, and accordingly constituted an illegal association and that the suit was not maintainable 1895 Sep. 17.

[**R.**, 29 M 477=16 M.L J. 385=1 M L.T. 237, 1 M L T. 106; **D.**, 20 M. 68 (71) 2 M L.T 52] APPELLATE CIVIL.

PETITION under Provincial Small Cause Courts Act, IX of 1887, Section 25, praying the High Court to revise the decree of [32] K. Krishnamacharar, District Munsif of Madura, in small cause suit No. 809 of 1894 19 M. 31=5 M. L. J. 275.

The facts were stated by the District Munsif as follows —

" Suit to recover Rs 40-12-0, being the balance of subscription and interest thereon, due in respect of a chit subscribed for by the deceased father of the first defendant with the first plaintiff as stakeholder. The said subscriber got his prize and was paid the money, on himself and the third defendant executing the plaint bond as security for the due payment of the subscription

" The first and second defendants, who are the legal representatives of the deceased subscriber, Ruppa Subbayyan, have allowed the suit *ex parte* "

The bond above referred to was executed by the deceased subscriber and defendant No 3 in favour of plaintiff No 1 and the other subscribers to an association, the nature of which did not appear from the printed records in the case, but was made apparent by the facts admitted at the hearing, the effect of which is stated in the judgments on the petition. A question was raised before the District Munsif as to whether the suit was maintainable " the suit transaction relating to a company consisting of more than twenty subscribers and not registered under the Indian Companies Act " The District Munsif determined this and the other questions raised in the suit in favour of the plaintiff and passed a decree as prayed.

Defendant No 3 preferred this petition

Balaji Rau, for petitioner

Bhashyam Ayyangar and *Gopalasami Ayyangar*, for respondents.

JUDGMENT

SHEPHARD, J —The question is whether the association formed by the plaintiffs and the deceased Subbayyan, not having been registered under the Companies Act, was an illegal one If they were associated together for the purpose of carrying on a business and had in view the acquisition of gain, the action, being brought to enforce a contract made for an illegal purpose, clearly cannot be maintained The facts are not fully stated in the judgment, but it was admitted before us that the chit-fund, or kuri as it is called, in which the deceased Subbayyan and the plaintiffs took part, was managed in the following way. Periodically the subscribes pay each a certain sum to a stakeholder The sum total of their subscriptions is then assigned by casting of lots to one of the subscribes who is thereupon required to execute a bond with [33] a surety obliging him to continue his subscriptions to the end of the period for which the arrangement is agreed to hold good The subscriber who at any one drawing happens to take the prize enjoys the benefit of the money without paying interest— and accordingly an advantage is gained by those who gain the prize in the early part of the period as compared with those who, having to keep up their subscriptions all the time, do not receive anything until towards the end of the period. (See *Kamakshi Achari* v. *Appavu Pillai* (1)—also Logan's Malabar District Manual, page 172, and

(1) 1 M.H C.R 448.

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as to analogous institutions in China, Simcox's Primitive Civilization, Vol. II, page 332.)

It can hardly be doubted that persons associated together in this way must be said to carry on a business. It is true that they have no business relations with persons outside their circle as in cases when a trade is carried on; there is no subsisting fund with which such business could be carried on. But money-lending is a business, and here upon each drawing of lots there is a loan of the common fund made by ninety-nine members of the association to the hundredth. The point taken by Mr. Bhashyam Ayyangar was that business was not carried on for the purpose of gain either to the association or to the individual members of it. It was suggested that the real object which subscribers to a chit-fund have in view is, not the chance of an early drawing of the lot, but the securing of a safe deposit for saving and the consequent inducement to save money. It is possible that the idea of enforced economy may weigh with those who contribute to a fund, but I am unable to believe that the chance of gain by the securing of a loan on easy terms is not also an object which contributors have in view. Mr. Bhashyam Ayyangar's argument was the same as that used in *Shaw* v. *Benson* (1). The object of the society in that case was first to advance money to shareholders to enable them to build or purchase houses, and secondly to lend money to shareholders on approved personal security. Interest was charged on the moneys so advanced and the business was so conducted that at the end of the period for which it was intended to go on, the members who had not borrowed would pay £84 on each £100 share, whereas the members who had borrowed from the beginning would pay £119. In that case, therefore, it was rather the lenders [34] than the borrowers who acquired gain. It was argued that the object of the society being the encouragement of saving, all members received equal advantage, there was therefore no acquisition of gain. But it was held that at any rate for the lending members there was a gain and therefore the society was an illegal one. In that case, as it seems to me, the contention that the encouragement of saving was the object of the association was more entitled to weight than it is in the present case in which all the subscribers must at the outset have had in contemplation the borrowing of the fund.

The case of *Kraal* v. *Whymper* (2) was cited on the plaintiffs' behalf. The decision, which turns on the particular conditions of the society in question, a society established on the mutual principle for the maintenance of widows and children, appears to me to have no bearing on the present case. The cases in which the object is to make some of the members to acquire gain by their dealings with the rest are expressly distinguished in the judgment. The present case, in my opinion, belongs to that class and, acting on the principle enunciated in the English cases that the Act should be carried out without a too minute or hypercritical consideration of its terms, (*In re Padstow Total Loss and Collision Assurance Association* (3) I think we are bound to hold that the association was an illegal one and that therefore the decree should be reversed and the suit dismissed. I would make no order as to costs.

BEST, J.—I concur. The object of the association was the business of money-lending—the member to whom the loan was to be given being decided by drawing lots. These lots were drawn once a month, when also were due the monthly subscriptions of each of the members—and the

(1) 11 Q B.D. 563 (570). (2) 17 C. 786 (808).. (3) 20 Ch. D. 137 (145).

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APPEL-LATE CIVIL.

19 M. 31 = 5 M. L. J. 275.

whole amount of the month's subscriptions was paid over to the drawer of the loan for that month, on his executing a bond (with a surety) for his continuing to subscribe during the remaining months for which the kuri was established the whole number of months of its existence being equal to the number of subscribers, so that each subscriber should have a month in which he must be the drawer of the loan Those who drew the loan in the earlier months were decidedly gainers, as they at once got the money on condition of repaying the por-[35]tion of it merely in excess of their theretofore paid subscriptions by punctual payment of future subscriptions—no interest being charged except on such subscriptions as should not be paid as they fell due The hope of gain by drawing an early prize is no doubt the motive which induces persons to become subscribers to these kuris—and such gain is sufficient to bring the associations within the scope of the Companies Act, *Cf. Shaw* v. *Benson* (1) and *In re Padstow Total Loss and Collision Assurance Association* (2) *Kraal* v. *Whymper* (3) is distinguishable, as pointed out in that case itself, from a case in which the object of the business is "to enable some of the members to acquire gain by their dealings "with the rest," which is a not inapt description of the object of the association now in question

The bond A on which the suit was brought is executed not only to the first plaintiff as stakeholder, but to him and the subscribers to the kuri

It is, therefore, a contract to pay money according to the rules of an association illegal for want of registration under Section 4 of the Companies Act (VI of 1882)

I concur in dismissing the suit without any order as to costs

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ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

THAYAMMAL (*Plaintiff*) *v* ANNAMALAI MUDALI AND ANOTHER (*Defendants*) * [11th October, 1895]

Hindu law—Inheritance—Stridhanam—Sister-in-law.

A childless Hindu widow, who had been predeceased by her parents, died, leaving stridhanam property Her brother's widow claimed to be entitled to inherit that property and sued to enforce her claim

Held, that, whether the marriages of the deceased and her mother respectively had taken place in a superior or an inferior form, the plaintiff was not entitled to inherit the stridhanam property in question

[**R.,** 32 M 512= 3 Ind Cas 541=19 M L J. 656 (661)=6 M L T 183; 16 Ind Cas 939=23 M L J 518 (519)=12 M L T 499 (1912) M W N 1166 (1167), 16 M L J 550 (551)]

[**36**] SUIT for possession of certain property the stridhanam of one Seshammal, deceased, to which the plaintiff claimed to be entitled under the law of inheritance Seshammal had died, leaving no children or parents and the plaintiff was her brother's widow. It was pleaded, *inter alia,* that the plaintiff was not entitled to inherit under the Hindu law The first issue related to this plea and that alone was tried

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*Civil Suit No 108 of 1895.

(1) 11 Q.B D 563 (570) (2) 20 Ch D. 137 (145) (3) 17 C. 786 (808)

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ORIGINAL CIVIL.

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Mr. *R. F. Grant*, for plaintiff.
Balaji Rau and *Desikachariar*, for defendant No. 1.
Sundara Ayyar, for defendant No. 2.

JUDGMENT.

On the application of the defendants the first issue, which is one of law, was argued under Section 146 of the Code of Civil Procedure. It raises the question whether the plaintiff is, as alleged in the plaint, heir to the stridhanam of the late Seshammal, a married woman.

According to the rules of law applicable to the devolution of the stridhanam of a married woman, the property passes in the first place to the lineal descendants, if she left any, in an order to which it is unnecessary here to refer. The course of descent in default of descendants varies according to the form in which the deceased was married. If the marriage was in one of the four approved or superior forms, the husband, if he survives, takes the inheritance and in default those who would be his heirs. But if the marriage was in one of the four unapproved or inferior forms, the deceased's mother succeeds, and if there is no mother, the father. Failing the parents the heirs of the father and in default those of the mother inherit (Mitakshara, Chapter II, Section XI; Stokes' Hindu Law Book, page 461).

Now the allegation in the plaint relevant to the present question are that Seshammal died, leaving no lineal descendants nor husband nor mother nor father, and that the plaintiff is the widow of Seshmmal's brother, who predeceased his sister. As to the form, however, in which Seshammal was married the plaint is silent. The law presumes under the circumstances that the marriage was in one of the approved forms (Mayne's Hindu Law, 5th edition, paragraph 80) and in this view of the matter the plaintiff has to show that she is heir to Seshammal's husband. The learned counsel for the plaintiff scarcely ventured to assert that a person in the position of the plaintiff can be heir to her sister-in-law's husband. No authority was cited in favour of that proposition [37] and none, I believe, can be found to support it. A man's wife's brother's widow belongs to none of the three well-known classes of relations who are heirs to him. She is neither a sapinda nor samanodaka nor a bandhu of that man, and so far as the law of inheritance goes there seems to be no difference between her and a complete stranger. It is thus perfectly clear that, on the hypothesis that Seshammal's marriage was in one of the superior forms, the plaintiff's claim must fail.

The case, however, has to be considered with reference to the other hypothesis also, *viz.*, the marriage was in an inferior form. It is true, as observed before, that the presumption is against that hypothesis. But that is a rebuttable presumption, and, as no evidence has been taken, I think the plaintiff is entitled to ask for a determination of the question on the supposition that she will be able to adduce evidence to rebut that presumption. In this view the question is, is the plaintiff heir to Seshammal's mother or father? It is convenient to take first the latter part of the question. On behalf of the plaintiff certain passages in *Kutti Ammal* v. *Radakristna Aiyan* (1) and *Lakshmanammal* v. *Tiruvengada* (2) were relied upon. Assuming those cases to be among the authorities for the proposition that bandhus need not necessarily be male relations, I fail to see how they afford any support to the claim of the plaintiff, since to

(1) 8 M.H.C.R. 88. (2) 5 M. 241.

enable her to come in as a bandhu of Seshammal's father, his gotra and that of the plaintiff must be different, whereas the contrary is the case here. By her marriage she passed into his gotra; and if she is entitled at all, it can only be as one of his sagotra sapindas. But, unlike under the Mayukha, a female sagotra sapinda of Seshammal's father in the position of the plaintiff is not an heir to him in this Presidency. (*Balamma* v *Pullayya* (1)); see as to daughter-in-law, specially, Mayne's Hindu Law, 5th edition, paragraph 488, and Dr Jolly's Lectures on Hindu law at page 199). The next question is, is the plaintiff heir to Seshammal's mother? The answer to this also must be in the negative For if Seshammal's mother's marriage was in an approved form, on the hypothesis that she died an issueless widow, (on which hypothesis alone the plaintiff can claim), the mother's heir would be her husband's, *i e.*, Seshammal's father's heir. And [38] I have already shown that the plaintiff is not his heir But even supposing Seshammal's mother was married in an inferior form —*Bandam Settah* v *Bandam Maha Lakshmy* (2), wherein it was broadly laid down that under the Hindu law a daughter-in-law is not an heir to her mother-in-law, is a direct authority against the plaintiff

1895 Oct. 11 — Original Civil. — 19 M. 35.

I must, therefore, hold that in no point of view the plaintiff's claim, that she is entitled to Seshammal's stridhanam, is sustainable And finding the first issue against her I dismiss the suit with costs

Branson & Branson, attorneys for plaintiff

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19 M. 38.

APPELLATE CIVIL.

Before Mr Justice Parker and Mr Justice Subramania Ayyar

KANAKAYYA (*Plaintiff No.* 2), *Appellant* v NARASIMHULU AND OTHERS (*Defendants*), *Respondents* * [20th and 29th August, 1895]

Party—Wall—Erection on the wall by one tenant in common—Injunction at suit of other co-tenant

One of two tenants in common of a party-wall raised the height of the wall with a view to building a superstructure on his own tenement. The other tenant in common, who had not consented to the alteration in the wall, but had suffered no inconvenience therefrom, now sued to enforce the removal of the newly-erected portion

Held, that the plaintiff was entitled to the relief sought

[R., 33 P R 1901=71 P L R 1901; 1 S L R 66]

SECOND appeal against the decree of N Saminadha Ayyar, Subordinate Judge of Vizagapatam, in appeal suit No 40 of 1893, affirming the decree of A L Narasimham, District Munsif of Vizianagaram, in original suit No. 86 of 1892

The plaintiffs and defendants were tenants in common of a party-wall The defendants, without the consent of the plaintiffs, intending to build a superstructure on their tenement, raised the [39] height of the party-wall. This suit was brought to compel the removal of the newly-erected part of the wall.

The District Munsif dismissed the suit, and his decree was affirmed on appeal by the Subordinate Judge who held that the defendants had " every

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* Second Appeal No 865 of 1894

(1) M 168 (2) 4 M.H.C R. 180.

1896 Aug. 29. "right to use the wall for lawful purposes without inconvenience or injury "to the co-owner, and this is exactly what they have done."

Appellate Civil. Plaintiff No. 2 preferred this second appeal.

19 M. 38. *Ramachandra Rau Saheb*, for appellant.

Mr. *M. O. Parthasaradhi Ayyangar* and *Parthasaradhi Ayyangar*, for respondents.

JUDGMENT.

PARKER, J.—The finding is that the wall in dispute is a party-wall, belonging to plaintiffs and defendants as tenants-in-common. It is also found that the agreement A has no reference to the plaint-wall.

The plaint asks that the part of the wall newly raised by the defendants shall be removed, and on the authority of *Watson* v. *Gray* (1), I am of opinion that plaintiffs are entitled to the relief asked for. It is true that the refusal of plaintiffs to give the required permission may be ill-natured and that the raising of the wall will not really harm them; but, at the same time, the altered wall is no longer the same wall and the newly erected portion will not be a common or party wall. The erection of it might give rise to inconvenience and quarrels.

I would give second plaintiff a decree for removing the portion of the wall newly raised, but as both parties have set up false pleas, I would direct that each pay his own costs throughout.

SUBRAMANIA AYYAR, J.—I was at first inclined to hold that the sound view to take with reference to the point at issue was that adopted in *Brookes* v. *Curtis* (2). There the Court of Appeal of New York observe:—"The fairer view and the one generally adopted in legislative "provisions on the subject in this and other countries is to treat a party-"wall as a structure for the common benefit and convenience of both of "the tenements which it separates, and to permit either party to make "any use of it which he may require either by deepening the found-"ation, or increasing the height, so far as it can be done without injury "to the other. The [40] party making the change, when not required "for purposes of repair, is absolutely responsible for any damage which it "occasions; but in so far as he can use the wall in the improvement of his "own property without injury to the wall or the adjoining property, there "is no good reason why he should not be permitted to do so." On further consideration, however, I have arrived at the conclusion that the better rule to lay down is the simpler one enunciated in *Watson* v. *Gray* (1) since it will compel such of the owners of party-walls as are desirous of adding to, or otherwise materially interfering with, the common property to obtain beforehand the consent of the others interested in it to the change being effected, and consequently is the one less likely to lead to disputes among joint holders of party-walls. I agree, therefore, with my learned colleague in giving a decree to the appellant as proposed.

(1) L.R. 14 Ch. D. 192. (2) Gray's Cases on property, Vol. II, pp. 225 226.

19 M. 40 (F.B.)=5 M.L.J. 282.

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FULL BENCH

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APPELLATE CIVIL—FULL BENCH

Before Sir Arthur J H Collins, Kt, Chief Justice, Mr Justice Parker and Mr. Justice Shephard

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VALLABHA VALIYA RAJAH (*Counter-petitioner*), *Appellant* v VEDAPURATTI (*Petitioner*), *Respondent* * [6th and 7th August, 6th September, 24th October and 1st November, 1895.]

Transfer of Property Act—Act IV of 1882, Sections 87, 89, 92, 93

A mortgagor who has made default in payment of the mortgage money within the time limited by the decree in a suit for redemption is not entitled to apply for execution of the decree after the time limited.

[**Diss.**, 3 Bur L T 134=8 Ind Cas 961=5 L B R 219 (220), **Not F.**, 21 M L J 941 (943)=10 M L T 422=(1911) 2 M W N 323; **F.**, 35 C 683=9 C L J 1 =12 C W N 628, **R.**, 24 A 44 (65) **(F.B.)**; 25 C 703 (706), 36 C 122 (129)=8 C L J 547=13 C W N 36 (N); 25 M 244 (256) **(F.B.)**; 25 M 300 (309) **(F.B.)**; 27 M 40 (41), 36 M. 29 (35)=11 Ind Cas 868=10 M L T 183; 1 A L J 300, 7 A L J 953 (954)=7 Ind Cas 50, 21 A W N 194; 2 N L R 137 (143), 5 O. C 82 (84), **Cons.**, 31 M 354 (360)=18 M L J 259=3 M L T. 281, **D.**, 3 Bom. L R 667 (669); 5 M L T. 76 (78)]

SECOND appeal against the order of R S. Benson, District Judge of South Malabar, on civil miscellaneous appeal No 122 of 1893, reversing the order of E K Krishnan, Subordinate Judge of Palghat, made on miscellaneous petition No 706 of 1893 in the matter of original suit No 3 of 1889.

The plaintiff sued to redeem a kanom, and a decree was passed directing that the mortgage premises be delivered to him on his payment of the mortgage money to defendant No. 31 within six [41] months of the final decree, and providing that in default of payment the property be sold The money was not paid within the prescribed period, but 25 days after it had expired the plaintiff paid the amount into Court and got possession of the property Defendant No 31 refused to receive the money, and now prayed that the property should be restored to her on the ground that the plaintiff was not entitled to execute the decree after the expiry of the period limited thereby.

The Subordinate Judge rejected the petition with reference to the ruling in *Kanara Kurup* v *Govinda Kurup* (1), and he directed that the property should remain with the plaintiff. On appeal the District Judge reversed the order of the Subordinate Judge with reference to the ruling in *Elayadath* v. *Krishnan* (2)

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Sundara Ayyar, for respondent

The second appeal came on for hearing before SHEPHARD and BEST JJ., who made the following order of reference to the Full Bench;

ORDER OF REFERENCE TO THE FULL BENCH

The decree in this case directs that, upon the plaintiff paying a certain sum into Court on or before a certain day, the defendants shall deliver up the mortgaged property to the plaintiff, and " that, if such payment is not made on or before the said date, the said property be sold " The money

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* Appeal against Appellate Order No 32 of 1894

(1) 16 M 214

(2) 13 M 267.

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was not paid within the time limited, but it was paid into Court a few days afterwards and the property was put into the possession of the plaintiff. The defendant thereupon, refusing to receive the money, applied for restoration of the property on the ground that it was no longer open to the plaintiff, after the expiration of the time limited, to apply for execution of the decree. The District Judge on appeal ruled in favour of the defendant on the authority of the decision in *Elayadath* v. *Krishna* (1), by which he held that the case was governed. In the case cited the point decided was that a plaintiff, having a decree similar to that now before us, but not containing any direction for sale, could not be allowed to execute it after the expiration of the time limited. This decision is, in our opinion, open to grave doubt, and, as there are other decisions in conflict with it and the question is of some [42] importance, we think it right to refer it to a Full Bench. The other decisions to which we refer are to be found in *Ramunni* v. *Brahma Dattan* (2), *Kanara Kurup* v. *Govinda Kurup* (3) and an unreported case. In Calcutta also the High Court has taken the view favourable to the decree-holder—see cases cited in *Ajudhia Pershad* v. *Baldeo Singh* (4).

On principle, as it appears to us, these decisions are right. In the terms of the decree itself there are no words indicating a forfeiture of the mortgagor's right on default being made by him in payment within the the fixed period. It is for his benefit that the term for payment is introduced. On default the mortgagee is at liberty to apply for an order for sale. To allow him, by remaining passive after default made, to retain possession notwithstanding an offer of the mortgagor to redeem, is practically to hold that upon default made he becomes absolute proprietor. The mortgagee is thus placed in a higher position than he would be if there were in the decree a direction for foreclosure on default, for in that case clearly the direction would need to be carried into effect by an order under Section 93 of the Transfer of Property Act, and until that was done the right of the mortgagee would not become absolute. On the other hand according to the construction placed upon the decree and upon the Act in the judgment in *Kanara Kurup* v. *Govinda Kurup* (3) the mortgagee is placed in such a position that, while he can always recover his money by insisting on a sale, he cannot gain more than the money due to him by remaining passive and not applying for a sale. We desire to adopt the reasoning used by Muttusami Ayyar, J. in *Kanara Kurup* v. *Govinda Kurup* (3). As it must be admitted that the mortgagor may, on the mortgagee applying for an order for sale, come in and ask for time or offer to redeem even at the last moment before the sale is concluded, may he not anticipate the action of the mortgagee and offer to redeem before a sale is threatened?

The question we have to refer is, whether, after the expiration of the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the property?

The case then came on for hearing before the Full Bench.

Mr. *K. Brown* and *Sankaran Nayar*, for appellant.

[43] The Advocate- General (Hon. Mr. *Spring Branson*) and *Sundara Ayyar*, for respondent.

JUDGMENT.

COLLINS, C.J.—The question referred to a Full Bench by SHEPHARD and BEST, JJ. is, "whether, after the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the

(1) 13 M. 267 (2) 15 M. 366 (370). (3) 16 M. 214 (4) 21 C. 818 (824).

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property?" The decree in question directs that, upon the plaintiff (the mortgagor) paying a certain sum into Court on or before a day certain, the defendants (the mortgagees) shall deliver up the mortgaged property to the plaintiff and "that, if such payment be not made on or before the said date, the said property be sold" The money was not paid within the time limited, but it was paid into Court after that date and the property was put in possession of the plaintiff under the decree. The mortgagee refused to receive the money, and applied for restoration of the property on the ground that it was no longer open to the plaintiff, after the expiration of the time limited, to apply for execution of the decree. The District Judge ruled in favour of the mortgagee on the authority of *Elayadath* v *Krishna* (1).

I am of opinion that the District Judge was right and that the decision in *Elayadath* v *Krishna* (1) is good law The Judges in that case (MUTTUASAMI AYYAR and PARKER, JJ,) held that the application by the mortgagor for permission to pay after the expiration of the period fixed in the decree does not fall under the proviso of Section 93 of the Transfer of Property Act There was no application by the mortgagee for foreclosing the right of redemption Sections 92 and 93, Transfer of Property Act, must be read together, and the proviso of the latter Section has no application when the mortgagee does not apply for foreclosure or when the original decree does not contain the last clause mentioned in Section 92 The case of *Ramunni* v *Brahma Dattan* (2) is not in conflict with *Elayadath* v *Krishna* (1). In *Ramunni* v *Brahma Dattan* (2) the jenmi land in Malabar sued in 1886 to redeem a kanom of 1849 and obtained a decree which merely directed the surrender of the land to the plaintiff on payment of a certain sum within three months from date of decree The decree remained unexecuted, the money not having been paid The jenmi brought another suit to redeem the same kanom, and the Court held the suit was not barred by the former decree The question was referred owing to the observations [44] of MUTTUSAMI AYYAR, J in *Kanara Kurup* v *Govinda Kurup* (3) but it is to be observed that, although both Judges (MUTTUSAMI AYYAR and BEST, JJ,) were of opinion that the order appealed against could not be supported, they differed in their reasons—BEST, J holding that, as the defendants (the mortgagees) had accepted the amount tendered by the plaintiff, the defendants must be held to have waived their right to object to the same as paid out of time MUTTUSAMI AYYAR, J apparently overlooked the decision in *Elayadath Krishna* (1), and in his judgment observed that, the mortgagee never having obtained an order for sale under Section 93 of the Transfer of Property Act, the mortgagor's right of redemption never became extinct and the necessity for the sale was obviated by payment before any order was made under Section 93. I do not think that was the question the learned Judge had to decide. The point in dispute was, whether the plaintiff, who had made default in payment of the money within the time fixed by the decree, had a right to apply for execution of that decree after the time limited, and I am clearly of opinion that he had no such right in execution The cases cited in the Calcutta reports do not appear to me have a material bearing on the point in question, and the Bombay decisions appear to support the decision in *Elayadah* v *Krishna* (1).

I answer the question referred in the affirmative so far as it relates to the execution of the decree It appears to me that the terms of the

(1) 13 M 267 (2) 15 M. 366 (370) (3) 16 M 214

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reference are somewhat too wide, as the defendant's only contention in the case was that it was not open to the plaintiff after the time limited to apply for execution of the decree, and that question I have decided in favour of the defendant.

PARKER, J.—The question referred to the Full Bench is whether, after the expiration of the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the property.

In the case which gave rise to the reference the decree directed that, upon the mortgagor (plaintiff) paying a certain sum into Court on or before a certain day, defendants should deliver up the mortgaged property to plaintiff, and that if such payment were not made on or before the said date, the property be sold. The money was not paid within the time limited, but it was paid [45] on a later date and the Court put plaintiff into possession. The mortgagee refused to receive the money and applied for restoration on the ground that it was no longer open to plaintiff after the expiration of the time limited to apply for execution of the decree. The District Judge decided in defendants' favour on the strength of the ruling in *Elayadath* v. *Krishna* (1). The learned Judges who made this reference to the Full Bench consider that this ruling is in conflict with the cases in *Ramunni* v. *Brahma Dattan* (2) and *Kanara Kurup* v. *Govind Kurup* (3), and also refer to *Ajudhia Pershad* v. *Baldeo Singh* (4) which later decisions, they state, they would prefer to follow.

Elayadata v. *Krishna* (1) *Manavikraman* v. *Unniappan* (5), *Ramunni* v. *Brahma Dattan* (2), *Kanara Kurup* v. *Govind Kurup* (3), *Ramasami* v. *Sami* (6), *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (7), *Ajudhia Pershad* v. *Baldeo Singh* (4), *Mahant Ishwargar* v. *Chudasama Manabhai* (8) and *Patloji* v. *Ganu* (9) were referred to in the argument. It will be observed that both the Calcutta cases were suits by the mortgagee, whereas all the Madras and Bombay cases were, like the present, suits by the mortgagor. It does not appear to me that the Calcutta cases have any application. The first *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (7) was a foreclosure action in which plaintiff got possession without taking the proceedings prescribed by Section 87 of the Transfer of Property Act. It was held that as he had not done so it was still open to the mortgagor (defendant) to redeem. In the second case *Ajudhia Pershad* v. *Baldeo Singh* (4) it was held that an application by plaintiff (mortgagee) for sale under Section 89 did not require to be in the form prescribed in Section 235, Code of Civil Procedure, and was of the nature of an application for a decree absolute.

The Bombay cases are in accord with *Elayadath* v. *Krishna* (1) and *Manavikraman* v. *Unniappan* (5). In the former (*Mahant Ishwargar* v. *Chudasama Manabhai* (8)) it was held that the Court in execution could not extend the time fixed by the decree, and in the latter *Patloji* v. *Ganu* (9) that the time ran from the date of the original decree. In the latter case the decree directed that, if [46] the money be not paid within the time limited, the plaintiff (mortgagor) should be for ever foreclosed.

Passing to the Madras cases, it does not appear to me that the decision in *Ramunni* v. *Brahma Dattan* (2) is in conflict with *Elayadath* v. *Krishna* (1). The former case *Ramunni* v. *Brahma Dattan* (2) was one of a second suit for redemption by the plaintiff (mortgagor). The first suit had remained unexecuted since plaintiff had not paid the money

(1) 13 M. 267. (2) 15 M. 366 (3) 16 M. 214. (4) 21 C. 818 (824).
(5) 15 M. 170 (6) 17 M. 96. (7) 16 C. 246.
(8) 13 B. 106. (9) 15 B. 370.

within the time limited The decree contained no declaration as to foreclosure or sale It was held that, though the first decree could not be executed, the relation of mortgagor and mortgagee still continued to subsist until it was terminated either by foreclosure or sale, and hence that a second suit for redemption would lie This decision is not inconsistent with *Elayadath* v *Krishna* (1), which simply held that a decree could not be executed after expiration of the time limited, or with *Ramasami* v *Sami* (2), where it was held that no second suit would lie since that first decree directed that, if the money be not paid within the time limited, redemption should be barred

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It is however difficult to reconcile the decision in *Kanara Kurup* v *Govinda Kurup* (3) with the earlier decisions In that case the mortgagor (plaintiff) obtained a decree for redemption on 16th March 1889 by which six months' time was given for the payment of the sum fixed The Appellate Court simply confirmed the original decree in June 1890, but the appellate decree gave no extension of time for the payment of the money notwithstanding that an application for further time had been made by the plaintiff in an execution petition put in in February 1890 This petition had, however, been presented after the time fixed by the original decree had expired The Subordinate Judge executed the decree on the ground that plaintiff's right to relief could only be extinguished by an order under Section 93 of the Transfer of Property Act It seems to me that the order of the Subordinate Judge to execute the decree after it was at an end was wrong. See *Elayadath* v *Krishna* (1), *Mahant Ishwragar* v. *Chudasama Manabhai* (4), and *Patloji* v *Ganu* (5) On a Letter's Patent Appeal being preferred, the learned Judges upheld the action of the Subordinate Judge in executing the decree, but on different grounds. [47] Best, J was of opinion that as defendants had accepted the money they must be held to have waived their right to object to the sum as paid out of time, while MUTTUSAMI AYYAR, J., held that, as the mortgagee never obtained any order for sale and as the money was paid before the equity of redemption was extinct, the order of the Subordinate Judge was right

In the case which gave rise to the present reference the mortgagee has refused to accept the money and therefore cannot be said to have waived his right The special ground on which BEST, J based his decision does not apply here With regard to the judgment of MUTTUSAMI AYYAR, J I can only say with great deference that I think the learned Judge overlooked the decisions in *Elayadath* v *Krishna* (1) and *Manavikraman* v. *Unniappan* (6) and mistook the real question that was before him In all the remarks that he makes as to the scheme of the Transfer of Property Act I entirely agree I also agree that the mortgagor can redeem at any time before the right of redemption becomes extinct either under the Transfer of Property Act or by the Law of Limitation But the question under consideration was one of procedure, not of substantive law, and though the plaintiff could bring a second suit for redemption (provided such a suit be not barred), or might pay the money into Court if defendant applied for sale, I do not see how this right to do either of these things can affect the Law of Limitation and enable him to execute a redemption decree after the expiration of the time limited.

(1) 13 M. 267 (2) 17 M. 96. (3) 16 M 214
(4) 13 B. 106 (5) 15 B 370. (6) 15 M. 170.

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The right of applying for sale after the time limited is the right of the defendant-mortgagee, and if he does not choose to exercise that right he cannot be compelled to do so. He may prefer to remain in possession, and may consider that he could not find a better investment for his capital if he were paid off. He may (it is true) be compelled to accept payment if the mortgagor pays the money into Court within the time limited or succeeds, after the expiration of that time, in a second redemption suit. But if he prefers to retain the property, he need not apply for sale, and he may possibly hope that the right of redemption will become barred before the mortgagor is in a position to sue again.

I find it impossible to reply to the question referred to the Full Bench by a simple affirmative or negative. If by the question is [48] intended "Is the mortgagor precluded from executing the decree?" I would answer in the affirmative; but if the question be "Is he precluded from redeeming the property?" the answer seems to be that it all depends upon the circumstances of the case. Provided the mortgagor's right of redemption be not extinct he can bring a fresh suit, or he can redeem if the mortgagee applies for sale; but he cannot himself apply for execution of the decree after the expiration of the time limited.

I would reply to the referring Bench accordingly. In the case under reference it seems to me that the decision of the District Judge was right.

SHEPHARD, J.—The question raised by this reference is stated in terms larger than the actual case requires. The precise question should have been whether, under the circumstances mentioned, the mortgagor is precluded from redeeming the property under the decree. This question, however, almost necesarily involves the larger question, what remedy is open to the mortgagor after the expiration of the time limited by the decree for the payment of the mortgage money. That the right of the mortgagor still remains, notwithstanding the expiration of the period so fixed, there can be no doubt. Whether the decree be made in a suit by the mortgagee or in the mortgagor's suit for redemption, whether the decree contains a direction for sale or a direction for foreclosure, it is equally open to the mortgagor to come in, on an application being made by the mortgagee either under the 87th or under the 93rd section, and pay the mortgage money into Court. The 93rd section contains an express provision indicating that the right of redemption is extinguished only upon the passing of an order absolute for foreclosure or a similar order for sale under the provisions of the same section. And even after such latter order has been passed, there still remains to the mortgagor the right, which, under the provisions of the Civil Procedure Code, every judgment-debtor has, to prevent the sale by paying money into Court. While it is thus clear that the mortgagor, when put on the defensive by a hostile application made on the mortgagee's behalf, has the means of making good his right of redemption at any time before the actual sale takes place, it has to be seen in what manner he can assert his right against a mortgagee who remains quiescent and makes no application for an order absolute. The 93rd section of the Act, which is supplementary to the preceding section and has [49] to be read with it, says: "if payment is made of such amount and of such subsequent costs as are mentioned in Section 94, the plaintiff shall, if necessary, be put into possession of the mortgaged property." A like provision is contained in the 87th and in the 89th sections, except that in the latter a payment "on the day fixed as aforesaid" is pre-supposed. Although the language of the other

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two sections is not so precise, I think it is evidently intended that in all three cases alike the payment is to be made on the day fixed That being so, the mortgagor having lost the opportunity of recovering possession under the first paragraph of the 93rd section, must, unless the proviso can be called in aid, assert his right of redemption otherwise than under the decree The proviso in the 93rd section authorizing the Court upon good cause shown to postpone the day fixed for payment is similar to that in the 87th Section, but curiously in the 89th section, which is the section declaring the course to be taken in the case of a decree for sale, there is no such proviso It is quite clear, as was pointed out in *Elayadath* v. *Krishna* (1) that the proviso cannot be intended to operate except in cases where the decree for redemption contains a clause similar to that prescribed by the last paragraph of the 92nd section Reading the 87th section and the 93rd section together, I also think that the proviso was only intended to come into play when an application has been made by the mortgagee for the final order to which he may be entitled That seems to have been the opinion of the learned Judges who heard the appeal in *Elayadath* v. *Krishna* (1), (see also *Mahant Ishwargar* v *Chudasama Manabhai* (2) The point did not arise for decision, because the decree under consideration stopped short with the order for payment of the mortgage money within three months and contained no order for sale on default In the two cases where it was held that the mortgagor could proceed under the decree even after the lapse of the six months, the judgments are not founded on the proviso enabling the Court to give time In the Madras case *Kanara Kurup* v *Govinda Kurup* (3) MUTTUSAMI AYYAR, J , dwells on the circumstance that the mortgagor's right of redemption is not lost until the actual sale takes place The learned Judge says the real question is " whether on the expiration of six months the [50] right of redemption becomes extinct under IV of 1882 " With great deference I must say that I do not think that was the real question which he had to decide What he had to determine was whether the mortgagor, not having applied within the six months, was entitled to an order for the delivery of the mortgaged property on payment of the mortgage money Undoubtedly the mortgagor had not lost his right of redemption, but it did not follow that he was entitled to make it good by an application for execution of the decree The possibility of a second suit for redemption being brought does not seem to have been noticed In the Calcutta case *Poresh Nath Mojumdar* v *Ramjodu Mojumdar* (4), the decree had been made in a foreclosure suit, and, although after the expiration of the six months no order absolute was made under the 87th Section, the mortgagee obtained an order and under it got possession The mortgagor subsequently brought the money into Court and applied for redemption of the property. In this case again, as it appears to me, the right of redemption was clearly not lost to the mortgagor. The Court, proceeding partly on the English cases, held that the mortgagor's application ought to be allowed A lucid statement of the English practice in foreclosure suits is given by the late Master of the Rolls in *Campbell* v *Holyland* (5) According to that practice the Court has a discretion to enlarge the time for payment. This may be done either on the independent motion of the mortgagor, or on the hearing of an application to make the foreclosure absolute; *Alden* v. *Foster* (6), *Jones* v *Creswick* (7) Even after

(1) 13 M 267, 268 (2) 13 B 109 (3) 16 M 214 (218).
(4) 16 C. 246. (5) L R 7 Ch. D 168
(6) 5 Beav. 592. (7) 9 Sim. 307, (317)

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the foreclosure is made absolute, it is only in point of form that the order is final, for the Court still has a discretion to treat the parties as mortgagor and mortgagee. The practice prescribed by the Act so far follows the English practice that in a foreclosure or redemption suit there is first an interim order fixing a time for payment, and, secondly, a final order for foreclosure absolute. Until this latter is passed under the 87th or 93rd section, as the case may be, I do not think the mortgagor's right of redemption is lost; but, except in the provision already mentioned, I do not find anything in the Act to justify the notion that the English practice as to enlarging the time for payment was intended to be followed. In that practice a wide distinction is [51] made between foreclosure suits and redemption suits, applications for enlargement being rarely granted in the latter case. See *Faulkner* v. *Bolton* (1), where, on default of payment, the Vice-Chancellor refused to allow the plaintiff to redeem and dismissed the bill No sign of such a distinction is to be found in the Act. It appears to me that, if the Legislature had intended that the mortgagor should be allowed to come in after the day fixed and apply on his own motion for enlargement of the time, they would have recognized this distinction and framed some rules for the guidance of the Court. It is only reasonable to hold that the mortgagor, in seeking to take advantage of the decree, should be kept strictly to its terms, and that on the other hand, the mortgagee should not, perhaps many months after the passing of the fixed day, be called upon without notice to find a fresh investment for his money.

This view of the law is supported by the series of cases in which it has been held in this Court that a mortgagor, not having prosecuted the decree obtained by him in a redemption suit, is at liberty to bring a second suit for redemption, for, if these cases are good law, the mortgagor cannot complain that he is without a remedy. According to those cases *Sami* v. *Somsundram* (2), *Periandi* v. *Angappa* (3) and *Karuthasami* v. *Jaganatha* (4), *Ramunni* v. *Brahma Dattan* (5) and *Ramasami* v. *Sami* (6), the mortgagor who has let pass the time for executing his decree is in much the same position as a mortgagor in England whose suit has been dismissed for want of prosecution The principle involved in them derives a qualified support from the observation of the Judicial Committee in *Hari Ravji Chiplun Kar* v. *Shapurji Hormasji Shet* (7) where the case in *Periandi* v. *Angappa* (3) was cited in argument It seems to me that it is too late for us to question those cases. It was pointed out that in them the decrees under consideration contained no direction for sale or foreclosure, but in my opinion the addition of such a direction, inasmuch as it does not by itself extinguish the right of redemption makes no difference. Apart from these cases, I should, for the reasons already stated, arrive at the same conclusion as to the rights of a mortgagor under his decree. If the mortgagor is [52] left in this position that he can neither proceed upon the decree nor institute another suit, he is after all in no worse position than a mortgagor in England whose suit for redemption has been dismissed for other reasons than want of prosecution. If he is in possession, his rights are fully protected under the provisions of the Act If the possession is with the mortgagee, the mortgagor has only himself to blame if he has not been careful to conform to the terms of the decree for which he himself asked. Where the decree has been made in

(1) 7 Sim. 319. (2) 6 M. 119. (3) 7 M. 423.
(4) 8 M. 478. (5) 15 M. 366. (6) 17 M. 96 (97).
(7) 10 B. 461 (465). (8) 16 C. 246.

a foreclosure suit as in *Poresh Nath Mojumdar v Ramjodu Mojumdar* (8) it must be admitted that there may be more hardship On that case, however, it is not necessary to give an opinion For the reasons stated I think that the question whether the mortgagor is, after the day fixed in the decree for redemption, precluded from taking action under his decree, must be answered in the affirmative

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[This second appeal having come on for final disposal, the Court delivered judgment dismissing it with costs]

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19 M. 52=5 M.L.J. 228.

APPELLATE CIVIL

Before Mr Justice Best and Mr Justice Subramania Ayyar

AMBALAVANA PANDARAM (*Plaintiff*), *Appellant* v VAGURAN AND OTHERS (*Defendants*), *Respondents* * [28th March, 1895.]

Limitation Act—Act XV of 1877, Schedule II, Article 116—Suit for rent—Registered contract signed by lessee only

In a suit for rent accrued due more than three years before the date of the plaint, it appeared that the contract between the landlord and tenant was comprised in a registered document which was signed only by the latter

Held, that the suit was not barred by limitation

[**R**, 25 M 55=11 M L J 318 (321), 24 M L J 54 (59)=1913 M W N 303 (307), **Cons.**, 14 Ind Cas 184=11 M L T 276=(1912) M W N 652 (653), **D.**, 30 M 322=17 M L J 395=2 M L T 270]

SECOND appeal against the decree of C Gopalan Nayar, Subordinate Judge of Madura (East), in appeal suit No 339 of 1893, reversing the decree of H. Krishna Rau, District Munsif of Madura, in original suit No 164 of 1892

[53] Suit by a landlord against his tenant for rent. The contract between the landlord and tenant was contained in a registered document signed by the latter only The rent had accrued due more than three years before the institution of the suit

The District Munsif passed a decree for the plaintiff. The Subordinate Judge on appeal reversed this decree, holding that the suit was barred by limitation.

The plaintiff preferred this second appeal

Krishnasami Ayyar, for appellant

Mr *Gantz*, for respondent

JUDGMENT

The only question is whether the claim for rent more than three years prior to suit is time-barred Plaintiff's contention is that it is not, as the document is registered and therefore Article 116 is applicable, the rent being for a period within six years prior to the suit. The Subordinate Judge has held Article 116 to be inapplicable on the authority of the decision of KERNAN and BRANDT, JJ , in *Ramasami Chetti* v *Sokkanada Chetti* (1) This decision is, however, not reported in the authorized Law Reports, and is consequently not a binding authority See Act XVIII of 1875, Section 3 Were it otherwise, we should have felt it our duty to have referred the question for decision by the Full Bench, as we are very clearly of opinion that the decision referred to is erroneous In

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*Second Appeal No 1337 of 1894

(1) 1. M.L.J. 737

1895 MARCH 28. APPELLATE CIVIL. 19 M. 52=5 M. L. J. 228.

our opinion a contract which has, in fact, been registered is no less a "contract in writing registered" within the meaning of Article 116, because it bears the signature of only one of the parties in the absence of any statutory provision requiring the signatures of both parties.

We are of opinion that the registration in the present case is sufficient to bring the present suit within the provisions of Article 116, and consequently the claim for rent for fasli 1295 and 1296 is not barred.

We must set aside the decree of the Subordinate Judge, and restore that of the District Munsif.

Appellant will have his costs in this Court and in the lower appellate Court.

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19 M. 54.

[54] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

VENKATANARASIMHA NAIDU (*Plaintiff and Petitioner*), *Appellant v.* PAPAMMAH (*Defendant and Counter-Petitioner*), *Respondent.**
[17th September, 1895.]

Decree, construction of—Application for execution by defendant—Previous orders as applied for by defendant—Present objection by plaintiff to continued execution on behalf of defendant—'Res judicata.'

Although a decree does not in terms give a certain relief yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent application to treat those orders as erroneous and put another construction on the decree

[**F.**, 20 M. 289 (292); 24 M 683 (684)=11 M L.J 432; **R.**, 14 Ind. Cas 264=24 M L. J. 545 (547)=3 S L R 133 (135); **D.**, 17 M.L J 423 (431); 48 P.R. 1900=1900 P L.R. (418)]

APPEAL under Letters Patent, Section 15, against the judgment of DAVIES, J., dismissing an appeal against the order of G. T. Mackenzie, District Judge of Kistna, in miscellaneous appeal No. 661 of 1891, by which an order of C. Rangayya Pantulu on miscellaneous petitions Nos. 1239 and 1550 of 1891 was affirmed.

The last mentioned petitions were preferred respectively by the plaintiff and defendant in original suit No. 333 of 1877. In that suit the plaintiff sued to establish his right to open and keep open the mouth of a channel leading to a village in his estate and a decree was passed by which it was declared "that the plaintiff is entitled to take through the "channel in question the flood water of the Tammileru, but to take none "of the clear water; that for this purpose he is entitled to extent none "channel 343 yards from the spot locally known as 'ene' parallel to the "bank of the river on which the channel is, and to take such measures "as may be necessary for diverting the flood water, but none of the clear "water; that the channel shall not be more than 5 yards 2 feet and 2 "inches wide at the mouth with a 'floor' sufficiently to prevent clear "water passing and that the taking of clear water to the injury of the "interests of the village of Vengur shall be at his risk."

*Letters Patent Appeal No. 31 of 1894.

1895 SEP. 17. APPELLATE CIVIL. 19 M. 54.

[55] In 1883 and 1886 the plaintiff presented applications for execution of the decree by the erection of the 'floor' therein referred to, but they were not proceeded with. In 1885 the defendant made an application with the same object; the plaintiff thereupon objected that it was not competent to the defendant to make the application, but the Court made an order that the 'floor' should be constructed and the plaintiff did not appeal In 1887 on the application of the defendant which was opposed by the plaintiff, the Court applied a Commissioner for the execution of the decree, and under similar circumstances the Court in 1890 appointed another Commissioner to construct the 'floor' in accordance with the decree. The plaintiff now applied to stop the work which had been begun alleging that the decree was declaratory only and did not determine the height of the 'floor' to be erected

The District Munsif was of opinion that, although the decree was declaratory and not capable of execution, the orders above referred to were binding on him and that the work should proceed With regard to the height of the erection, he pointed out that the suit went on second appeal before the High Court by which an order was made for the trial of an issue relating to that matter, and that the second appeal was abandoned by the plaintiff before this issue was determined, and he put off making an order about that matter pending the receipt of a report from the commissioner

The District Judge on appeal concurred in the opinion that though the decree was declaratory merely the plaintiff was not now entitled to raise the objection which had been overruled by the orders of 1885, 1887 and 1889 against which he had not appealed

The plaintiff preferred an appeal against the appellate order of the District Judge which came on for hearing before DAVIES, J , who dismissed it

The present appeal was preferred as above against the judgment of DAVIES, J

Pattabhirama Ayyar, for appellant

Krishnasami Ayyar, for respondent.

JUDGMENT

It appears that, since the passing of the decree in 1879, no less than four applications have been made for execution, and orders have been passed accordingly for the construction of a dam or 'floor' as it is termed in the decree These orders were passed notwithstanding the opposition of the plaintiff and he never appealed

[56] There can be no doubt that, although some of the terms of the decree are inserted for the protection of the defendant, it was never intended that the defendant should execute it against the plaintiff It is argued that the District Munsif had no jurisdiction to order execution of the decree and that the previous orders in execution should be disregarded, and we are referred to *Kalka Singh* v *Parasram* (1) That was not a case in which the execution of a decree was immediately in question and is therefore distinguishable from the other decisions of the judicial committee which were cited.

Those decisions go to show that although a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on a subsequent application to treat those orders as erroneous and put another construction

(1) 22 I.A. 68

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on the decree *Mungul Pershad Dichit* v. *Griga Kant Lahiri Chowdhry* (1) *Ram Kripal Shukal* v. *Mussumat Rup Kuari* (2) and *Bani Ram* v. *Nanhu Mal* (3).

We think those decisions are applicable to this case. We must dismiss the appeal with costs.

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19 M. 56.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

CHAKRAPANI ASARI (*Plaintiff*), *Appellant* v. NARASINGA RAU AND OTHERS (*Defendants*), *Respondents*.* [26th July 1895.]

Civil Courts Act (Madras)—Act III of 1873, Section 12—Suits Valuation Act—Act VII of 1887, Section 8—Suit for share of undivided property.

Persons entitled to a share in certain lands of a village only part of which was held in severalty, executed a mortgage of part of the lands due to their share. The mortgage contained a description of the land comprised therein by paimash numbers and admeasurement. The mortgaged property was brought to sale in execution of a mortgage decree and was purchased by the present plaintiff. [57] The plaintiff now sued for the apportionment and possession of the share to which he was entitled, and stated the value of the suit to be the value of the share claimed by him, *viz*, Rs. 1,870, and not that of the entire property. The defendants were the mortgagors and the other persons interested in the land, their respective shares not having been ascertained and demarcated.

Held, that the suit was within the jurisdiction of a District Munsif.

[R., 20 M. 289 (292), 13 Ind. Cas 903 (904)=11 M.L.T 155=(1912) M W N 199 (200).]

CASE stated for the opinion of the High Court under Civil Procedure Code, Section 617, by V. Srinivasacharlu, Subordinate Judge of Kumbakonam.

The case was stated as follows:—

"This is an appeal against an order of the District Munsif of Trivalore, returning the plaint presented in original suit No. 352 of 1892 to be presented to the proper Court.

"The plaintiff is a purchaser of a share in a small village called Kongayanagaram in the Nannilam taluk, from the defendants Nos. 15 and 16 under a conveyance executed to him on the 28th March 1887.

"The village in question comprises 13 velies and odd of land divided into four shares and was long held in two parts, one moiety of two shares (termed periapathi) by the defendants Nos. 6 to 9, and the other (termed chinnapathi) by the defendant Nos. 1 to 5. There are also some lands termed Samudayam appertaining to all the four pangus or shares, some being assessed to revenue and some unassessed. The plaintiff states that these remain common and undivided amongst the holders of the four shares. .—.—.—.—.—.—.—.—.—. The plaintiff finds that, though the lands appertaining to the entire chinnapathi and comprising 6 velies, 12 mahs, 40 gulies and 25 cents of nanja, punja and garden land are being enjoyed by the shareholders in common, that the patta for some of them runs in the name of the second defendant and for others in the names of the defendants Nos. 4 and 5; and he thinks that those falling under the

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*Referred Case No. 12 of 1894.

(1) 8 I.A. 123. (2) 11 I.A. 37. (3) 11 I.A. 181.

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second defendant's patta appertain to his own and first defendant's half-shares, and those entered under the patta of the defendants Nos 4 and 5 belong to their half share, and that, for the sake of convenience, all the lands were mixed up together and held and enjoyed by all of them in common

"The fifteenth and sixteenth defendants were the decree-holders in original suit No. 27 of 1884 on the file of the Subordinate Court of Negapatam, they having there sued upon a simple mortgage bond, dated the 15th May 1882, executed to them by the first defendant and his father and secured on a part of the lands due to [58] their share, more particularly specified by their paimash numbers and extent as entered in the patta of the second defendant — — — — The fifteenth and sixteenth defendants having attached the entire lands specified in column 4 of the schedule attached to the plaint as the property of their judgment-debtor, the second defendant intervened and claimed some of them as those which had fallen to his share under an execution had under a partition decree obtained by him They were released and the remainder of the lands were sold and brought by the aforesaid decree-holders themselves The plaintiff states that the second defendant not having sued for his share of the undivided samudayam lands, and not being decreed the same, his share of this property remained to the defendant No 1 and his father and passed by the Court sale to the defendants Nos 15 and 16 and the plaintiff having now purchased all the properties bought by the defendants Nos 15 and 16 in the Court auction, he has lodged this suit for the recovery of the same He sued for the division of the four shares of samudayam lands also and for allotment to him of 1½ shares of the same

"For purposes of Court-fee, he stated the value of the lands sued for at five times the ordinary revenue payable to Government

	Rs	A	P
"(1) On the nunja, punja and garden lands under Section 7, paragraph 5, Clause (*a*) of the Court Fees Act, which amounted to	306	4	0
"(2) On the jari manaikats due to three-fourths share of the first defendant out of two shares appertaining to the chinnapathi portion of the village on its market value under clause (*d*) of the same paragraph (5), and this amounted to	325	0	0
"(3) On the chinnapathi samudayam lands due to the said share on the market value of the same under the same provision of law, this amounted to	110	0	0
"(4) On the one and a half out of four shares of the unassessed samudayam lands, which remain undivided on their market value, and this amounted to .	150	0	0
Total	891	4	0

"He sued also for past mesne profits and estimated their amount at Rs 978-12-0, and stating that the total of these figures, *viz*, Rs 1,870, is the value for jurisdiction purposes, he instituted the suit in the Court of the District Munsif of Tiruvalore

[59] "According to the plaintiff all the samudayam and jari manaikats mentioned in Nos 2 to 4 above remain undivided, those mentioned under Nos 2 and 3 among the share-holders of chinnapathi and those of No. 4 among the holders of the four shares of the entire village.

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"Although the nanja, punja and garden lands sued for have been described by their paimash numbers and the extent due to the three-fourths share claimed by the plaintiff, it was distinctly stated in paragraph 16 of the plaint that they formed undivided portions of such numbers: and the plaintiff's share of the same, having regard to good and bad soil, has yet to be ascertained."

The Subordinate Judge referred to *Vydinatha* v. *Subramanya* (1). *Khansa Bibi* v. *Syed Abba* (2), *Nagamma* v. *Subba* (3), and *Ramayya* v. *Subbarayudu* (4), and he stated as the question on which he was doubtful whether the case was governed by the ruling in *Nagamma* v. *Suba* (3), or by that in *Ramayya* v. *Subbarayudu* (4): he stated his own conclusion as follows:—

"In my opinion, when the suit relates to coparcenary property, unless it is one for general partition among all the shareholders, the specific and definite share claimed must be held to be the subject-matter of the suit as stated in the Suits Valuation Act and the Act III of 1873 (The Madras Civil Courts Act) and the value of the same should determine the Court's jurisdiction, and not that set on the whole property which will, of course, be the value of a suit in which a general partition of all the shares may be prayed for"

Rangachariar, for appellant.

Sundara Ayyar, for respondents.

JUDGMENT

In our opinion the Subordinate Judge is right in his conclusion (see also *Krihnasami* v. *Kanakasabai* (5)) Furthermore under the 8th section of the Suits Valuation Act of 1887 it is clear that the suit is within the jurisdiction of the District Munsif. Costs to be costs in the suit.

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19 M. 60=5 M.L.J. 222.

[60] APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

SOMASUNDARAM AYYAR AND OTHERS (*Plaintiff*), *Appellants* v FISCHER (*Defendant No.* 1), *Respondents*.* [6th March, 1895.]

Vendor and purchaser—Covenant by a benamidar—Covenant for quiet enjoyment.

Land forming part of a zemindari was brought to sale in execution of a decree and was purchased by a *benami* for the zemindarni After the zemindarni's death B, her son and supposed heir, together with A, sold the land under a conveyance, which contained a joint covenant to remove any hindrance in the vendee's enjoyment of the land. Persons claiming under the lawful successor of the deceased zemindarni obtained an ejectment decree against the representatives of the vendee, then deceased, and they were permitted to retain possession only on a payment made to the decree-holders. They now sued A and B for the amount of the purchase money paid on the conveyance and the costs incurred in the ejectment suit:

Held, that the plaintiffs were entitled to the decree sought by them against A, notwithstanding that he was a *benamidar* merely.

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*Second Appeal No. 1512 of 1894

(1) 8 M 235 (2) 11 M. 140 (3) 11 M 197
(4) 13 M. 25. (5) 14 M. 183.

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No 151 of 1893, affirming the decree of Venkataranga Ayyar, Subordinate Judge of Madura (East), in original suit No 62 of 1891.

1895 MARCH 6.

APPELLATE CIVIL

19 M. 60 = 5 M.L.J. 222.

In 1874, the father of the plaintiffs obtained a lease for ten years of one-fourth of the village of Sattukudi from the zemindarni of Sivaganga Before the expiry of the lease the property was brought to sale in execution of a decree against the lessor, on whose behalf it was bought in by the present defendant No 1 for Rs 2,500 Subsequently in 1877 the lessee purchased the land for Rs 2,000 from defendant No 1 and the son and supposed heir of the lessor then deceased The conveyance contained a covenant by the vendors in the following terms —" Should there be any hindrance in your enjoying the said premises, we shall settle and remove such hindrance " In 1889, persons claiming under the lawful successor of the lessor obtained an ejectment decree against the present plaintiffs, their father having meanwhile died The matter was compromised by a payment of Rs 3,500 to the decree [61] holders, who thereupon entered up satisfaction of the decree The plaintiffs now sued defendant No 1 and the other vendor to recover with interest the purchase money and the amount of costs incurred in the ejectment suit. The lower Courts held that the first defendant, as being a benamidar merely, was not liable to satisfy the plaintiffs' claim, and a decree was passed against the other defendant alone

The plaintiffs preferred this second appeal

Krishnasami Ayyar, for appellants

Mr *H G Wedderburn*, Mr *Parthasaradhi Ayyangar* and *Rangachariar* for respondent

JUDGMENT

The only question is as to the liability of the first defendant jointly with the second defendant, against whom a decree has been given The judgment of the lower Courts exonerating the first defendant proceeds on the ground that he was merely a benamidar as far as the property sold to plaintiffs' father was concerned

The real question is whether, even assuming the first defendant to have been merely a benamidar as to the property, he is not liable on the covenant mentioned in C which is in the following words —" Should there be any hindrance in your enjoying the same, we shall settle and remove such hindrance " This is an express covenant by both the defendants, which cannot be affected by the benami character of the first defendant who is equally liable thereunder with the second

It is contended on behalf of respondent that, being a benamidar, there was no consideration for the promise made by him The consideration was clearly the purchase of the property by the plaintiffs' father

In this view we do not consider it necessary to dwell upon the letter A and the proceedings taken by respondent on the promissory note which was given in first defendant's name by plaintiffs' father for the consideration amount

It is next contended that there was no breach of covenant, in that appellant was not actually evicted, and our attention is called to *Howard v Maitland* (1) The observations of the Master of the Rolls in that case tend in the opposite direction, for he says —" If anybody had brought

(1) 11 Q.B.D 695

1895 MARCH 6.

APPELLATE CIVIL.

19 M. 60=5 M. L. J. 222.

an action against the plaintiff and recovered [62] judgment, I am not prepared to say that that alone might not have been a disturbance within the covenant."

In the present case a decree was obtained and proceedings taken in execution, and it was only on paying a sum of Rs. 3,500 to the decree-holder that plaintiffs were allowed to retain possession of the property. There was therefore such hindrance as was contemplated in the covenant.

In allowance of this appeal we modify the decree of the lower Courts by making first defendant jointly liable with the second for the amount decreed.

Appellants are entitled to their costs in this Court and in the lower appellate Court.

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19 M. 62=5 M.L.J. 209.

APPELLATE CIVIL.

Before Sir Arthur J H Collins, Kt., Chief Justice and Mr. Justice Parker.

THOLAPPALA CHARLU (*Plaintiff*), *Appellant v.* VENKATA CHARLU AND OTHERS (*Defendants*), *Respondents.**
[18th March, and 25th, and 30th April, 1895.]

Civil Procedure Code—Act XIV of 1882, Section 11—Right to hereditary office of guru.

The plaintiff as Anagundi Raja guru claimed to be entitled, and now sued for a declaration of his title, to the hereditary office of priest of Samayacharam The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office. The office was not connected with any particular temple, no specific pecuniary benefit was attached to it, and the alleged duties of the office were to exercise spiritual and moral supervision over persons wearing a certain caste mark in a certain tract of country

Held, that the suit was not cognizable by a Civil Court.

[**R.,** 32 A 527 (540)=7 A.L.J. 529=6 Ind. Cas. 223; 33 M. 67 (70)=3 Ind Cas 955 (957)=19 M.L.J. 714=6 M.L.T. 290; 12 C.L.J. 74 (78)=6 Ind. Cas. 864 (867), 17 M.L.J. 421 (422), **D.,** 2 C.L.J. 460 (471).]

SECOND appeal against the decree of L. Moore, District Judge of Bellary, in appeal suit No. 170 of 1891, reversing the decree of C. Ranga Rau, District Munsif of Naraindevarakerry, in original suit No. 33 of 1889.

Suit to establish plaintiff's claim to a hereditary office, the nature of which is stated sufficiently for the purpose of this report in the judgment of the High Court. The District Munsif passed a decree for plaintiff, which was reversed on appeal by the District [63] Judge on the ground that the plaintiff's claim was not cognizable by a Civil Court.

The plaintiff preferred this second appeal.

V. Bhashyam Ayyangar, Pattabhirama Ayyar and *Desikachariar,* for appellant.

Ramachandra Rau Saheb and *Kuppusami Ayyar,* for respondent No. 2.

JUDGMENT.

The District Judge dismissed the plaintiff's suit on the ground that it was not maintainable. He based his decision on the ground that the

*Second Appeal No. 321 of 1894.

suit was analogous to that decided in *Subbaraya Chetti* v *Venkatanarasu Chetti* (1), in which it was held that a suit for a declaration that a person was entitled to the exclusive right to the office of a desayi would not lie, the right of desayi being alleged to be a right to settle caste disputes in certain villages It is urged upon us in appeal that the right claimed by plaintiff is a right to an hereditary office, to which titles have been attached by the former ruling power, that the right of the Anagundi Raja guru carried with it a monopoly, and that it had been found by the District Munsif that defendants had been guilty of personation and deceit, assuming the hereditary titles of the plaintiff, and under such false pretences receiving fees, which would otherwise have been paid to plaintiff and not to defendants On this state of facts, as found by the District Munsif in paragraph 99 of his judgment, it is urged that plaintiff is entitled to relief

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APPELLATE CIVIL.

19 M. 62 = 5 M. L. J. 209.

It is, however necessary to refer to the plaint to see the grounds on which relief is asked for by the plaintiff himself It is therein stated that plaintiff and his ancestors, " in consequence of their being the priests of the Anagundi royal family," have been enjoying hereditarily the Samayacharam guru office in respect of the people wearing namam mark in a certain tract of country, that defendants 2 and 3 have been claiming the right to this office, using plaintiff's titles and collecting the fees The plaint goes on to pray for a decree to establish plaintiff's right to the priestship of Samayacharam in respect of the namam-wearing people living in the places mentioned, and for an injunction to restrain defendants from interfering in the said right and collecting the fees, &c

It will be observed that the plaint does not ask for any injunction to restrain defendants from assuming plaintiff's hereditary [64] titles, or for damages caused by personation or assumption of such titles. It is a suit to establish a claim to an hereditary office, and the plaintiff alleges that the person entitled to hold the office is hereditary guru for the time being of the Anagundi royal family

The question then is whether the priestship of Samayacharam is an office for which a suit will lie in a Civil Court It is distinguishable from most of the cases quoted in that it is not attached to any particular temple or place; no specific pecuniary benefit is attached to the office, the only emoluments being voluntary contributions, while the duties of the office are to exercise spiritual and moral supervision over people who wear a certain caste mark in a certain tract of country No such supervision over the members of the caste can be enforced by law, it being entirely within the option of each individual member of the caste whether he will submit to it or not. Such being the case, the office seems exactly analogous to that of a desayi, as to which it was decided in *Subbaraya Chetti* v. *Venkatanarasu Chetti* (1) that a suit would not lie. No doubt the office of hereditary guru to the Anagundi royal family may be an endowed office, and the holder thereof entitled to certain titles and distinctions, but the relief sought in the plaint is not on the ground that defendants have represented themselves to be the raja's gurus The District Munsif has, it is true, treated it as if such was the claim, but the plaint does not ask for any declaration that plaintiff is the raja's guru, or to restrain defendants from using his titles, but merely for a declaration that plaintiff is entitled to the Samayacharam office. It is possible the

(1) Second Appeal No 200 of 1891 (unreported) (See 2 M L J 883).

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plaintiff might have succeeded had the plaint been framed differently, or had it been amended, but there was no issue as to any personation by defendants, or as to any fraud in assuming the plaintiff's titles.

Under these circumstances we think the District Judge was right in holding that the suit is not maintainable, and we must dismiss the second appeal, but we make no order as to cost.

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19 M. 65=4 M.L.J. 235.

[65] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

JAMBUVAYYAN (*Plaintiff*), *Appellant v.* VENKATARAYAR (*Defendant*), *Respondent.**

[19th August and 3rd September, 1895.]

Civil Procedure Code—Act XIV of 1882, Section 344—Insolvent judgment-debtor—Decree passed on appeal—Jurisdiction of original Court to make declaration of insolvency.

A suit for money was dismissed, but on appeal the High Court passed a decree for the plaintiff. The judgment-debtor made an application to the Court of first instance under Civil Procedure Code, Section 344 to be declared an insolvent:

Held, that the Court had jurisdiction to make the declaration sought for.

APPEAL under Letters Patent, Section 15, against the judgment of Muttusami Ayyar, J., dismissing appeal against order No. 42 of 1893, which was preferred against an order of C. Venkobachariar, Subordinate Judge of Tanjore, on insolvent petition No. 2 of 1890.

The application in the Subordinate Court was made under Civil Procedure Code, Section 344, by the defendant in original suit No. 36 of 1886 on the file of that Court. This suit had been dismissed by the Subordinate Judge, but his decree had been reversed in appeal No. 60 of 1888 in the High Court, in which a decree was passed for the plaintiff. Objections to the application were overruled by the Subordinate Judge, who passed an order as prayed. The decree-holder preferred to the High Court the appeal, which came on for hearing before Muttusami Ayyar, J., who delivered judgment as follows:

MUTTUSAMI AYYAR, J.—It is urged in support of this appeal that the jurisdiction of the Subordinate Judge in insolvency matters is limited to decrees actually passed by himself and does not extend to decrees passed on appeal from his decrees by the Appellate Court, although the suits in which they are passed are cognizable by him. In support of this contention, reliance is placed on the wording of Section 360 of the Code of Civil Procedure. That section is in these terms:—" The local Government may, " by notification in the official Gazette, invest any Court other than a " District Court with the powers conferred on District Courts by Sections " 344 to 359 of the [66] Code of Civil Procedure, and the District Judge " may transfer to any Court situated in his district and so invested, any " case instituted under Section 344. A Court so invested may entertain an " application under Section 344 by any person who has been arrested or " imprisoned, or against whose property any order of attachment has been " made, in execution of a decree for money *passed by that Court.*" The

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*Letters Patent Appeal No. 49 of 1894

"argument is that the words passed by that Court" are words of limitation, and do not include decrees under execution if they are passed by the Appellate Court in appeal

By Section 344 plenary jurisdiction is conferred on District Courts subject to the condition precedent that the judgment-debtor is arrested or imprisoned in execution of a decree for money, or that an order of attachment is made in execution of such decree By the first clause of Section 360, power is reserved to the local Government to confer on any Court other than a District Court the powers conferred on District Courts by Sections 344 to 359 These two sections, if nothing more appeared, would disclose an intention to enable the local Government to confer co-ordinate jurisdiction As Courts other than District Courts may have limited pecuniary jurisdiction over suits, the words "in any decree passed by that Court" are inserted The occasion when the jurisdiction arises is arrest or imprisonment or attachment in execution of a money decree The reasonable construction is that the words "decree for money passed by that Court" mean decrees passed by that Court in suits which are cognizable by it or decrees passed in appeal in confirmation, reversal or modification of those decrees For purposes of execution the decree passed by an Appellate Court is on the same footing with the decrees passed by the original Court itself Whenever there is an appeal, the final decree capable of execution is the decree passed by the Appellate Court, whether it confirms, modifies or reverses the original decree, and if the appellant's contention were to prevail, all decrees from which appeals are preferred would cease to be decrees passed by the original Court for purposes of execution There would also be this anomaly A Subordinate Judge would have insolvency jurisdiction over one defendant who did not prefer an appeal, and have no insolvency jurisdiction over another defendant in the same suit who prefered an appeal from his decree At the last hearing when this Court directed the District Court to return the appeal preferred to it for presentation to the High Court, this objection was not taken I [67] dismiss this appeal with costs on the ground that the construction which ought to be placed on a statute should be such as fairly and reasonably executes the intention of the legislature where that intention is plain

The appellant preferred the present appeal under Letters Patent, Section 15

Sivasami Ayyar, for appellant

Mr *Parthasaradhi Ayyangar*, for respondent

JUDGMENT

It is conceded that if the Subordinate Court had, in the first instance decreed in plaintiff's favour, it would have had jurisdiction to entertain an application under Section 344, but it is contended that it is otherwise, since the Subordinate Court dismissed the plaintiff's claim and the decree in his favour was passed by the Appellate Court

If this argument be valid, the jurisdiction of the Subordinate Court would also be ousted, if the plaintiff had obtained a decree in his favour in the first instance, and that decree had subsequently been confirmed on appeal, since the decree to be executed would be that of the Appellate Court

There can be no doubt that the Subordinate Court must execute the decree of an Appellate Court, reversing its own, and that in that respect it is regarded for all intents and purposes as the Court which passed the decree

We think the order of the learned Judge was right and dismiss this appeal with costs.

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Sep. 17.

APPEL-
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CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

BARROW (*Respondent No.* 1), *Appellant v.* JAVERCHUND SETT (*Appellant*) *Respondent.** [17th September, 1895.]

Limitation Act—Act XV of 1877, Section 14, Schedule II, Article 179—Exclusion of time of proceeding bona fide *in Court without jurisdiction—Step-in-aid of execution—Application for sanction to an agreement to give time to a judgment-debtor.*

On an application made in June 1892 for execution of a decree for the payment of a sum of money by instalments passed in 1883 by a Subordinate Court, [68] it appeared that the Subordinate Court, after executing it in part, had transferred it to the Presidency Court of Small Causes, which proceeded to execute it up to 23rd February 1887, and that on a further application made on 5th March 1888, it was discovered that the transfer of the decree was a mistake, as the amount exceeded Rs 2,000 and the decree was returned to the Subordinate Court on 5th July 1888. On 26th February 1889 an application was made to the Subordinate Court to sanction an agreement to give time for the satisfaction of the judgment debt under Civil Procedure Code, Section 257 (A) but sanction was never given, and on 28th July 1891 the decree-holder applied to have the decree transferred to another Court, and in September applied for execution and realized Rs 250 towards the debt.

Held by Parker, J., that the time during which the decree was in the Presidency Court of Small Causes should be deducted in the computation of the period of limitation for the present application under Limitation Act, Section 14 Clause 3.

Held by Shephard and Best, JJ, that whether or not such deduction should be made, the present application was barred by limitation for the reason that the application on 26th February 1889 was not a step-in-aid of execution

APPEAL under Letters Patent, Section 15, against the judgment of Parker, J., delivered in appeal against order No. 161 of 1892 reversing the order of V P. DeRozario, Subordinate Judge of South Malabar, in miscellaneous petition No 86 of 1892.

Application by the assignee of the plaintiff for the execution of the degree in original suit No. 39 of 1882 on the file of Subordinate Court, Calicut

The application was dismissed by the Subordinate Judge as being barred by limitation under the circumstances set out in the following judgment of PARKER, J. :—

PARKER, J.—The decree of which execution is sought was passed on 3rd April 1883 by the Calicut Subordinate Court for a sum of Rs. 7,220 with costs and interest from date of decree till payment, and was made payable by monthly instalments of Rs. 60 each. After some execution had been had at Calicut, the decree was, on 23rd July 1884, transferred for execution to the Madras Small Cause Court. Execution was had by instalments in Madras and payments, amounting to Rs. 1,050, were made up to, 23rd February 1887. On 5th March 1888, a further application for execution was made in the Small Cause Court, and it was then discovered that under the penultimate clause of Section 223, Code of Civil Procedure, the decree ought never to have been sent for execution to the Small Cause Court at all, since the amount exceeded Rs. 2,000. It was accordingly returned for execution to the Calicut Subordinate Court on 5th July 1888.

*Letters Patent Appeal No. 52 of 1894.

[69] On 5th February 1889 an arrangement was made by the parties at Madras for the discharge of the balance of the decree by monthly instalments at a different rate from that prescribed by the decree, and a petition to enforce this agreement was put in in the Calicut Subordinate Court on 26th February 1889 A notice went on petitioner's application, but the Court never formally sanctioned the arrangement On 28th July 1891, petitioner applied to have the decree transferred to the Palghat Subordinate Court for execution, and it was transferred on 30th July An application for execution was made at Palghat on 25th September 1891 and Rs 250 was realized This last application was made on 20th June 1892 and the Subordinate Judge has now held that execution is barred

The Subordinate Judge bases his order on two grounds—(i) that (the present application being to enforce the decree and not the unrecognized arrangement of 5th February 1889) no certain time for the payment of the instalments has been fixed by the decree, and (ii) that as all proceedings in the Madras Small Cause Court were invalid, they cannot avail to keep the decree alive, and the application of 23rd July 1884 to transfer the decree to Madras cannot be regarded as step-in-aid of execution The Subordinate Judge held that the decree had become barred on 3rd April 1887 (1886)

There can be no doubt that the application of 23rd July 1884 was made in good faith and was intended as a step-in-aid of execution The mistake was not discovered by the Madras Small Cause Court for nearly three years, and the Madras Court received and executed the decree I think the case falls within the purview of Section 14, Clause 3, of the Limitation Act, and that the time occupied in executing the decree in Madras ought to be deducted See *Rajbullubh Sahai* v *Joy Kishen Pershad* (1) and *Krishnayyar* v *Venkayyar* (2)

Against this view the decision in *Chettar* v *Newal Singh* (3) was quoted, but that case referred to an application for a kind of relief which obviously could not be granted, and does not touch the question of a *bona fide* mistake in seeking relief in the wrong Court

Taking this view, the application of 26th February 1889 was in time, since the decree was only returned to the Calicut Subordinate Court on 5th July 1888, and no limitation has arrived since 1889 [70] Though by some informality the arrangement of February 1889 was not sanctioned, I think the application can still be viewed as a step-in-aid of execution of the decree

Further, I do not agree with the Subordinate Judge that it is impossible to ascertain from the decree the dates on which the instalments are to be paid It seems to me clear they are intended to be paid monthly from 3rd April 1883, and this is all that is necessary See *Kaveri* v *Venkamma* (4) and *Lakshmibai Bapuji Oka* v *Madhavrav Bapuji Oka* (5)

The order of the Subordinate Judge must be reversed and execution allowed The appellant is entitled to costs in this appeal

The judgment-debtor preferred this appeal under Letters Patent, Section 15

Sankaran Nayyar, for appellant

Respondent was not respresented

JUDGMENT.

Even if the period during which the application was pending in the Madras Court of Small Causes should be excluded under Section 14 of the

(1) 20 C. 29 (2) 6 M 81 (3) 12 A 64 (4) 14 M. 396 (5) 12 B 65

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Limitation Act, the application of 26th February 1889, being one for sanctioning the agreement to give time for payment, and not for execution of the decree, was clearly not a step-in-aid of execution; the subsequent application is, therefore barred

We must, therefore, allow this appeal and restore the order of the Subordinate Judge Under the circumstances, we make no order as to costs of this appeal.

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19 M. 70.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

Saminadha Pillai and others (*Defendants Nos.* 1 *to* 4, 7, 8, 11 *and* 15), *Appellants v.* Thangathanni (*Plaintiff*), *Respondent.**
[20th and 23rd September, 1895.]

Hindu law—Inheritance—Obstructed heritage—Succession per capita—*Succession on extinction of a divided branch of a family.*

On the death, without issue, of a Hindu who was divided from the rest of his family, his property passed in succession to his widow and mother on the [71] death of the latter, the nearest surviving reversioners were the plaintiff's husband and the first defendant's father, both since deceased and their first cousin The plaintiff now claimed a one-third share of the property above mentioned as the heiress of her husband who left no issue. It appeared that the plaintiff's husband and his co-reversioners were divided:

Held, that the plaintiff was entitled to recover.

Semble. that she would have been entitled to recover even if her husband had not been divided from his co-reversioners.

[**Overruled,** 25 M 678 (688) **(P.C.)**=4 Bom. L R. 657=7 C.W N. 1=29 I.A. 156=12 M L.J. 299=8 Sar P.C.J. 286,. **R.**, 20 M. 207 (218);27 M. 300 **(F.B.)**=13 M L.J. 398 **(F.B.)**; 13 C.P.L.R 115 (119)]

Appeal against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in original suit No. 12 of 1893

The plaintiff, a Hindu widow, sued to recover a one-third share of properties left by Kolandavelayuda Pillai, who died without issue in 1876. The widow and afterwards the mother of the deceased had held the properties until the death of the latter, which took place in June 1885. The plaintiff's case was that, at the time of the mother's death, the nearest surviving reversioners to the estate were her husband, since deceased and his brother, the father of defendants Nos. 1 and 2, and their first cousin Ramasami Pillai. It was admitted that the three persons were the grandsons of Velayuda Pillai's paternal uncle, and that there was no coparcenary between Velayuda Pillai and them, that the plaintiff's husband had died without issue in October 1886 not having secured possession of his share of the properties. The defendants Nos. 1 and 2 contended that their father deceased and his brother and cousin were undivided, and that they were all members of a joint family and that, even if it were not so, the property did not devolve as separate property, but jointly, and that the plaintiff was not entitled to the relief sought.

The Subordinate Judge held that the plaintiff's husband was divided from his brother and cousin, and (on the second issue) that whether or not they were divided, the property devolved on them as separate property

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* Appeals Nos. 121 and 124 of 1894.

and (on the third issue) that the plaintiff was entitled to the share of her husband which vested in him before his death and accordingly passed a decree for the plaintiff

1895 Sep. 23.

APPELLATE CIVIL.

19 M. 70.

The defendants preferred this appeal

Mr. *Parthasaradhi Ayyangar*, for appellants

Pattabhirama Ayyar, for respondent

JUDGMENT

We agree with the conclusions of the Subordinate Judge on the second and third issues The question whether the rule of survivorship holds good among a group of heirs who succeed on the extinction of a divided branch of the family has [72] not been actually decided in this Court. In *Gopalasami* v *Chinasami* (1) the inclination of the Court was evidently in favour of the contention that the rule did not apply in the case of daughter's sons succeeding In principle there is no distinction between that case and the present In both it is an instance of obstructed heritage, the heirs being ascertained at the time of the death and taking *per capita* Since the date of the Madras case the question has been considered in Calcutta, and the conclusion arrived at was that the rule of survivorship does not apply to property taken in the ordinary course of inheritance as distinguished from property in which persons have an interest on birth (*Jasoda Koer* v *Sheo Pershad Singh* (2)—see also *Nallatambi Chetti* v *Mukunda Chetti* (3) We think this view is correct To hold otherwise would be to recognize as co-parceners with rights of survivorship a group of persons who might be descended from different parents and might at the same time belong to a larger group having another and distinct family property of their own

Apart from this there is the finding, which is amply supported by the evidence that the three heirs—Ramasami, Chockalingam and the plaintiff's husband—were divided when the property devolved upon them

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19 M. 72=5 M.L.J. 151

APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Best

SRINIVASA AYYANGAR (*Petitioner*), *Appellant* v SEETHARAMAYYAR AND OTHERS (*Respondents*), *Respondents* * [9th October, 1895].

Civil Procedure Code—Act XIV of 1882, *Section* 295—*Rateable distribution—Assets realized in execution*

A, B and C held money decrees against the same judgment-debtor A attached by a prohibitory order dated in December funds of the judgment-debtor in the hands of D. In January, B attached in execution the same funds In February they were paid into Court, and subsequently on the same day C attached them as money due in the custody of the Court

[73] *Held*, that the funds should be rateably distributed between A and B, and that C was not entitled to participate therein

[R., 28 B 264 (271), 31 M 502 (504)=4 M.L.T 348]

APPEAL under Letters Patent, Section 15, against the judgment of MUTTUSAMI AYYAR, J , dismissing a petition under Civil Procedure Code,

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*Letters Patent Appeal No 17 of 1895

(1) 7 M 458 (2) 17 C 33 (36) (3) 3 M H C. R. 455

1895 Oct. 9. — Appellate Civil. — 19 M. 72=5 M. L. J. 151.

which prayed the High Court to revise the proceeding of A. F. Elliot, District Munsif of Vellore, in small cause suit No. 1480 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the following judgment:—

MUTTUSAMI AYYAR, J.:—Three persons hold money decrees against one Seetharamayya, and one Venkatasami had with him certain stamps and other things of Rs. 95-2-0 value belonging to the judgment-debtor. Petitioner had the property attached by prohibitory order on the 22nd December 1892 Another judgment-creditor, Muniammal, attached the same on 16th January 1893 in execution of her own decree. Venkatasami paid Rs. 95-2-0 due by him to the judgment-debtor into Court on the 3rd February 1893. On the same day, but after payment into Court, one Manikkam Chetty attached it as money due in the custody of the Court On the 30th March 1893 the District Munsif paid out of the deposit petitioner's costs and divided the balance rateably among the three creditors. To this order petitioner objects in revision. and urges that Manikkam Chetty attached after the money was realized, and that this was not a case for rateable distribution under Section 295, Code of Civil Procedure. Neither of these contentions seems tenable. Section 295 applies to every case whereby the process of the Court in execution property becomes available for distribution amongst judgment-creditors. Money paid into Court by reason of a prohibitory order does not become the property of the creditor at whose instance the prohibitory order was issued without a further order directing payment to him. Until then his position is that of an attaching creditor, and under the Code of Civil Procedure several decree-holders may successively attach the same property and claim rateable distribution. The mere payment into Court does not constitute realization There must be a further order directing its payment to a particular creditor or creditors. I see no reason to disturb the order in revision.

I dismiss this petition with costs.

The petitioner preferred this appeal under the Letters Patent, Section 15.

[74] *Subramania Ayyar*, for appellant.

Ethiraja Mudaliar and *Sivagnana Mudaliar*, for respondent.

JUDGMENT.

It seems to us clear that the debt due by the third party to the judgment-debtor, when paid into Court, was realized within the meaning of the 295th section, *Pallonji Shapurji Mistry* v. *Jordan* (1) and was therefore liable to reteable distribution among those who applied before the payment into Court.

In Manikkam's case the application was not made till after the payment into Court, and he therefore is not entitled to distribution.

The order must be altered accordingly.

No costs

(1) 12 B. 400.

19 M. 74.

ORIGINAL CIVIL

Before Mr Justice Subramania Ayyar

1895 Oct. 3.

ORIGINAL CIVIL.

19 M. 74.

RANGAYYA CHETTI (*Plaintiff*) v THANIKACHALLA MUDALI AND OTHERS (*Defendants*).* [3rd October, 1895]

Hindu Law—Insolvency of managing member of a family—Insolvent Act, Section 7—Vesting order—Official Assignee's power to convey land

The managing member of a Hindu family was adjudicated as insolvent and a vesting order was made The Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who now sued for possession. The second defendant, who was a leper, was the younger brother of the insolvent, the other defendants were the insolvent's sons The plaintiff did not prove that the debts which led to the adjudication were incurred for the necessary purposes of the family, and the insolvent's sons did not prove that they were incurred for immoral purposes

Held, (1) that the second defendants' disease, which was not of a virulent type, did not affect his co-parcenary rights;

(2) that the Official Assignee could only convey the shares of those persons upon whom the debts of the insolvent were binding, and accordingly that the plaintiff was entitled to a moiety of the house only and that the house should be sold and half the sale proceeds paid to him

[F, 13 M L T 460 (461), R., 21 B 205 (219), 26 M 214 (220), 4 C L J 323 (329)]

THE facts of the case appear sufficiently for the purposes of this report from the judgment of the Court

[76] *Venkataramayya Chetti*, for plaintiff

Nadamuni Chetti and *Varadarajulu Chetti*, for defendants

JUDGMENT

The plaintiff, as purchaser under a sale-deed, dated 24th February 1894, executed by the Official Assignee, claims possession of the house in dispute, which admittedly was the family property of the defendants, of whom the second defendant is the younger brother and the other defendants' sons of the first He rests his claim on the grounds that the second defendant being a leper is not entitled to any share in the property and that even if he was entitled, the debts with reference to which the first defendant was declared insolvent were incurred by him for purposes binding upon all the defendants As to the relief the plaintiff prays in the alternative, that should it be held that the plaintiff is not entitled by his purchase to the possession of the entire property, but that he became entitled to an interest less than the whole, the same be ascertained and that on due partition being made, such share be ordered to be delivered to him, or if that be found impracticable the whole house be sold and such portion of the sale-proceeds as represents his interest be ordered to be paid to him

The first and the third defendants are dead The secnod defendant denies that the disease which it is now admitted he has been suffering from is of such a character as to entail forfeiture of his rights and that the debts referred to in the plaint are binding upon him. The fourth and fifth defendants also raise a similar contention as to the debts.

Three issues were raised The first relates to the extent of the interest which passed under the sale and the second and the third to the second defendant's disease and its effect if any upon his right to the property in dispute

* Civil Suit No 62 of 1894.

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It will be convenient to deal first with the last two. That the second defendant's disease is leprosy is not now disputed. But that disease is regarded by the Hindu Law as a disqualification entailing forfeiture of rights only when it appears in a virulent and aggravated form. *Muttuvelayuda Pillai* v. *Parasakti* (1), *Janardhan Pandurang* v. *Gopal Pandurang* (2), *Ananta* v. *Ramabai* (3), *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Raghunundun* v. *Ramanuj Das* (4). Consequently the plaintiff has to make out [76] that the disease is of that particular description which leads to loss of rights. With reference to this matter the plaintiff called as a witness Mr. Haller, a medical practitioner, who had been in subordinate charge of Leper hospitals for many years and who appears to have made the disease a subject of special study; the witness states that the form from which the second defendant suffers is of the slowest type, that it expends itself in the extremities of the hands and the feet, and that it is of the least disfiguring kind. I am of opinion, therefore, that the second defendant's disease is not virulent and it hence does not affect his coparcenary rights.

Now as to the first which is the remaining issue and which relates to the extent of the interest acquired by the plaintiff under the sale to him, two questions have to be considered.

The first is whether the Official Assignee was in law entitled to convey not only the interest of the first defendant the insolvent, but also that of his coparceners the other defendants. On behalf of the plaintiff it was contended that he was and *Fakirchand Motichand* v. *Motichand Hurruckchand* (5) was referred to as a distinct authority in favour of that contention. There it was held by Latham, J., that the right which entitles a father governed by the Mitakshara law to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not incurred for immoral purposes, is, on a vesting order being made on the father's insolvency, vested, under Section 7 of the Indian Insolvent Act, in the Official Assignee who can consequently give a good and complete title to such ancestral immoveable estate to a purchaser. The learned Judge considers that the father's right of disposal is not a 'power' within the meaning of Section 30 of the said Act, which in his opinion applies to powers in the ordinary legal sense of the term created by will or instrument *inter vivos*, but that it falls more appropriately within the words in Section 7 under which all the real and personal estate and effects of the insolvent and all his future estate, right, title, interest and trust in or to any real or personal estate or effects (with certain specified exceptions immaterial for the present) vest in the Official Assignee. To put it shortly the learned Judge's view amounts to saying that the son's share in the ancestral estate is property available for the realization [77] of the father's debts not shown to be immoral. A substantially similar conclusion was arrived at in *Jagabhai Lalubhai* v. *Bhukandas Jagivandas* (6), where West and Birdwood, JJ., held that the father's right referred to above was covered by the words of Section 266 of the Code of Civil Procedure laying down what property is liable to attachment in execution of a decree. West, J., who delivered the judgment of the Court referring to this point observes:—" The District Judge has relied on Section 266 of the Code of Civil Procedure which says that the property subject to attachment must be such as the judgment-debtor could dispose of for his

(1) Sudder Reports (1860) 239 (2) 5 B. H. C. R 145 (3) 1 B. 554.
(4) 22 I. A. 94 (5) 7 B. 438. (6) 11 B. 37 (41).

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own benefit. This is the direction, no doubt, but it does no more than state a general principle which, though the section is not referred to, must have been present to the minds of the Judicial Committee Their Lordships thought probably that the father could dispose of the family estate for his own benefit at least *prima facie* and subject only to the rights on which the sons could rely in particular cases" (*Jagabhai Lalubhai* v *Bhukandas Jagjivandas* (1) If this conclusion were erroneous, the innumerable cases including the leading decisions of the Judicial Committee on the point, wherein the interest of sons was held to have passed by a sale in execution of decrees obtained against the father alone, must be considered to have been wrongly decided, a contention which is impossible at all events at this time of the day *Fakirchand Motichand* v *Motichand Hurruckchand* (2) relied upon on behalf of the plaintiff is therefore a direct authority in favour of his contention, so far as the third and fifth defendants, the surviving sons of the late first defendant, are concerned Nor as to the second defendant am I able to see any sound distinction in principle between his case and that of the other defendants just referred to For if the son's share is property which the father has power to dispose of for his own benefit in the restricted sense explained by West, J , in the passage quoted above, how can the share of any other undivided coparcener, which the managing member can convey for debts incurred by him for legal necessity, be treated differently? No doubt there is difference in the proof to be adduced as to the character of the debt in the two instances But the essential element that the shares other than that of the transferee are liable to be proceeded against for the transferor's debt is common [78] to both the cases I must therefore hold that the Official Assignee has in law power to transfer not only the share of the insolvent, but also those of his coparceners, whether they be his sons or brothers or other collaterals, provided of course the debt for which the property is disposed of, are shown to have been incurred for purposes binding upon them

The second question, therefore, to be considered with reference to the issue under discussion is, were the debts incurred for such purposes? The case of the third and the fifth defendants is easily disposed of, as they have failed to prove that any of the debts which led to their father being adjudicated an insolvent was incurred for immoral purposes It is quite true that the evidence of Baggyam called by the defendants satisfactorily establishes that the late first defendant kept her for nearly ten years from 1885 up to his death, and spent upon her considerable sums of money By such proof above, however, the said defendants cannot be said to have discharged the onus thrown on them by law as they should connect the particular debt, about which the dispute exists, with the immorality of the father In this case not only has that not been shown, but there is positive evidence on behalf of the plaintiff which proves that the debts in question had nothing to do with the immoral life of the late first defendant The second defendant's case, of course, rests on a different ground As to him, unlike the case of the sons, the burden of proof as already suggested is on the plaintiff who must affirmatively make out that the debts were incurred for the necessary purposes of the family Has this been shown? Before considering this question, I ought to notice the contention urged by the plaintiff's vakil in his reply to the effect that the second defendant, not having expressly traversed the averments in the plaint as to

(1) 11 B. 37 (41). (2) 7 B 438.

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the character of the debts, is not now entitled to say they are not binding upon him. This contention is clearly untenable. In the first place there is nothing to show that the defendant admitted that debts were incurred for family purposes. Secondly, the first issue is wide enough to raise the point, and in fact the whole trial proceeded upon the distinct footing that this question was one of the points to be established by the plaintiff who accordingly adduced evidence on it. Now in the evidence thus adduced only three debts are referred to. The first is a sum of money lent by the plaintiff to the first defendant. Theruvengada, plaintiff's second witness, states that the first defendant became a [79] surety for one Shanmuga Mudali with reference to certain moneys borrowed by the latter from the Bank of Madras and as Shanmugam failed to pay the Bank, the first defendant incurred the debt in question to enable him to discharge his obligation to the Bank. Whether in the interests of the family it was necessary for the first defendant to become Shanmugam's surety has not been shown, and the debt in question cannot therefore be held to be binding on the second defendant. The two remaining debts are similar in character and the circumstances connected with them are these. The first defendant Theruvangada referred to above and Virasami, plaintiff's first witness, jointly executed about 1888 certain works under the Public Works Department and made profits. But as the first defendant received the whole of the profits and withheld from Theruvengada and Virasami their shares thereof, they sued and obtained against him decrees for the sums so due to them. Beyond the oral testimony of these two persons, there is no evidence on the point. No portion of the record in the suits in which the said decrees were passed had been exhibited in this case. Nor does it appear why Virasami and Theruvengada allowed the first defendant to take away moneys due to them. The evidence shows that from 1886, *i.e.*, a considerable time before the three became partners in connection with the said works, the first defendant ceased to live with the other members of the family including the second defendant and had been residing elsewhere with his concubine Baggyam already referred to. That the first defendant lived not only an immoral, but an extravagant life from the time he took the said woman into his keeping in 1885 seems tolerably clear from her evidence. And even though I am not prepared to say that no share of his earnings as a contractor under the Public Works Department went to the support of his children and the second defendant, who remained in the family house, I am unable to hold that the debts due to the two individuals in question arose from family necessity. Baggyam says that during all this time Theruvengada lived with the first defendant in the same place in which he and she resided. I cannot treat one in such a position as a *bona fide* creditor in respect of a sum of money which he ought never to have allowed the first defendant to appropriate to his own use especially as against the second defendant from whom the first defendant was living separately without any fault on the part of the former (second defendant). The case of Virasami is not the [80] same as that of Theruvengada in this respect, but at the same time as against him also, I fail to see why the second defendant should be held responsible for moneys which are not shown to have been appropriated for the purposes of his family and towards the misapplication of which by his elder brother, he in no way contributed. I must therefore hold that the plaintiff has failed to establish that any of the debts relied on by the plaintiff is binding upon the second defendant, whose interest in the house in dispute, therefore, remains unaffected by the sale to the plaintiff.

The result is there must be a decree in favour of the plaintiff for a moiety of the house which will be sold and the plaintiff's moiety of the sale-proceeds paid to him. Both parties are permitted to bid for the property at the sale The rest of the claim is disallowed The plaintiff must pay the second defendant's costs, and the third and fifth defendants will pay those of the plaintiff

1895 OCT. 3.

ORIGINAL CIVIL.

19 M. 74.

19 M. 80=6 M.L.J 11.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Parker

MANAVIKRAMAN (*Defendant*), *Appellant* v AVISILAN KOYA (*Plaintiff*), *Respondent* * [15th October and 5th November, 1895.]

Limitation Act—Act XV of 1877, Schedule II, Articles 36, 49—Suit for compensation for attachment before judgment

In a suit by A against B property of B was attached before judgment in November 1888 The suit was dismissed in October 1889, and an appeal by the plaintiff was dismissed in July 1890. B now sued A in September 1892 for damages occasioned by the attachment before judgment

Held, that the suit was barred by limitation

[**R.**, 6 Bom L R 704 (706), **D**, 23 M 621 (626)]

SECOND appeal against the decree of A Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No 447 of 1893, [**81**] affirming the decree of A Chathu Nambiar, District Munsif of Ernad, in original suit No 550 of 1892

Suit instituted on 28th September 1892 for compensation for an attachment before judgment on 1st November 1888 Both the Lower Courts held that the period of limitation applicable to the case was six years under Limitation Act, Schedule II, Article 120, and they passed decrees for the plaintiff

The defendant preferred this second appeal

Subramania Sastri, for appellant

Sundara Ayyar, for respondent

JUDGMENT

The timber in respect of which plaintiff seeks for compensation was attached before judgment in original suit No 490 of 1888 on the file of District Munsif of Ernad It had been cut in a forest by the plaintiff on the strength of a karar obtained from Manjery Karanamalpad, but the defendant sued in original suit No 490 of 1888 alleging his own title to the *mala* and therefore to the timber which had been cut therein It was on the allegation that the timber was his that the defendant obtained the attachment before judgment Eventually the court found that the defendant had no title to the *mala* and the judgment was confirmed on appeal (Exhibit G).

Under Section 491 of the Civil Procedure Code it is open to a Court on the application of a defendant to award compensation for attachment before judgment in two cases (1) when the attachment was applied for on insufficient grounds, and (2) if the suit fails and it appears to the Court

* Second Appeal No 43 of 1895.

1895 Nov. 5. — APPELLATE CIVIL. — 19 M. 80=4 M. L. J. 11.

there was no probable ground for instituting the suit. Both these cases are thus recognised as giving rise to a cause of action, and it is evident that the wrong (if any) done to the plaintiff falls within the second class since there could be no question of the sufficiency of the grounds for attachment had the defendant possessed any title at all.

The first question is as to whether the suit is or is not barred. The Courts below have held that Article 120 of the Limitation Act applies to the case since they have not been able to see that the suit falls under any other article. We agree with them that Article 29 does not apply since this is not a case of wrongful seizure, but it is argued for the appellant that the case falls under Article 36 and that the suit should be regarded as one for misfeasance independent of contract, and that it falls under the description of a [82] tort for which a limitation of two years is generally provided. See the judgment of Farran, J., in *Essoo Bhayaji* v. *The S. S. Savitri* (1).

It appears to us, however, from the observations of the learned Judge in that case that he would have classed a suit of this description under Article 49 and not under Article 36. His view was that for actions for tort a two years' limitation was provided as a general rule subject to certain special exceptions. Article 49 prescribes a limitation of three years for a suit for compensation for wrongfully taking or injuring or wrongfully detaining specific moveable property, and the time runs from the date of the wrong. If this article applies the suit will be barred since defendant had no title whatever to the timber and the wrong was done at the date of the attachment (1st November 1888). In favour of this view it may be noted that the same period of limitation is prescribed for a suit for compensation for injury caused by an injunction wrongfully obtained (Article 42) for which a similar compensation can be granted by the Court under Section 497, Civil Procedure Code. The two classes of cases are exactly parallel, and we can hardly suppose that the Legislature intended to prescribe a limitation of three years in the one case and six years in the other. It is true that the unlawful taking was through a process of the Court, but the timber was attached as belonging to defendant, and had he succeeded in his suit it would have been handed over to him It does not appear material that the actual seizure was made by the Court amin. If Article 49 does not apply, the suit would appear to fall under Section 36 and in either view the suit is barred. It is not necessary to consider the other points raised. The appeal must be allowed and the decrees of the Courts below reversed, the suit being dismissed with all costs throughout.

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19 M. 83=5 M.L.J. 293.

[83] APPELLATE CIVIL.*

Before Mr. Justice Shephard and Mr. Justice Best.

WILSON (*Appellant*) *v.* THE MADRAS MUNICIPALITY (*Respondent*).† [8th October, 1895.]

City of Madras Municipal Act—Act I *of* 1884, *Schedule B—Vehicle Tax—Bicycle.*

A bicycle with pneumatic tires having two metal springs under the saddle, is liable to taxation as a vehicle with springs under the City of Madras Municipal Act, 1884.

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(1) 11 B. 133.

* May be more appropriately styled "criminal" instead of "Civil"—Ed.

† Referred case 13 of 1895.

1895 Oct. 8.

APPELLATE CIVIL.

19 M. 83-5 M. L. J. 293.

Case stated for the decision of the High Court under the City of Madras Municipal Act, Section 193

The case was stated as follows —

Dr. W. H Wilson apealed to the Magistrates at the Egmopre Court against a tax imposed by the Municipality on his bicycle under the head of "other vehicles with springs" in Schedule B of the above Act The appellant now requires us to state a case for the decision of the High Court on the point of law involved He contends that his bicycle is not a vehicle or that it conveys nothing, that the rider conveys the bicycle and not the bicycle the rider; and he states that the proper definition of vehicle is that which conveys a burden distinct from the motor or motive power Even adopting this extended definition, a bicycle can and often does convey the rider's luggage and is often used by postmen to convey Her Majesty's mails We, therefore, decided that a bicycle is a vehicle

Then Dr Wilson contends that even if a vehicle, a bicycle is not a vehicle with springs, as a fact there are two metal springs under the saddle of Dr Wilson's bicycle, but the Act does not say metal springs The object of the words "with springs" in the Act is to divide fast-running vehicles provided wth apparatus to lessen jolting from slow-moving carts in which no attempt is made to counteract jolting The pneumatic tires of a bicycle are to prevent jolting and perform the same office as metal springs in other vehicles The appellant cited one or two English cases, but in these the question was whether a bicycle is a "carriage" In the Madras Act the word is "vehicle" which is a very different thing

[84] "The question, we submit for the decision of the High Court, is whether a bicycle is a vehicle with springs within the meaning of Section 123, Schedule B of Act I of 1884"

The provisions of Schedule B of the City of Madras Municipal Act referred to above prescribe rates of taxation (i) "for every four-wheeled vehicle with springs drawn by two or more horses", (ii) "for every four-wheeled vehicle with springs drawn by a horse, mule, bull, or bullock, or by two or more horses under thirteen hands, or by two or more mules, bulls or bullocks"; (iii) "for every two-wheeled vehicle with springs drawn by one or more horses, mules, bulls or bullocks", (iv) "for every other vehicle with springs.

Mr *J Adam*, for appellant

Mr *J. M H Ryan*, for respondents.

JUDGMENT.

We are of opinion that a bicycle is a vehicle with springs within the meaning of the Madras Act I of 1884 The word "vehicle" is not defined in the Act The term is used by itself and not qualified by reference to any particular kinds of vehicle Clearly, as appears from the language of Schedule B, the term is not confined to carriages drawn by horses or other beasts of burden A perambulator used for children is within the operation, though it may be exempted under the proviso to Section 153

The case of *Williams* v *Ellis* (1) is distinguishable for the reason that in the statute there under consideration, various special kinds of carriages were mentioned, and therefore the rule of *ejusdem generis* applied. As it

(1) L R 5 Q. B. D. 175.

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cannot be doubted that a bicycle is a vehicle in the general acceptation of the word, so we think there is no doubt that this particular bicycle is a vehicle with springs. We must, therefore, answer the question in the affirmative.

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19 M. 85.

[85] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

ADIPURNAM PILLAI, *Appellant v.* D'SENA AND OTHERS, (*Petitioners*), *Respondents*.* [29th July and 9th August, 1895.]

Companies Act—Act VI of 1882, Section 182—Notices—Loan Society—Liquidation—Previous withdrawal of member—Construction of rules—Distribution of assets.

One of the articles of association of a registered Loan Society provided that a member who has received no loan may withdraw from the association and receive the amount at his credit in calls *minus* the arrears, if any, and interest due thereon on giving one month's notice, such withdrawals to be paid from the first available funds. The society went into voluntary liquidation. By an extraordinary resolution it was resolved that the assets be rateably divided among the shareholders who had already withdrawn and those who were still in the fund. The liquidators applied to the Court under Companies Act, Section 182, to determine the question how the assets should be distributed with reference to the above article. *Shephard, J.*, ordered that notice of the application be given by advertisement on the notice board of the Court and in newspapers, and that a copy be posted at the society's office:

Held, affirming the judgment of Shephard, J, that those members who had given notice of withdrawal under the article quoted above were entitled to be paid out of the assets of the society in priority to the other members.

APPEAL against the judgment of SHEPHARD, J., dated the 17th August 1894, and pronounced on an application made in the matter of the Indian Companies Act VI of 1882, and the Madras Building Association (Limited) in liquidation.

This was an application by the liquidators of the Madras Building Association (Limited) for the directions of the Court as to the mode and order of distribution of the company's assets with reference to the claims and right of two classes of members of the company designated, respectively, withdrawal and non-withdrawal members. The petition, which was dated the 6th of March 1894, was based on an affidavit of the liquidators, which set out that the applicants had been appointed in pursuance of an extraordinary resolution passed on the 17th of November 1893, for winding up the association under Act VI of 1882, Section 173, Clause (c) and that at the same time a resolution was passed that the assets be [86] rateably divided among "the shareholders who have already withdrawn and those who are still in the fund." The affidavit further alleged as follows:—

"That the Madras Building Association (Limited) was started in June 1877 and registered under the Indian Companies Act X of 1866 for the purpose, among other things, of granting loans to members on approved securities.

"That the nominal capital of the association, which was a mutual society, was Rs. 6,50,000, divided into 1,300 shares of Rs. 500 per share,

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* Original Side Appeal No. 10 of 1895.

subscribed for by monthly calls of Rs 5 per share, extending over a period of one hundred months or eight years and four months 1895 Aug. 9. Appellate Civil. 19 M. 85.

"That loans were granted to subscribers by ballot as provided for by Section 13 of the articles of association

"That loans were granted to the members according to the number of shares held by each of them

"That borrowers were required to repay the loan by monthly calls of Rs. 5 per share and interest at 6 per cent under rule 23 of the articles

"That rule 42 of the articles of association provides that a member, who obtains no loans, may 'withdraw from the association and receive the 'amount at his credit in calls *minus* the arrears (if any) and interest due 'thereon on giving one month's notice, such withdrawals to be paid from 'first available funds.'

"That the practice from the commencement of the association has been to pay such withdrawal non-loan members in rotation according to the dates on which such withdrawal notices were received by the association

"That, up to the date when the society went into liquidation, there were 44 withdrawal members remaining unpaid whose claims amounted to Rs 20,144 as per Schedule A hereto annexed, and 38 members who had not withdrawn and whose claims amounted to Rs 16,995 as per schedule B hereto annexed.

"That a dividend to all the members was declared by the association annually except during the last three years in consequence of heavy losses

"That two of the withdrawal members, T Manicka Mudaliar and J. L. Pinto, sued the association in the Madras Court of Small Causes, and obtained decrees for the amounts due to them on the 31st October 1893 and on the 16th November 1893 for [87] Rs 1,600 and Rs 105 respectively (Small Cause Suits Nos 18001 of 1893 and 19275 of 1893)

That the entire claims of the shareholders against the company, at the time when it went to liquidation, amounted to Rs 37,139, and a sum of about Rs 1,050 was distributed among the shareholders in or about December 1893, in accordance with the resolution set forth in the last preceding paragraph and the shareholders accepted their dividend with the excepton of six shareholders, among whom (the latter) were T Manicka Mudaliar and J. L Pinto who sued the association in the Court of Small Causes as set forth in paragraph 10 herein and whose (those who refused to accept the dividend above referred to) claims amounted in all to Rs. 3,245, as per Schedule C, hereto"

The matter having come on for hearing, SHEPHARD, J, made an order as follows:—

"I order that notice of the application for an order as to the mode of "distribution of the assets of the above association, &c, be served person- "ally on the members named in the above-said joint affidavit of E. C "D'Sena and W Fermier who refused to accept the dividend therein men- "tioned, and by public advertisement in the *Hindu* and *Standard* news- "papers twice in each and by posting notices on the notice-board of this "Court and at the office of the said association, and I further order that "this application do stand and be, and the same is hereby adjourned to "17th day of July 1894."

The notices and advertisements having been made as ordered, further affidavits were filed from which it appeared that some of the members had and others had not given notice under Article 42 of the memorandum of association.

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Article 42 of the memorandum of association was in the following terms:—

Withdrawal of members who have received no loans.

42. "A member who has received no loan, may withdraw from the association and receive the amount at his credit in calls, *minus* the arrears (if any) and interest due thereon, on giving one month's notice, such withdrawals to be paid from first available funds."

Parthasaradhi Ayyangar, for the liquidators.

Nammayya Chetti, *Venkataramayya Chetti* and *Seshagiri Ayyar*, for various members of the association.

[88] Shephard, J.—This is an application under Section 182 of the Companies Act for the determination of a question with reference to the claims of members of the society who have and members who have not given notice of withdrawal under the rules.

The affidavid does not state with such clearness as might be desired, the prescise question which the liquidators desire to raise, and more than one question was mentioned in the course of the argument. It was suggested that the notices of withdrawal were given after the society was known to be insolvent. That however is not a matter put forward in the original affidavit of the liquidators and no question is asked upon it I confine myself to the question above stated which, as I read the affidavit, is the only question requiring an answer It is not alleged that there are any outside creditors of the society. The question arises simply between members who have given notice under rule 42 and members who have not. Whether the former are to be paid in priority to or *pari passu* with the latter.

On behalf of the liquidators in support of the view expressed in the resolution, 17th November 1893, I was referred to the observation of Jessel, M. R., in *In re Mutual Society* (1).

It was contended that the rules contemplated the society as a going concern and had no application to the affairs of the society in liquidation. There is no authority for this position. On the contrary if authority is needed, *In re Blackburn and District Benefit Building Society* (2) is clear authority for the proposition that the rights of members must be regulated by the contract contained in the rules. The question then is simply one of construction—the construction of rule 42. The rule says that, under certain circumstances, a member may withdraw and receive the amount at his credit in calls *minus* arrears and interest—" such withdrawals to be paid from first available funds."

I am clearly of opinion that the rule gives members, who have given due notice, the right to have the sums due to them paid in priority to other members who have not given notice, such payments to be made out of the funds in the liquidator's hands so far as they are available.

Adipurnam Pillai, one of the class described as non-withdrawal members, preferred this appeal.

[89] The Advocate-General (Hon'ble Mr. *Spring Branson*, for appellant.

Parthasaradhi Ayyangar, for the liquidators, respondents Nos. 1 and 2.

Sundara Ayyar, for respondent No. 3, one of the class described as withdrawal members.

(1) 24 Ch. D. 427.

(2) 24 Ch. D. 421.

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JUDGMENT

This is an appeal from an order of Mr Justice SHEPHARD disposing of an application under Section 182 of the Indian Companies Act in the matter of the Madras Building Association (Limited)

The Madras Building Association (Limited) is now in liquidation, but prior to the petition for liquidation certain shareholders gave notice of withdrawal from the company, and the question for decision is, what are the rights of the withdrawing members between themselves and the other members of the association, in other words, have the members who have given notice of withdrawal a right to be paid out of the assets in priority to the other members? The learned Judge decided that they had priority

Article 42 of the memorandum of the articles of association says that a member who has received no loan may withdraw from the association and receive the amount at his credit in calls *minus* the arrears (if any) and interest due thereon on giving one month's notice, such withdrawals to be paid from first available funds The learned Advocate-General appears for the appellant and argues that Article 42 only applies to the association as a going concern, and that as the association is in liquidation all the shareholders as between themselves are entitled to share and share alike, and the case of *In re Mutual Society* (1) decided by the late Master of the Rolls was relied on But that case is distinguishable from the present, as the shareholders of the Mutual Society who had given notice of withdrawal were to be paid out of one particular fund which was non-existent at the time the society went into liquidation Mr Sundra Ayyar who appears for the third respondent, relies on the case of *In re Blackburn and District Benefit Building Society* (2) which has been confirmed by the House of Lords in *Walton* v *Edge* (3) Rule 3 of that society stated that any member of the society shall be allowed to withdraw (provided [90] the funds permit) sums by giving certain notices of withdrawal, and that no further liabilities shall be incurred by the society till such member shall be repaid It was held on the construction of the above that the rule as to the withdrawal of members must not be confined to the society as a going concern, but was applicable to adjust the rights of the withdrawing and continuing members *inter se* in the winding up, that the members who had given notice to withdraw, and whose notices had expired before the commencement of the winding up, were entitled to be paid out of the assets in priority to the other investing members who had not given notice of withdrawal, notwithstanding that at the date of the winding up there were no funds in hand for their payment

In the present case rule 42 states that the withdrawals are to be paid from the first available funds

We hold, therefore, that the learned Judge was right, and this case comes within the principles laid down *in re Blackburn and District Benefit Building Society* (2), and we dismiss the appeal with costs

Alasingaracharіar —attorney for appellant

(1) 24 Ch D, 427. (2) 24 Ch D, 421 (3) L R 10 Ap Cas 33

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19 M. 90.

19 M. 90.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Davies.

SUBBARAU NAYUDU, *Plaintiff* v. YAGANA PANTULU AND ANOTHER *Defendants.** [21st November, and 3rd December, 1895.]

Limitation Act—Act XV of 1877, Section 14—Exclusion of time of former proceedings

In 1892 a suit was instituted in the Presidency Court of Small Causes against defendants not resident within the jurisdiction, the leave of the Registrar of the Court having been first obtained. Subsequently it was ruled that the Registrar was not empowered to give such leave, and the suit was dismissed. A similar suit was then instituted, the leave of the Court having been first obtained:

Held, that the time during which the first suit was pending should be deducted in the computation of the period of limitation applicable to the second suit.

[**F.,** 20 M 48 (51)(**F.B.**); R, 22 A 248 (256) (**F.B.**); **D.,** 32 C. 118 (122).]

[91] CASE stated for the opinion of the High Court under Presidency Small Cause Court Act, Section 69 by V. P. DeRozario, one of the Judges of the Presidency Small Cause Court.

The case was stated as follows:—

In this suit, presented on the 26th April last, the plaintiff seeks to recover from the defendants residing in Kistna a sum of Rs. 525-3-6 due on balance of account to one Kottaya Naidu who assigned the debt to the plaintiff. The cause of action is alleged to have arisen about five years before the date of the present suit. The plaintiff states that, under Section 14 of the Limitation Act, he is entitled to deduct the period of three years during which a former suit No. 6837 of 1892 filed on the 25th March 1892 on the same cause of action was pending in this Court, which suit was dismissed on 26th April 1895 by the Chief Judge for want of jurisdiction, as the leave to sue the defendants residing beyond the jurisdiction was given by the Registrar who had no power to grant it.

This power was vested in the Registrar by a rule framed by the High Court and published in the *Fort St. George Gazette* in 1885, and from that date until 27th March 1895, when the rule was declared by the High Court to be *ultra vires*. See *Rajam Chetti* v. *Seshayya* (1); the power of granting leave was exercised by the Registrar.

It is not contended that the plaintiff acted otherwise than *bona fide* in applying for the required leave to the officer publicly declared by the High Court to which the Small Cause Court is subordinate to have the power to grant it. This suit was filed on the very day on which the leave was obtained, and it is not contended that the plaintiff failed to exercise due diligence in prosecuting the suit, or that its long pendency in this Court is due to any negligence on his part. But it is urged that the plaintiff's suit was not dismissed for want of jurisdiction on the part of the Court, but, on the contrary, the Court having jurisdiction was precluded from taking cognizance of it by reason of the leave of the Court not having been obtained for its institution as required by law, that the Court was divested of its jurisdiction by the plaintiff's own act or omission, and that this omission was *per se* negligence or want of due diligence

* Referred case No. 12 of 1895.

(1) 18 M. 236.

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on his part In support of this contention the case of *Ramakristna* [92] *Sastrulu* v. *Darba Lakshmidevamma* (1) is relied upon There a suit for inam lands was dismissed on the ground that the plaintiff had no certificate as required by Regulation IV of 1831. Eight years afterwards the plaintiff having obtained the requisite certificate commenced a second suit, it was held that the institution of the former suit had not suspended the statute of Limitation Act XIV of 1859—Holloway, J., remarking "the fact that he (plaintiff) failed to obtain the required certificate will no more suspend the statute, than the inability to procure evidence would have done . That the certificate was not procured, may be from the plaintiff's misfortune or from his negligence, but with that the Court has no concern This case really proceeds on the very obvious principle that a plaintiff's failure to procure what is necessary for the institution of his suit, does not keep alive his cause of action" But the circumstances of that case are different from those of the present, and further the remarks of the learned Judge are *obiter dicta*, as even if the period during which the first suit was pending were deducted, the second suit was barred as more than twelve years had run against the plaintiff's remedy In a much later case *Putali Meheti* v *Tujla* (2), where the production of the Collector's certificate was necessary to give jurisdiction to the Court, it was held that its non-production did not necessarily constitute such a want of due diligence as to disentitle the plaintiff to the deduction of time allowed by Section 14 of the Limitation Act West, J, observed "the case appears to have been one of an error committed in good faith and not one of want of due diligence The plaintiff wanted a decree and took the steps apparently necessary to obtain it His suit failed, through a defect of jurisdiction of the Court, which had not really judicial cognizance of the cause until the preliminary condition overlooked for so long, had been satisfied" The circumstances of that case and those of the present case appear to be similar.

Section 14 enacts "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First Instance or in a Court of Appeal, against the defendant shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in [93] a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it"

The section indicates that the Legislature intended to show indulgence to a party acting *bona fide* under a mistake (*Kristna* v *Chathappan* (3) and that a plaintiff is entitled to the benefit of the terms of Section 14, if it is shown "that his suit had been prosecuted *bona fide* and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff The inability of the Court must be either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties." (Per Jackson, J, in *Chunder Madhub Chuckerbutty* v *Bissessuree Debea* (4).

I am of opinion that the plaintiff is entitled to the benefit of the terms of Section 14 of the Limitation Act But at the request of the

(1) 1 M H C R 320 (2) 3 B 223 (3) 13 M 269 (4) 6 W. R 184

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defendants' pleader, I beg to submit for the opinion of the High Court the question, whether, in the circumstances stated, the time during which the plaintiff was prosecuting his former suit in this Court should be excluded in computing the period of Limitation for the present suit.

I have reserved judgment contingent upon the opinion of the High Court on the question submitted.

Mr. *K. Brown*, for plaintiff.

Pattabhirama Ayyar, for defendants.

JUDGMENT.

This suit No. 6550 of 1895 was instituted in the Presidency Small Cause Court on the 26th April last under Section 18 (*a*) of Act XV of 1882, the leave of the Court having first been given as was necessary, because the defendants do not reside within the local limits of its jurisdiction but in the Kistna District. A precisely similar suit had been filed on the 25th of March 1892 by the leave of the Registrar of the Court, and it was pending until the 26th April last, when it was thrown out on the ground that the Court had no jurisdiction to entertain it, because the leave of the Registrar was not the leave of the Court as had recently been declared by the High Court (*Rajam Chetti* v. *Seshayya* (1). Up till then, the Registrar had been exercising the power for many years under a rule passed by the High Court in 1885, which was now found to be *ultra vires*. The plaintiff's [**94**] present suit is barred by limitation if he cannot claim the benefit of Section 14 of the Limitation Act, and that is the question referred to us, whether the time from the 25th of March 1892 to the 26th of April 1895 during which he was prosecuting his former suit should be excluded in computing the period of limitation for the present suit.

Section 14 of the Limitation Act allows such exclusion if the former suit was prosecuted with due diligence and in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. It is not contended that the plaintiff was in fact negligent in prosecuting the suit, the long pendency of which was owing to no fault of his, nor that he did not act *bonâ fide* in bringing the suit on the sanction of the Registrar, which was then supposed to be a valid sanction even by the Court itself. What is contended is that he is responsible in law for his omission to obtain the leave of the Court, and it was only by reason of that omission that the Court was divested of its jurisdiction. In support of the first proposition several cases are cited. In *Ramakristna Sastrulu* v. *Darba Lakshmidevamma* (2) it was held that the statute of limitations was not suspended in consequence of plaintiff's misfortune or negligence in not producing a certificate required by law, for want of which his previous suit had been dismissed. In *Bai Jamna* v. *Bai Ichha* (3), the plaintiff was held not entitled to deduct the time she was engaged in prosecuting the first suit, because that was dismissed owing to the non-production of a registered certificate due to her own laches. In *Krishnaji Lakshman* v. *Vithal Ravji Renge* (4) the plaintiff was not allowed the benefit of Section 14, because his previous suit was defective for want of parties and was withdrawn by himself. In *Tirtha Sami* v. *Seshagiri Pai* (5) the first suit had failed by reason of misjoinder of causes of action and parties,

(1) 18 M. 236. (2) 1 M. H. C. R. 320. (3) 10 B. 604.
(4) 12 B. 625. (5) 17 M. 299.

1895 DEC. 5.

APPELLATE CIVIL.

19 M. 90.

and hence plaintiff was held not entitled to exculde the time it was pending. In all these cases it will be observed that the condition was one within the power of the party to fulfil, and it was default or defect in himself and not a "defect of jurisdiction" in the Court which entertained the suit "or other cause of like nature" that deprived him of the time occupied in carrying it on to a failure Now in this case, it [95] would be impossible to say that the plaintiff committed any fault when he complied with the rule sanctioned by this Court Being then accepted as good in law, he could hardly have disputed it, especially as the Court to which he applied recognised and acted upon it It cannot therefore be held that he was guilty of any omission, and it is conceded there was no actual negligence or want of *bona fides* on his part To entitle a plaintiff to the benefit of the terms of Section 14 of the Limitation Act, it is sufficient to show "that his suit had been prosecuted *bona fide* and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff" *Per* Jackson, J , in *Chunder Madhub Chuckerbutty* v *Bissessuree Debea* (1)

Then as to the proposition that the Court had an inherent jurisdiction over the case, which it was prevented from exercising only by reason of the plaintiff's omission to obtain the requisite leave, we are not prepared to accede to it. It is argued that the case is similar to cases such as that under Section 30 of the Code of Civil Procedure, where with permission of the Court, one party may represent others in the suit, or such as those wherein the production of a certificate or other authority is a preminary condition to a suit, without which the Court will not exercise its jurisdiction, albeit jurisdiction is vested in it In this class of cases however the inability of the Court is not an inability to entertain the suit, but an inability to decide it until the condition is fulfilled, and it is an everyday occurrence to allow the omission to be supplied after the plaint is filed But in this case the Presidency Small Cause Court had absolutely no jurisdiction until its leave had been obtained in writing "before the institution of the suit," because the defendants did not reside within its local jurisdiction The Act conferring the jurisdiction is not only a special but a local Act, and it is an essential qualification that the leave of the Court be first given before it can exercise jurisdiction over defendants not residing within the local limits of its ordinary jurisdiction, and who otherwise are not subject to it Its jurisdiction is excluded until it is specially conferred by the Court's own act, and that act must be performed prior to the institution of the suit The Court had therefore no inherent jurisdiction, which makes all the difference [96] between the case here in question and the class of cases referred to above, where there is no want of jurisdiction to begin with but only a refusal to exercise it for the time being It is just as if a plaint were presented not in proper form or unverified, the Court would not act upon it—not because it had no jurisdiction, but because a prerequisite was wanting, which is allowed to be supplied afterwards by amendment In the present case the Court was altogether debarred and precluded from receiving the plaint, as it had not given its prior consent to its entertainment and had no authority to accord it afterwards. It is urged that, that being the case, the Court should have returned the original plaint for presentation in the proper Court and the question of limitation need not then have arisen. But we give no opinion

(1) 6 W R, 184.

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on this point, as it is not embraced in the reference made to this Court. With regard to that, we reply for the reasons given that the plaintiff is entitled to exclude, from the computation of the period of limitation for his present suit, the time his former suit was pending in the Court.

Rencontre:—Attorney for plaintiff.

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19 M. 96.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard and Mr. Justice Best.

SADASOOK GAMBIR CHUND (*Plaintiff*), *Petitioner v.* KANNAYYA AND ANOTHER (*Defendants*), *Respondents.**

[4th and 19th September, 29th October and 18th December, 1895.]

Presidency Small Cause Courts Act—Act XV of 1882, Section 37—Powers of Full Bench of Presidency Small Cause Court—Question of fact.

One of the Judges of the Presidency Small Cause Court in a suit tried by him delivered judgment for the plaintiff. The defendant made an application to the Full Bench under the Presidency Small Cause Courts Act, Section 37, and the Court arrived at the conclusion that the judgment proceeded on a misappreciation of the evidence and reversed the decree.

Held, by COLLINS, C.J., and SHEPHARD, J. (BEST, J., *dissenting*) that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the [97] jurisdiction conferred by Act XV of 1882, Section 37, as the case was one of which different minds might not unreasonably have come to different conclusions.

[**F.**, 27 B. 563 (571); 24 C. 455 (459)=1 C.W.N. 44, 21 M. 232 (233); **R.**, 23 B 414 (420), 38 C. 425=16 C.W.N. 25 (26); 31 M 490 (492)=18 M.L.J. 480=4 M.L.T. 283.]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceeding of the Full Bench of the Presidency Court of Small Causes in small cause suit No. 4946 of 1894.

One of the Judges of the Presidency Small Cause Court passed a decree for the plaintiff in the above suit. The Full Bench on an application made under Presidency Small Cause Courts Act, Section 37, considered that he had come to an erroneous conclusion on the evidence and reversed the decree.

The plaintiff preferred this petition

Mr. *W. Grant*, for petitioner.

Mr. *R. F. Grant*, for respondents.

OPINION.

SHEPHARD, J.—This petition raises an important question with regard to the practice of the Full Bench of the Small Cause Court in dealing with applications under the 37th section of the Act of 1882. The application in this case was made on behalf of the defendants, against whom a decree had been passed. It is made in the form of an appeal against the decision of the Second Judge, and is based on various grounds, three of which relate merely to questions of the appreciation of evidence. In their judgment on the application, the learned Chief Judge and his colleagues discuss the evidence, and deal with the case precisely in the manner in which an Appellate Court might have treated it. They differ

* Civil Revision Petition No. 510 of 1894.

1895. Dec. 18. — Appellate Civil. — 19 M. 96.

from the conclusion of fact at which the Second Judge had arrived and find in favour of the defendants They hold that the case is one in which, under the rules of the 16th February 1886, they are justified in entertaining the application and dealing with the case accordingly The result was the reversal of the decree and the dismissal of the suit

Now, whatever may be the force or effect of the rules abovementioned, there can be no doubt that under those rules the Full Bench cannot assume a jurisdiction which under the Act itself they do not possess The question then, is whether under the 37th Section of the Act, the Full Bench was justified in entertaining the application and reversing the decree

The section consists of two parts First there is a declaration that the determination of a case tried in the Small Cause Court is to be final and conclusive In other words the right of appeal is [98] denied Then comes the provision empowering the Full Bench, on application duly made, to grant to re-trial or to do certain other things The forms which the interference of the Full Bench may take are such as a Court of Appeal might be empowered to use, but evidently the Full Bench is not intended to sit as a Court of Appeal The section which follows, providing for a rehearing by the High Court in cases of miscarriage or failure of justice, furnishes an alternative course, which would scarcely be given if under the preceding section the Full Bench were meant to be a Court of Appeal The distinction between the functions of the Full Bench and those of an Appellate Court must lie in the character of the conditions under which the Full Bench has jurisdiction to interfere Those conditions are not expressed even in such general language as is used in the 38th Section, but I think they may be gathered from the langauge of the previous Act and the rules of English law *in pari materia* By the 50th Section of the Act of 1850, which also contains a declaration that the judgments of the Small Cause Court are to be final and conclusive, there is reserved to the Court the power of granting a new trial The section does not provide for any other mode of interference with the original decree When, in 1882, the Legislature altered the law by prescribing several modes of interference, it appears to me that it clearly was not intended to alter the conditions under which the Full Bench might act Now under the Act of 1882, as formerly under the Act of 1850, it has to be seen whether in any given case the circumstances are such as would justify the granting of a new trial In the present case, if under the Act of 1850 a new trial would not properly have been granted, then, in my opinion, under the existing law, the application ought not to have been allowed and the decree ought not to have been reversed The conditions under which a new trial may be granted according to the accepted practice prevailing in English Courts in cases in which that is the form of remedy provided are various (See Lush's Practice) The only rule which could possibly have any application to the present case is that which justifies a motion for a new trial on the ground that the verdict is against the weight of evidence This rule, however, does not mean that the Court before which the motion is made is at liberty to set aside the verdict merely on the ground that they take another view of the evidence and do not agree with the conclusion of the jury The applicant for a new trial must go [99] farther than this he must show that the verdict is one to which no reasonable man ought to have come (see *Solomon* v *Bitton* (1)) It does not

(1) 8 Q B D 176

1895. Dec. 18. — Appellate Civil. — 19 M. 96.

appear that in the present case there was any pretence for saying that the judgment of the Second Judge was in this sense an erroneous one. The burden of proof was on the defendants, and the question was simply as to the sufficiency of the proof adduced by them. It is clear that the case was one in which different minds might not unreasonably have come to different conclusions. In the case cited above the Judge before whom the case had been tried had expressed dissatisfaction with the verdict. Yet the Court of Appeal reversed the order for a new trial on the ground that the granting of a new trial did not depend on the opinion of the Judge who tried the action, but on the question whether the verdict was such as reasonable men ought to have come to.

In my opinion the Full Bench have transgressed the limit of the jurisdiction conferred on them by the 37th Section. They have in fact assumed the functions of a Court of Appeal.

I would therefore set aside their order and restore the decree. The respondents must pay all the costs.

Best, J.—It is contended on behalf of the petitioner that the Full Bench of the Madras Small Cause Court exceeded its powers in reversing the decision of the Second Judge merely on a consideration of the evidence, there being no question of law.

Section 37 of the Presidency Small Cause Courts Act (XV of 1882), under which the Judges acted, after declaring that every decree and order of the Small Cause Court in a suit shall be final and conclusive, "save as is herein specially provided," adds that the Court may, on application of either party, made within eight days from the date of the decree or order in any suit, order a new trial to be held, "or alter, set aside or reverse the decree or order," upon such terms as it thinks reasonable.

The language used seems to me to mean that, though the party is not entitled to appeal as of right, in any case in which application is made within the time allowed the Court may, if it thinks fit, reconsider any decree or order with all the powers of an ordinary Appellate Court. There is nothing, either in the wording of the section or in the rules for new trials sanctioned on the 16th [100] February 1886, to debar a re-hearing where the question is one merely of appreciation of the evidence. The rules, in fact, by saying that the powers conferred by the section will ordinarily be exercised only on certain specified grounds, recognize the power of the Court to grant a re-hearing even in other cases, should the same be thought necessary for the ends of justice; and such also appears to have been the intention of the Legislature, judging from the language used in Section 37.

Being of opinion that the Full Bench did not act without jurisdiction and seeing nothing illegal in its proceedings, I would dismiss this petition with costs.

This petition came on for hearing under the provisions of Section 575 of the Code of Civil Procedure before Collins, C. J., who delivered judgment as follows:—

JUDGMENT.

Collins, C. J.—This case was not re-argued before me, the respondents not appearing.

I agree with Mr. Justice Shephard's reasons and conclusion, and I would therefore set the order aside and restore the decree. The respondents must pay all the costs.

19 M. 100.

APPELLATE CIVIL

Before Mr. Justice Shephard and Mr. Justice Best

1895
Aug. 13.

APPELLATE CIVIL.

19 M. 100

VIZIANAGARAM MAHARAJAH (*Plaintiff*), *Appellant* v SITARAMARAZU AND OTHERS (*Defendants Nos.* 1 *to* 9, 11 *to* 13, 15 *to* 29 *and* 10 *to* 14 *Defendants, Representatives*), *Respondents* *
[7th, 8th and 13th August, 1895]

Limitation Act—Act XV of 1887, Schedule II, Article 132—Suit for kattubadi—Whether kattubadi is rent merely or constitutes a charge—Resumption of service grant

The plaintiff sued for possession of three villages granted by his predecessor to the ancestors of the defendants on the ground that the villages had been granted on service tenure and that he was entitled to resume them He prayed, in the alternative for a decree for six years' arrears of kattubadi

Held (1) *on the evidence* that the plaintiff was not entitled to resume the villages,

[101] (2) that the plaintiff was entitled to a decree for only three years' arrears of kattubadi

[D, 10 M L T 391=(1911) 2 M W N 406 (409)]

APPEAL against the decree of H R. Farmer, District Judge of Vizagapatam, in original suit No. 14 of 1891

The plaint set out that three villages, " included under the head of jeroyati relating to the plaintiff's samastanam, were given by the plaintiff's grandfather the Maha Rajah to the defendants' ancestors, three in number, that is, Kakarlapudi Appala Razu, Seetarama Razu and Vijiagopala Razu, who were in the subordinate service of the plaintiff's ancestors, with the condition that they should render service by being present as courtiers Having regard to the treaty entered into between the English Government and this samastanam, and before the English Government took the administration of the Northern Circars, the gifts made by the holders of this samastanam of their own accord can be enjoyed for life only during their time They cannot bind the interest of the reversionary heirs according to the custom " After setting out that the first named grantees adopted sons of the third, the plaint proceeded as follows —

" The remaining seven sons and Vijiagopala Razu enjoyed one share separately As the suit villages were granted as service mokhasa and as the permission of the Maha Raja was required for their division, only the suit villages were enjoyed jointly till 1845 Vijiagopala Razu's son, Seetarama Razu, requested the plaintiff's father, the Maha Raja Garu, very much in 1853, that he should grant him again saying that he would render service as usual and enjoy the same, and that he would be paying the kattubadi fixed by the circar Thereupon, instead of granting them into three shares according to family rights, they were given again on the 13th September 1853 to the seven sons who were staying with Vijiagopala Razu and the adopted sons Lakshminarasimha Razu and Bungaru Razu with a kattubadi of Rs. 300 newly fixed for enjoyment on the condition that they should according to mamul be in attendance as courtiers, whenever the circar may desire, render service and be subject to their pleasure "

The effect of certain litigation was next stated in the plaint, and it was added that after its close the defendants divided the villages into nine shares " and have been enjoying till 1879 according to their respective shares, paying the usual kattubadi " The further averments were that, as

* Appeals Nos 134 and 179 of 1893

1895 AUG. 13. — APPELLATE CIVIL. — 19 M. 100.

the defendants were not at the [102] inam settlement made by the plaintiff according to the custom, and as the conduct of the defendants was not satisfactory to the plaintiff, and as the services of the defendants were not required, the defendants were informed that they should pay a sist of Rs. 5,000 for the villages; and that, as they failed to do so, notices were served on them requiring them to relinguish the villages. The plaintiff's prayers were for possession of the villages and for the payment of kattubadi at Rs. 300 a year for four faslis (1289 to 1292) and mesne profits for three faslis (1297 to 1299) or in the alternative (in case plaintiff was not found to be entitled to possession) for the payment of kuttubadi for faslis 1289 to 1292 as above and for faslis 1297 to 1299 at Rs. 5,000 a year.

The District Judge held that the plaintiff was not entitled either to resume the villages or to enhance the kuttubadi, and passed a decree for kattubadi from 1289 at Rs. 300 a year.

Plaintiff preferred this appeal and objections were taken by the defendants as to the amount of kattubadi decreed.

Mr. *H G. Wedderburn* and *Rangachariar*, for appellant.

Bhashyam Ayyangar and *Subramania Ayyar*, for respondents.

JUDGMENT.

The plaintiff's right to resume the villages held by the defendants is chiefly put upon the ground that the latter and their predecessors have always held and still hold by tenure of service. It is also contended that, by the custom of the zemindary, the Maharajah had the right to resume the villages, and that the grant of 1853 made by the plaintiff's predecessor must be construed with reference to the acts done and views expressed by him at or about that time. Since 1853 the defendants have been holding under an instrument, dated the 13th September 1853, which recites that the villages then under attachment had been granted to their ancestors for family purposes under tenure of service, and that no kattubadi had hitherto been payable. It provides that henceforward kattubadi shall be payable at the rate of Rs. 300 a year, and requires that the grantees "shall behave themselves properly, abiding by the orders of the circar as was done before the attachment (sabak)." The attachment mentioned in this document had been in force since 1845, when the plaintiff's grandfather died. Up to that date the defendant's predecessor had held the villages under an instrument of 1808 (XII). That instrument, styled a mokhasa patta, declares that the grantees shall enjoy the villages hereditarily. Except in the use of the word mokhasa [103] there is no reference to any service. The grant is an absolute one, free of rent and evidently intended to be in perpetuity. The plaintiff's counsel was unable to explain what the nature of the supposed service required of the defendants was, and we can find no evidence that any services were ever rendered or required. The probability is that the grant of 1808 was made to the defendants' predecessors simply because they were fellow-castemen of the Maharajah whom he wished to maintain. No doubt it was the current opinion in 1853 that such grants were liable to resumption. That circumstance explains the language used by the late Maharajah in the letter on which the plaintiff's counsel relied.

The circumstances under which the new grant was made in 1853 are similar to those in *Vizianagaram Maharajah* v. *Suryanarayana* (1).

(1) 9 M. 307.

In that case the Privy Council approved the judgment of this Court in dismissing the suit The expressions of subservience used in the grant of 1853 are likewise to be found in the grant in the case We may also refer to the decision of this Court in *Suryanarayana* v *Ramachandra* (1) 1895 AUG. 13

We agree with the District Judge in the conclusion at which he has arrived We think there is no evidence of the alleged custom The plaintiff's appeal must be dismissed with costs. APPELLATE CIVIL.

The objection on the part of the respondents in appeal suit No 134 is based on the law of limitation The Judge has held that the suit for kattubadi is one to which Article 132 of the schedule to the Act applies and has awarded relief accordingly. Whatever may be the nature of the claim for kattubadi, the suit is so framed as to enforce the personal remedy only It has been held by the Judicial Committee that the 132nd article has reference only to cases in which the property charged is sought to be made liable—*Ram Din* v *Kalka Prasad* (2), see also *Miller* v *Runga Nath Moulick* (3), *Seshayyah* v *Annamma* (4), *Rathnasami* v *Subramanya* (5) In the face of these decisions we are bound to disregard an unreported decision to the contrary effect to which our attention was called * We must allow the objection and the decree must be [104] amended accordingly The respondents are entitled to their costs on this part of their objection The other objections are not pressed 19 M. 100.

In appeal suit No 179 of 1893, the memorandum of objections is allowed with costs

19 M 103 N=5 M L J 142

* Second Appeal No 822 of 1894, 8th November 1894 *Venkatarama Doss* v *Maharajah of Vizianagaram*—This was a suit by the Maharajah of Vizianagaram to recover from the defendant a sum of money being arrears of kattubadi accrued due for eleven years (faslis 1289 to 1299 both inclusive) on the village of Arjunavalasa held by the defendant in the plaintiff's zamindari It was held by the lower Courts that the suit was not barred by limitation for the reason that kattubadi was not rent merely but constituted a charge on the land *Alubi* v *Kunhi Bi* (10 M 115) was referred to by the lower appellate Court and Limitation Act, Schedule II, Articles 131 and 132, were held to be applicable to the case

The judgment of the High Court on second appeal so far it related to the question of limitation was as follows —

JUDGMENT

* * * * * * * * *

The next contention is that inasmuch as the last payment of kattubadi was made in April 1879 and the suit was brought on 20th June 1891, the whole claim is barred It was argued that the irregular levy of kattubadi abandoned more than 12 years before suit was not proof of a legal right, *Ramchandra* v *Jaganmohana* (15 M 161) and that even if the right was not extinguished kattubadi was only rent, and not more than three years rent can be recovered In proof of this latter position two unreported cases *Papamma Rau* v *Sivaramayya* and *Prakasa Rau* v *Maharajah of Vizianagaram* (second appeal No 1061 of 1894 and second appeal No 692 of 1893) were referred to Though the last payment of kattubadi was in 1879, the suit is only for 11 years instalments and if kattubadi is a rent charge the case falls under Section 132 of the Limitation Act and the suit is in time That kattubadi is a rent charge and really a portion of the revenue reserved was held in *Ramachandra* v *Jaganmohana* (15 M. 161) and in many decided cases See also *Alubi* v *Kunhi Bi* (10 M. 115) It follows that 12 years kattubadi may be recovered The decision in second appeal No 1061 of 1894 is not in conflict with this view The claim was for Rs 25 as kattubadi and it was not brought in a Small Cause Court, but on the regular side of a District Munsif's Court An appeal was heard by the Subordinate Judge a second appeal was rejected by the High Court under Section 586, Code of Civil Procedure, on the ground that the suit was of small cause nature. The sum claimed was Rs 25 only and it was not sought to make it a charge upon the land It was held that the claim was not for a cess, but that though originally payable to the

(1) Appeal No 77 of 1866, unreported (2) 7 A 502 (3) 12 C 389
(4) 10 M. 100. (5) 11 M. 56, 59.

1895
SEP. 23.

APPELLATE CIVIL.

19 M. 105.

19 M. 105.

[105] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

KOOPMIA SAHIB (*Plaintiff*), *Appellant v.* CHIDAMBARAM CHETTI AND OTHERS (*Defendants Nos.* 1 *to* 5, 7 *to* 14, 16 *to* 23, 25 *to* 35, 37, 38 *and* 40 *to* 54), *Respondents.** [23rd September, 1895.]

Transfer of Property Act—Act IV of 1882, Section 74—Redemption of prior mortgage—Extinguishment of prior mortgage—Title by possession—Limitation.

The trustees of a religious institution improperly mortgaged land forming part of its endowment, and put the mortgagee into possession on 27th June 1877 as usufructuary mortgagee. The mortgagee assigned his mortgage to defendant No. 1 on 7th December 1882. On 23rd December 1889 the mortgagors executed to the plaintiff a deed of usufrauctuary mortgage of the same land to secure Rs. 1,400; the deed stated that the money was borrowed with a view to discharge a prior mortgage and proceeded "as you have undertaken to pay Rs. 1,000, to "the mortgagee, I credit you with Rs. 1,000 and receive Rs. 402 in cash." The plaintiff paid off the prior mortgage on 18th April 1890, but did not obtain possession, other persons having entered in the interests of the institution. The plaintiff now sued for possession and a declaration of his mortgage right, the persons in possession and the prior mortgagee, but not the mortgagors were joined as defendants:

Held that Transfer of Property Act, Section 74 was not applicable to the case, and that the plaintiff was not entitled to a decree.

[**R.**, 4 Ind. Cas. 21 (22)=12 O.C. 285.]

SECOND appeal against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 165 of 1892, affirming the decree of

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Government as revenue it was now payable to the zamindar as rent The question of *rent charge* did not arise.

It must be admitted that the decision in *Prakasa Rau v Maharajah of Vizianagaram* (second appeal No 692 of 1893) is inconsistent with the reported cases as to the nature of kattubadi, but the case is not reported and we do not feel bound to follow it

We must hold, therefore, that the claim is not barred and dismiss the second appeal with costs.

[**Diss.**, 19 M 100, **N.F.**, 19 M 329 (330).]

* * * * * * * * *

The following is the portion of judgment omitted in I.L.R. 19 M. 103 N

["The first point raised was that there was no legal agreement to enhance the kattubadi in 1854. At that time the village was under attachment and defendant's mother and guardian executed the vakalat A to Vakil Roy Carlu to authorize him to make terms for the release of the village. The petition B was presented by the vakil on the same day as also the sannad B. Having regard to the language of Exhibit A, we are not prepared to hold that these documents were beyond the scope of the vakil's authority. Nor do we think that such an arrangement made to put an end to a *bona fide* dispute was beyond the power of defendant's mother and guardian. A precisely similar settlement was recognized in *Suryanarayana's case* (9 M. 307). The arrangement might therefore be valid without necessity of ratification. But the defendant attained majority in 1871, and it was not until the Privy Council Judgment was given in 1886 that the settlement was questioned. It was then decided that such enhancements were beyond the power of the incoming Zamindar and the obvious inference was that the enhancement of 1854 might have been resisted on the same ground. We cannot accept the contention that there is no evidence that the enhanced kattubadi was in fact paid. Not only are the long series of accounts corroborative evidence of such payment, but the mortgage-bond C shows that the defendant had himself accepted the enhanced rate. There is a legal evidence to support the finding of the Courts below."]

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* Second Appeal No. 1732 of 1894.

S. Krishnasami Ayyar, District Munsif of Erode, in original suit No. 285 of 1890. 1895 SEP. 23.

APPELLATE CIVIL.

19 M. 105.

The plaintiff sued for possession of certain land and for a declaration that he was entitled to hold it as usufructuary mortgagee. The plaint alleged that the owners of the land mortgaged it on 27th June 1877 to one Varadaraja Naik, who assigned the mortgage to defendant No. 1 on 7th December 1882, that the mortgagors on the 23rd December 1889 executed in favour of the plaintiff a usufructuary mortgage of the land for Rs. 1,400, part of the transaction being that he should redeem defendant No. 1, and that the plaintiff on 18th April 1890 paid off the mortgage under which defendant No. 1 held the land.

[106] Defendant No. 1 admitted that his claim had been discharged by the plaintiff and stated that he was not in possession. Defendant No. 2 alleged the land formed part of the endowments of a Durga. The other defendants were persons who came in and were joined on their own application. They had taken possession shortly before suit after a meeting of the community interested in the Durga, and their case was that the mortgagors held the land as poojaris of the Durga and had no right to mortgage it.

The District Judge found that the land formed part of the endowment of the Durga. He held that the plaintiff did not keep alive what rights the previous mortgagee had, but extinguished the mortgage under his arrangement with the mortgagors. As to this point he referred to the terms of the instrument of 23rd December 1889, which contained the following passage:—"I have mortgaged to you for Rs. 1,400, which I have borrowed with a view to discharge a prior mortgage. As you have undertaken to pay Rs. 1,000 to the mortgagee, I credit you with Rs. 1,000 and receive Rs. 402 in cash." On the question whether the plaintiff was entitled to rely on the possessory title of defendant No. 1, the District Judge cited *Madhava* v. *Narayana* (1), and as to the claim of the persons in actual possession, he quoted *Ismail Ariff* v. *Mahomed Ghous* (2), and in the result he confirmed the decree of the District Munsif by which the suit was dismissed.

The plaintiff preferred this second appeal on the following grounds among others:—

"(1) The plaintiff being a subsequent mortgagee and having as such paid off the prior usufructuary mortgage in favour of the first defendant, is entitled to all the rights of the said first defendant and to recover possession of the properties sued for.

"(2) The lower appellate Court has misconstrued Section 74 of the Transfer of Property Act, the provisions of which are clearly applicable to the facts of the present case.

"(3) Possession having been held for more than twelve years under the first mortgage, the first mortgagee has, by the operation of the law of limitation, acquired a right to a limited interest as mortgagee even if the mortgagors had no right to mortgage the property.

"4) The lower appellate Court is wrong in holding that there can be no acquisition of right by limitation unless one and the same trespasser continues in possession for upwards of twelve years.

[107] "(5) The lower appellate Court ought to have held that the first mortgage became valid by limitaton, inasmuch as the possession of

(1) 9 M. 244. (2) 20 C. 834.

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each of the persons in occupation was not independent of but derivative from his predecessor."

Bhashyam Ayyangar and *Tiruvenkatachariar*, for appellant.

Sivasami Ayyar, Subramania Ayyar and *Ayya Ayyar*, for respondents

JUDGMENT.

The plaintiff has never been in possession, nor has he made his mortgagors parties to the suit. It is conceded he must fail unless Section 74 of the Transfer of Property Act applies to this case, the argument being that plaintiff stands in the position of first defendant, who has been mortgagee in possession for over twelve years.

We think it is clear that this section does not apply. Section 74 contemplates the existence of two mortgages at one and the same time, and the independent action of the subsequent mortgagee to put an end to the prior mortgage. It is difficult to see how two usufructuary mortgages could subsist at the same time, and the language of the instrument clearly proves that the intention of the parties was to extinguish the first mortgage by the execution of the second. In these cases it is the intention which must be regarded. See *Mohesh Lal* v. *Mohant Bowan Das* (1).

The second appeal fails and we dismiss it with costs.

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19 M. 1007=6 M.L.J 16.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

VENKATARAMAKRISHNA RAO AND ANOTHER (*Defendants Nos. 3 and 4*), *Appellants v.* BHUJANGA RAU (*Plaintiff*), *Respondent.**

[7th and 22nd October, 1895.]

Hindu Law—Stridhanam—Estate of married daughter in stridhanam property of mother

Under the Hindu Law in force in Southern India, a married daughter, who succeeds to her mother's immoveable stridhanam property, takes a life interest only and after her death, it passes to her mother's heir.

[**R.**, 34 B 553=12 Bom L R 545 (549)=7 Ind Cas 459; 32 M 521=3 Ind Cas 281 =19 M L J 384 (387)=6 M L T 196, 3 O C. 130 (135)]

[**108**] APPEAL against the decree of H. T. Rose, District Judge of Godavari, in original suit No. 18 of 1892.

Suit for possession of the estate of Bayyanagudem. This estate was given as stridhanam to Chinnamma Rau by her husband. Chinnamma Rau enjoyed it till 1873, when she died leaving a will by which she devised it to her son Prasada Rau. Prasada Rau entered into possession and enjoyed the estate until 1878, when he died leaving Bhujanga Rau, his adoptive son, on whose behalf possession was assumed by the Agent of the Court of Wards. In 1881, Ramayamma, the daughter of Chinnamma Rau, sued Bhujanga Rau for possession of the estate as the stridhanam of her mother and obtained a decree under which she was in possession till her death in 1891. Bhujanga Rau now sued to recover the estate. Defendant No. 1 was the husband of Ramayamma who alleged that she

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* Appeal No 176 of 1894.

(1) 9 C. 961.

1895 Oct. 22.

APPEL-LATE CIVIL.

19 M. 107 = 6 M. L. J. 16.

had devised the estate to him by will. Defendant No. 3 had been adopted by defendant No. 1 after the death of his wife Defendant No 2 was an executor of the last-mentioned will The other defendants were brought on to the record on the death of defendant No 1 as his legal representatives.

The plaintiff denied the genuineness of the will of Ramayamma and also her power to devise the estate which he claimed under the law of inheritance The defence was that Ramayamma's estate passed to her husband whether as heir or devisee

The District Judge held that the will was genuine but invalid, and passed a decree as prayed

The defendants Nos. 3 and 4 preferred the appeal

Ramachandra Rau Saheb, for appellants

Pattabhirama Ayyar, for respondent

JUDGMENT

The Substantial question in issue is whether Ramayamma took an absolute or a qualified estate The property was stridhanam in the hands of her mother, but it is settled law that such property, when inherited by a daughter, ceases to be stridhanam in her daughter's hands The decision in *Sangamalathammal* v *Valayuda Mudali* (1) is the leading case upon this subject, and it has been followed in numberless cases in this Presidency as also in Calcutta See *Prankissen Laha* v *Sreemutty Noyanmoney Dassee* (2) No doubt at all would have been felt in this case [109] had it not been for the decision of this Court in *Narasayya* v *Venkayya* (3), which has been represented as being inconsistent with the earlier decisions The District Judge who decided the case evidently considered it inconsistent, though he followed the earlier decisions, and so also did a Division Bench of this Court in *Virasangappa Chetti* v *Rudrappa Chetti* (4) to which we have been referred We will now proceed to point out that there was no inconsistency, and that the case referred to is in consonance with the whole course of decisions

In *Narasayya* v *Venkayya* (3) the question was who was the heir to the property of a maiden daughter with respect to the estate which she had inherited from her mother and in whose hands it had been stridhanam property The lady had no sister, and the contest was between her father and her brother as to which of them was the nearer heir The District Munsif held that the same rule of succession was to be applied as if the last holder was a male instead of a female, and that the brother was no heir as his father was alive On appeal the Subordinate Judge held that as a female the daughter had taken but a qualified heritage, and that upon her death the last full owner's heir was her heir On this view he considered that the son was the mother's heir in preference to the husband, and on this ground reversed the District Munsif's decree The decision in *Sengamalathammal* v *Valayuda Mudali* (1) was clearly before him, and in the appeal to the High Court it was expressly referred to Before the High Court it was contended that the decision of the Subordinate Judge was bad in law, but the Judges refused to accede to the contention, thus admitting that the decision in *Sengamalathammal* v *Valayuda Mudali* (1) was a binding authority It was, however, pointed out that the Mitakshara (Ch II, Sec XI, 30) laid down a special rule of succession to the

(1) 3 M H C R 312
(2) 5 C 222
(3) 2 M.L J 149
(4) 19 M 110

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inherited property of a maiden daughter, of which property she, by a special rule, was as much a full owner as her mother was. The special rule of succession gave the property to her uterine brother, and on this ground the decision of the Subordinate Judge was affirmed.

The observation which gave rise to the misconstruction is as follows: —" But when a daughter succeeds to her mother's stridhanam, she is as much full owner as her mother," but the context shows that the daughter spoken of was the maiden daughter to [110] whom alone the judgment relates. This is also clear from the fact that the general rule enunciated by the Subordinate Judge is expressly approved. The succession to a maiden daughter is the sole exception to the rule, and in all the other cases quoted, the question has been as to the succession to married daughter. It was expressly laid down in *Sangamalathammal* v. *Valayuda Mudali* (1) that the married daughter only took a life interest without power of alienation, and that, irrespective of the property being joint, the sister would succeed in preference to the husband; in other words, that the succession would go to the heirs of the mother. Taking this view, it s unnecessary to consider the validity of the will left by Ramayamma. The appeal fails and we dismiss it with costs.

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19 M. 110=6 M.L.J. 3.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

VIRASANGAPPA SHETTI (*Plaintiff*), *Appellant v.* RUDRAPPA SHETTI (*Defendant*), *Respondent.**

[18th and 19th April and 16th December, 1895.]

Hindu law—Stridhanam—Inheritance by a grand daughter for a limited estate—Succession by heir of last full owner

A Sudra (Lingayat) died in 1826 leaving his property to A, B and C, his daughters, who enjoyed it for some time jointly. In 1860 a settlement was made by (i) A, the sole surviving daughter, (ii) D who was the daughter of B, and (iii) the present plaintiff, who was the only son of C, and also the stepson of D. Under the settlement two-thirds of the property was given to the present plaintiff and the rest was divided between A on the one hand and D and E on the other. E was the daughter of D Subsequently D and E acquired A's share under a deed of gift dated 5th June 1863. D died in 1883. E had died previously, leaving the present defendant, her husband, and a daughter F, who died an infant unmarried in 1892. The plaintiff now sued to recover the property which had passed to the line of B:

Held (1) that the settlement of 1860 on its true construction gave to D and E a life interest only in the event of their having no descendants, but an estate of inheritance otherwise, and that that disposition was valid, and accordingly that in the event which happened they took a heritable estate;

[111] (2) that under the settlement of 1860 and the deed of gift of 1863 D and E took as joint tenants with benefit to survivorship, and not as tenants in common, and accordingly that D became sole full owner of the property on the death of E, whose husband thus acquired no title as her heir;

(3) that F inherited the property, but only for a limited estate, and that the plaintiff was entitled to succeed as heir to D, the last full owner.

[**N.F.**, 3 O.C. 130 (147); **R.**, 25 A. 468 (474) **(P.C.)**=5 Bom. L .R. 828=7 C.W.N. 831=30 I A. 202=13 M.L.J. 330=8 Sar. P.C.J 465; 24 B. 192 (217) **(F.B.)** =1 Bom. L.R. 574 **(F.B.)**; 19 M. 107 (109); 26 M. 1 (10); 32 M. 521=3 Ind. Cas. 281=19 M.L.J. 384 (387)=6 M.L.T. 196, 1 N.L.R. 154 (156).]

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* Appeal No. 136 of 1894.

(1) 3 M.H.C.R. 312.

1895 Dec. 16. — APPELLATE CIVIL. — 19 M. 110=6 M. L. J. 3.

APPEAL against the decree of O Chandu Menon, Subordinate Judge of South Canara, in original suit No 5 of 1892

The plaintiff sued to recover property left by one Kusavva, who died an infant without issue in August 1891 The defendant was the father of the deceased

The parties to this suit were Lingayats and Sudras The facts of the case were admitted and are stated sufficiently for the purposes of this report in the judgment of the High Court The relationship of the persons there referred to appears from the following table —

Virasangappa Shetti
(died in 1826, leaving three daughters)

Kusavva (died in 1877) | Malakavva (died before 1860) | Dadavva (died before 1860) = Nagappa Shetti*

* Nagappa Shetti (died before 1860) = Nadjavva (died in 1883), daughter of Malakavva

Virasangappa Shetti (the plaintiff), son of Dadavva and Nagappa Shetti

Rudravva (predeceased her mother), daughter of Nagappa Shetti and Nadjavva = Rudrappa Shetti (the defendant)

Kussavva (died 1891), child of Rudravva and Rudrappa Shetti

The operative part of the settlement of 1860 (Exhibit B), which was worded as the deed of Kusavva, though it was signed by Nanjavva and Virasangappa also, was as follows —

" On account of the properties valued at Rs 24,000 resolved to be given to the said Nanjavva and her daughter Rudravva, besides the moveable property with Rs 19,000 which was given to them on this date in the shape of gold, silver, bellmetal, copper and cash, I have given them out of my immoveable property situated at Pejawar of Murned magane in Mangalore taluk, all the lands assessed at Rs 424-2-4, fixing their value at Rs 5,000, with the exception of land No 5 called Kussavva assessed at Rs 26-11-7 and situated in Bolaur village—thus making up in all properties worth Rs 24,000 And I have made over to the said Virasangappa Shetti all the other immoveable and moveable [112] properties, as also the garden with the storied house and out-houses therein, forming a portion of the garden No 3 of Mangalore Kasba bazaar out of Virasangappa's wrag assessed at Rs 16 and situated to the south and east of the lane, with the exception of the house and garden situated in the north, purchased in auction and formerly occupied by a barber tenant, reserving to myself the garden and house now occupied by me and obtained by me on mulgeni from the Murgi Mutt people Hereafter both parties should enjoy the respective lands allotted to them and pay the Government assessment thereof and conduct the suits, &c , regarding the respective properties in thier possession Virasangappa should conduct without any omission the panchaparva and other ceremonies of our family god at Kadamatt as they had been conducted hitherto since the time of our ancestors. Either party has no right to object that the allotment of the moveable and immoveable properties made by me is unequal They must not through folly waste the properties allotted to their respective shares Either party has no right whatever to alienate, either by sale or mortgage, the properties in their possession without the co-operation of the other except for the purpose of improvement Virasangappa Shetti

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alone should pay the one year's interest on the debt of Rs. 700 due, and also the sum that may be found due to Nanaji Shetti on account of the articles purchased from his shop. Virasangappa Shetti should also pay the wages due, if any, to the Shanbhogue, the servants and the cooks, according to the account. Of the two parties, whichever has not got descendants (issue) should enjoy the property for lifetime only, and then the property should be enjoyed by the party having decendants. To this effect is the will executed."

The operative part of the deed of gift of 1863 (Exhibit C) was as follows:—

"Because I was living with you up to this time and you were looking after my maintenance, and because you should hereafter also maintain me during the rest of my life-time and perform the customary obsequies and ceremonies after my death, I have made over to you by way of gift the aforesaid garden with the storied house therein now occupied by us and which had been obtained on Maulza (for value) mulgeni from the Murgi Mutt people on payment of Rs 690, together with the five documents relating thereto, to wit. . . . .

[113] "You and your descendants, from generation to generation, shall enjoy (the same) and shall pay the annual mulgeni of Rs. 10 to the Murgi Mutt To this effect is the gift deed executed by me out of my own free will."

The Subordinate Judge dismissed the suit. The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Narayana Rau*, for appellant.

Ramachandra Rau Saheb, for respondent.

JUDGMENT.

One Virasangappa, who originally held considerable property, including that in litigation in the present suit, by his will dated 10th January 1826 devised it to his daughters Kusavva, Malakavva and Dadavva on terms and conditions which it is unnecessary to state fully. It is sufficient for our present purpose to say that he directed that the three ladies should live in union and enjoy the property jointly, and that, if they should find it inconvenient to do so, the same should be divided into four shares, of which Kusavva and Malakavva should each take one share and Dedavva and her husband the remaining two shares. Up to 1860 no separation took place, but in September of that year an arrangement was made, which was brought about by Kusavva, and to which all the descendants of Virasangappa that were then alive were parties, they being (i) Kusavva, the eldest daughter; (ii) Nanjavva, daughter of Malakavva, the second daughter, who had died before that time: (iii) Nanjavva's daughter Rudravva; and (iv) the plaintiff (appellant), the only son of Dadavva, the youngest daughter of the testator, she also having died before 1860. The arrangement was not a mere partition in accordance with Virasangappa's will, but a transaction which went beyond it, as the plaintiff thereunder got, as the representative of the third daughter's branch, more than two-thirds of the properties instead of half, which was his proper share under the will. Exhibit B, which evidences this transaction, after referring to the will of Virsangappa, the marriage of Dadavva, as the first wife of Nagappa Shetti, and, after her death, that of Nanjavva, daughter of Malakavva, as his second wife, the birth of children to him, *viz.*, the plaintiff by Dadavva and Rudravva by Nanjavva, states that, for the prevention of disputes among the parties, it was agreed and arranged

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that, excepting a house and a garden obtained on mulgeni by the first daughter Kusavva and reserved to her, moveables worth Rs. 19,000 and immoveables valued at Rs 5,000 [114] were to be taken by Nanjavva and Rudravva, and that the rest of the properties was to go to the plaintiff It also provides that whichever of these parties has no descendants should enjoy the properties allotted to him or her for life only, and then the same should go over to and be enjoyed by the party having descendants Three years after this arrangement, Kusavva made a gift, under Exhibit C, of the house and garden which she had reserved to herself, to Nanjavva and Rudravva These properties, as well as those granted to them under Exhibit B, were, on the death of Nanjavva, the survivor of the grantees, held by her granddaughter Kusavva till her death in 1892 The question at issue is, who is entitled to succeed to these properties left by the last-mentioned lady, she having died unmarried

The plaintiff's case, as put before us, is as follows —The grant under Exhibit B was to Nanjavva alone, Rudravva her daughter being mentioned therein only to indicate that the estate granted was not a life estate, but one of inheritance On Nanjavva's death, Kusavva, her granddaughter, inherited the property, Rudravva having predeceased Nanjavva The interest taken by Kusavva in the property thus inherited by her was only a limited interest similar to that taken by a woman in an estate inherited by her from a male Consequently on Kusavva's death, the succession should be traced from the last full owner Nanjavva, and there being no nearer heir than the plaintiff, he is entitled to the properties in question either as Nanjavva's co-wife's son or as her husband's sole sapinda, the defendant (respondent) Kusavva's father not being, as Nanjavva's son-in-law, entitled under the Hindu law to claim the same Further, if it should be found that the grant under Exhibit B was not to Nanjavva alone, but to her and Rudravva, as is contended on behalf of the defendant, even then the plaintiff is the party entitled For in this case, as well as under Exhibit C, Nanjavva and Rudravva took as joint tenants and consequently, on Rudravva predeceasing Nanjavva, the whole vested by survivorship in the latter to whom he is the heir

The case for the defendant is that Exhibit B conferred on Nanjavva and Rudravva only a life interest in the properties with remainder to their descendants Kusavva as their descendant took not as Nanjavva's heir, but directly under the instrument as grantee Consequently the succession is to be traced from her, and the defendant, her father, and not the plaintiff, is her heir It [115] was also urged that, if the above contention be held to be unsustainable, and if it be found that Kusavva took only by inheritance, then the estate which she thus took was a heritable one and consequently the defendant succeeded to the same Should this contention also fail, it was argued lastly that the plaintiff's claim should be held unsustainable so far at least as a moiety of the property granted under Exhibit B as well as that given under Exhibit C is concerned, inasmuch as Nanjavva and Rudravva took as tenants in common and the latter's share passed first to her daughter Kusavva and even assuming this lady took only a limited interest, under the law as contended by the plaintiff, it passed after her to the defendant, the last full-owner Rudravva's husband and heir

In these circumstances, the points which arise for determination are—

(i) As to Exhibit B—

Was the grant to Nanjavva alone, or to her and Rudravva?

Did the grantee or grantees take only an estate for life, or a

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heritable estate? If the grant was to both, did they take as joint tenants?

(ii) As to Exhibit C—

Did the donees take as joint tenants?

(iii) If Kusavva took any property as Nanjavva's heir, what interest did she take as such heir?

Now as to the first point arising with reference to Exhibit B, it is quite clear to us that the grant was not to Nanjavva alone, but to her and Rudravva. Exhibit B distinctly says so. And the evidence shows that the plaintiff as well as the other parties were also of that opinion. For, when some of the property set apart under Exhibit B had to be mortgaged in 1878, the instrument of mortgage was executed by both Nanjavva and Rudravva as owners, and the plaintiff signed the instrument as a withness. We are unable, therefore, to uphold the plaintiff's contention with reference to this point.

Passing on to the next point, we have, after a careful consideration of the language of Exhibit B and the circumstances in which it came to be executed, arrived at the conclusion that it gave a life-estate to Nanjavva and Rudravva only in the event of their having no descendants, but an estate of inheritance otherwise—a disposition perfectly valid in law (see Mayne's *Hindu Law*, 5th edition, paragraph 382, and the cases therein cited). And as they [116] had in Kusavva a descendant, their estate must be held to have been a heritable one to which Kusavva succeeded by inheritance. This was also the view taken in suit No. 33 of 1883 instituted by the present plaintiff against Kusavva and the present defendant whereby he sought to eject Kusavva on several grounds, one of them being that Nanjavva and Rudravva took only a life-estate. In dealing with this contention the Subordinate Judge who tried that suit found in unmistakable terms that " Nanjavva and Rudravva jointly took an absolute estate." On appeal to this Court the learned Chief Justice (Sir Charles Turner) and Muttusami Ayyar, J., agreed with the Subordinate Judge as to the construction of the document in question, though it must be admitted that the passage in their judgment which immediately follows this expression of their concurrence with the Subordinate Judge is somewhat ambiguous. We think, however, that we are justified in holding that the learned Judges did not intend to lay down that Kusavva took directly under Exhibit B, even if that document were susceptible of a construction different from that put upon it by us, as it is clear that, not having been in existence at the date of the instrument, she was precluded from so taking by the well-established rule of Hindu law that a grantee or donee must be a person capable of taking when the transaction begins to operate, and must, either in fact or in contemplation of law, be then in existence. We are confirmed in this view by the circumstance that in the concluding portion of the paragraph of the judgment wherein this question is discussed, the learned Judges speak of Kusavva " as entitled to *inherit* the property set apart for these ladies and their descendants by this instrument."

We must, therefore, hold that the interpretation put by the learned Judges upon Exhibit B is in accordance with the view now adopted by us.

Coming now to the third point, we may conveniently consider together that and the question raised with reference to Exhibit C. We think that the plaintiff's contention is sound. Considering that the manifest object of the arrangement under Exhibit B was to secure the enjoyment of the properties to Nanjavva and Rudravva and their descendants, and in default of any such descendant, to the plaintiff and his descendants, it seems to us

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more likely that the intention was that, on the event of either of the female grantees dying in the life-time of the other, the share of the deceased should [117] pass to the survivor. (Compare *Vydinada* v. *Nagammal*) (1) We see nothing in the circumstances of the arrangement or the terms of the instrument to show that a tenancy in common was intended. Nor was it otherwise in the case of the gift under Exhibit C For considering that the donor was the very lady who brought about the arrangement evidenced by Exhibit B, considering also that the donees were mother and daughter, and further, that the donees were, as stated in the document itself, under an obligation to maintain the donor during the rest of her life-time, it appears to us that what was in the contemplation of the parties was a joint tenancy If, on the other hand, it be supposed that they took as tenants in common, it might well have happened that Rudravva's share would, even in the life-time of the donor, have passed to a comparative stranger had she died leaving only her husband and no issue, she having, as a matter of fact, predeceased the donor That a tenancy which might possibly result in such a devolution was intended seems to us improbable.

In our opinion, therefore, on Rudravva's death, her share in all these properties passed by survivorship to Nanjavva, who thus became the sole full owner of the whole estate, and it follows that the defendant's claim to a moiety on the ground that he is Rudravva's heir is unsustainable

We have now to deal with the last point, which relates to the nature of the interest taken by Kusavva in the property in question If she took a heritable estate, the plaintiff must fail, but if, on the other hand, she took a limited estate, he must succeed The conention on his behalf is that she took only a limited interest, since in this Presidency property inherited by a woman even from another woman, is not the former's stridhanam, and since in stridhanam property alone a woman takes an estate of inheritance, and the contention on behalf of the defendant is that the property in question was Kusavva's peculiar property In *Sengamalathammal* v. *Velayuda Mudali* (2) the question arose as to property which devolved upon a daughter from her mother, and it was held by Bittleston, C J and Ellis, J , that the estate did not become the daughter's stridhanam On behalf of the defendant, however, we have been referred to the decision in C M A No 130 of 1890 *Narasayya* v *Venkayya* (3) which no doubt is in the [118] defendant's favour But we find that thought this case was distinctly before the Division Bench which decided *Mullangi Ammanna* v *Chinna Kamayya* (4), yet it was there held that property to which a woman succeeds as the heir of another woman does not become the successor's stridhanam

The learned vakil for the defendant streneously mantains that the rule laid down in *Narasayya* v *Venkayya* (3) referred to above is in accordance with the Mitakshara, the leading authority, in this Presidency, and though the passage in Section XI (2) of that work, which includes inherited property under the head of stridhanam, has been held not to lay down the law correctly as to property inherited by a woman from a male, yet there is no good ground for overruling its authority in respect of property inherited from a female There would be some force in this argument if the view that, notwithstanding that the language of Vijnaneswara in the passage in question is broad and general, the author did not really intend to include in his description of stridhanam what passes by inheritance

(1) 11 M 258 (2) 3 M H C R 312 (3) 2 M L J 149.
(4) Second Appeal No 169 of 1893 unreported

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from a male to a female, were well founded. For in that case it might be urged with some show of reason that the authority of the Mitakshara on the point at issue now is not necessarily affected by the decision laying down that property inherited from a male is not stridhanam. But that view has been shown to be clearly erroneous by Messrs. West and Buhler (Digest, 3rd edition, pages 269 and 272), Dr. Gooroodas Banerjee (Marriage and Stridhanam, pages 283-7) and Dr. Jolly (Lectures on Hindu Law, pages 242-251) It is, therefore, difficult to see how Vijnaneswara is still to be treated as an authority on the point under consideration, whilst, except in Bombay, the Courts, including the Privy Council, have unanimously declined to follow him as to property inherited from a male. Moreover, so far as this Presidency is concerned, the Courts, in thus rejecting Vijnaneswara's doctrine that the word '&c.,' in the text of Yajnavalkya relating to what constitutes stridhanam includes property inherited, have not proceeded solely on the authorities peculiar to the Dayabhaga school, but have been influenced considerably by the fact that the Smriti Chandrika and Daya Vibhaga or Madhavyam have put on entirely different construction on the same word in the said text. Bittleston, C. J., and Ellis, J., in *Sengamalath-* [119] *ammal* v. *Velayuda Mudlai* (1) referred to and rely on the Smriti Chandrika as supporting their conclusion, and the Privy Council in *Mutta Vaduganatha Tevar* v. *Dorasinga Tever* (2) observes "there are two commentaries which are received as authority in the Carnatic, the Smriti Chandrika and the Daya Vibhaga of Madhaviya, neither of which follow the cited passage of the Mitakshara, in assigning to a woman as her stridhan property inherited by her." It will thus be seen that the contention that property inherited is not sridhanam, though opposed to the Mitakshara, is supported by two out of the three commentators accepted as high authorities in the southern or the Dravida school, and one of whom wrote several centuries after Vijnaneswara.

Our attention was next drawn to the observations of Telang, J., in *Manilal Rewadat* v. *Bai Rewa* (3) on what has been called the doctrine of reverter. The learned Judge at p. 763 says with truth that "this doctrine of reverting to the heirs of the last male owner is one which is nowhere expressed, as far as we are aware in either the Mitakshara or the Mayukha." No doubt the circumstance thus alluded to by the learned Judge furnishes an excellent ground against the introduction of the doctrine of reverter in the provinces where the doctrine of the Mitakshara that inherited property is stridhanam is accepted to be law as it is in Bombay. But the argument has no force here, that doctrine not having been adopted by the Courts in this Presidency. And when once it is held that a woman inheriting property takes but a limited estate and does not become a fresh stock of descent, the doctrine of reverter is a necessary consequence, since inheritance must be traced from the last full-owner, whether such owner is a male or a female.

Following, therefore, the rule laid down by Bittleston, C. J., and Ellis, J., in *Sengamalathammal* v. *Velayuda Mudali* (1) so far back as 1867, and affirmed recently by the Chief Justice and Shephard, J., in *Mullangi Ammanna* v. *Chinna Kamayya* (4), we hold that Kusavva took only a limited interest in the property in question, and that on her death the plaintiff, as the heir of the last full-owner, is entitled to succeed to it.

(1) 3 M. H. C. R. 312. (2) 8 I. A. 99. (3) 17 B. 758.
(4) Second Appeal No. 169 of 1893 unreported.

The result is the plaintiff is entitled to the property left by Kusavva out of what was inherited by her from Nanjavva. 1895 Dec. 16.

[120] We must ask the Subordinate Judge to submit findings on the first, second and sixth issues. Further evidence may be taken on either side. APPELLATE CIVIL.

[After the Subordinate Judge had submitted the findings required, the Court passed a decree for the plaintiff.] 19 M. 110=6 M.L.J. 3.

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19 M. 120 (P.C.)=23 I.A. 28=6 Sar. P.C.J. 684.

PRIVY COUNCIL

PRESENT:

Lords Hobhouse, Macnaghten and Morris and Sir Richard Couch.
[*On appeal from the High Court at Madras.*]

MATHUSRI UMAMBA BOYI SAIBA AND OTHERS (*Petitioners*), *Appellants* v. MATHUSRI DIPAMBA BOYI SARIA AND OTHERS (*Counter-petitioners*), *Respondents*. [14th November, 1895.]

Duration of receivership—Discretion of Court—Decree in accordance with judgment, Section 206, Civil Procedure Code.

It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so. A decree of the High Court declared it to be necessary that a permanent appointment should be made of a receiver and manager of the estate allotted by the Government to the family of the deceased Maharaja of Tanjore, and directed that fresh appointments to the receivership should be made from time to time as occasion might require during the life of the senior widow under whose management the estate had been originally placed and the lives of the co-widows surviving her, or for so long as the Court might consider necessary.

Held, that the decree directing the permanent receivership was not in variation of the judgment which it purporated to follow, that the Court had a discretion to make such an order when necessary for the preservation of the estate, and that so doing was in accordance with the practice, there being nothing to prevent the Court from giving the management to the senior widow living at the time, if she should be fit to manage the estate on behalf of all interested in it.

APPEAL from an order (28th August 1893) of the High Court rejecting a petition for the amendment of a former decree (8th May 1868) of the same Court.

[121] This petition of the 15th August 1893, to bring the decree of 8th May 1868 into conformity with the judgment of the same date, related to the receivership and management of the estate allotted by the Government in 1862, after the decision in *The Secretary of State* v. *Kamachee Boyi Sahaba* (1), to the widows and daughter of the late Maharaja of Tanjore, who died in 1855, leaving fifteen widows, of whom eight survived when six of them made this application, two of them being counter-petitioners.

The question was as to the validity of an order contained in the decree of the High Court of the above date for the continuance of the receivership over the estate in which the widows and daughter were

(1) 7 M.I.A. 476.

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entitled to participate. This order rendered that office permanent during the widows' lives, or for so long as the District Court might consider necessary.

The Government order of 1862 (21st August) was that the estate allotted for the benefit of the family of the late Maharaja "should be "made over to the senior widow, who will have the management and "control of the property; and it will be her duty to provide in a suitable "manner for the participative enjoyment of the estate by the other "widows, her co-heirs. On the death of the last surviving widow, the "daughter of the late Raja, or failing her, the next heirs of the late "Raja if any, will inherit the property."

The widow (under whose management the estate was originally placed by the Government) H. H. M. Kamakshi Boye Saiba, died in 1892. Her co-widow, H. H. M. Jijoyiamba Boye Saiba, with another co-widow, instituted in 1866 the suit *Jijoyiamba Bayi Saiba and another* v. *Kamakshi Bayi Saiba* and others (1), the first defendant in that suit being then the senior widow managing under the above order The decree in that suit, dated 8th May 1868, issued upon the judgment of the same date, disallowed the division of the estate, but directed the appointment of a receiver and manager. The circumstances which led to this, and the order for the continuance of the receivership are stated in that judgment, of which the part material to the present question was as follows:—

"We are now satisfied that the first defendant is unfit to be again "trusted with the possession and control of any part of the [122] existing property; the further evidence now before the Court shows reckless "dealing with the property and the lavish expenditure of large sums "for purposes of which the accounts afford no satisfactory explanation; "not only has the large sums of ready money received from the Government, and the whole proceeds of the immoveable property been dissipated, but a considerable portion of the moveable property itself has "also been got rid of, and debts to a considerable amount left unpaid. "We are, at the same time, of opinion that it would be most imprudent "to entrust the management of the property to the second defendant as "urged by her vakil or to either of the junior widows. Little, if anything "we are sure, would be gained as respects the care and preservation of the "property, and there would very soon be violent disputes and further "litigation. It appears to us to be absolutely necessary that the estate "should remain in the custody and under the control and direction of a "competent receiver and manager appointed from time to time by the "Civil Court, and invested with general powers for the management and "regulation of the property and its enjoyment and the application of the "rents and profits. The Collector is at present the appointed receiver, "and there is no doubt that it is of the greatest advantage to the estate "and parties interested that he should continue to act as receiver and "manager, as we trust he will be able to do. The continuance of his "appointment, therefore, will be decreed; but should it be necessary, the "Civil Judge must appoint a fit and proper person in the Collector's "place, taking sufficient security for the discharge of his duties, and "fixing a fair and reasonable amount of remuneration for his services."

The judgment from which the above is an extract, was followed by a decree which, in reference to the same widow till then managing the

(1) 3 M.H.C.R. 424.

estate, declared as follows, appointing a receiver and manager in her place:—

"This Court doth also adjudge and declare that the first defendant "is not a fit and proper person to be again entrusted with the possession "and management of the said property and that the permanent appoint- "ment of a receiver and manager of the whole of the property is necessary; "and this Court doth decree and order that, it particable, the Collector be "continued as such receiver and manager, but, it not practicable, the "Civil Court do appoint a fit and proper person in his place, taking good "and [123] sufficient security for the discharge of his duties, and fixing "a fair and reasonable sum as a remuneration for his services, and from "time to time make fresh appointments as occasion may require during "the lives of the said widows and the survivors or survivor of them or "until it shall be considered by the Civil Court that a receiver and manager "is no longer necessary"

In 1888 a petition was filed by some of the widows, including Mathusri Jijoyi Amba, for the discharge of the receiver appointed by the Court, and to have the management of the estate declared to belong to the widows in succession according to their seniority This was rejected, and the rejection was upheld on appeal to the Queen in Council, *ex-parte Rani Mathusri Jijaiamba and others* (1)

Then followed, after the death of Mathusri Kamakshi, the present petition, dated the 15th August 1893, wherein six of the surviving eight co-widows, among whom were the four present appellants, petitioned that the decree of 1868 might be brought into conformity with the judgment which preceded it, by deleting the word 'permanent' between the words 'the' and 'appointment,' and by substituting the words "the life of the first defendant" for the words "the lives of the said widows and of the "survivor of them, or until it shall be considered by the Civil Court that "a receiver and manager is no longer necessary"

This application was rejected by the High Court on the 28th August 1893. The judgment of the Court (COLLINS, C J., and DAVIES, J.) was as follows:—

"It is not stated in the application under what provision of law the "application is made, but at the hearing the vakil who presented it made "reference to Section 206 of the Code of Civil Procedure (Act XIV of "1882) now in force, which directs that the decree must agree with the "'judgment,' and that 'the Court shall of its own motion or on that of "'any of the parties amend the decree so as to bring it into conform- "'ity with the judgment' But there was no such provision in Act VIII "of 1859 (as amended by Act XXIII of 1861) which was the law of pro- "cedure in force at the time the decree in question was passed Section "189 of that Act provides that 'the decree shall bear date the day on "which the judgment was passed It shall contain the [124] number "of the suit, the names and descriptions of the parties, and particulars "of the claim, as stated in the register of the suit and shall specify "clearly the relief granted or other determination of the suit.' This "section applies to the decree of the original Court, and the rules laid "down in Section 360 as to what the decree of the Appellate Court should "contain are just the same. No provision is made in either case that the "decree should be in agreement with the judgment except in the matter "of date No doubt that even under the old Act the decree would in the

(1) 13 M. 390

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"usal course follow the judgment, and would be liable to be set aside if "it were opposed to the judgment, but there was nothing to prevent "the insertion in the decree of directions that might not have found place "in the judgment, or to use the words of the section itself, 'to specify "clearly what the determination was.' Now, in this case we have had "before us the decree of this Court in its original state, and we find it "signed by the two learned judges who gave the judgment, and it is not "to be supposed that they were not aware of its contents, and if they "were aware of its contents, it must be taken that in it they declared "clearly and specifically what their final determination was, and unless it "can be shown that it is at direct variance with their judgment we have "no conflict of authority that we can be called upon to set right. Tak-"ing the judgment then and reading it we are unable to see anything in "it which is contrary to what is decreed, that is, anything which decides "that the appointment of receiver and manager is not to be permanent and "that the appointment is to last only during the life-time of the first "defendant. On the other hand, we consider the following portion of "the judgment distinctly contemplates what is only more fully expressed "in the decree. 'The remaining point for consideration is the future "'preservation and management of the whole property with a view to "the interests of all the parties. Although we do not consider the "'case one in which the first defendant should be held responsible to the "'plaintiffs and the other widows as a defaulting trustee, we are now "'satisfied she is unfit to be again trusted with the possession and control "'of any part of the existing property. . We are at the same time "'of opinion that it would be most imprudent to entrust the management "'of the property to the second defendant as urged by her vakil or to either "'of the other junior widows. Little, if anything, we are sure, would be "'[125] gained as respects the care and preservation of the property, and "'there would very soon be violent disputes and further litigation. It "'appears to us to be absolutely necessary that the estate should remain "'in the custody and under the control and direction of a competent "'receiver and manager appointed from time to time by the Civil Courts "'and invested with general powers for the management and regulation "'of the property and its enjoyment and the application of the rents and "'profits.' We have therefore no ground for altering the directions in "the decree which was passed by this Court twenty-five years ago, and "which has been preserved in its integrity and acted upon in its entirety "ever since. If, as it is further stated in the application, the decree "gave a relief different from that claimed in the plaint, the matter "should have been made the subject of appeal at the time. It is too late "to reopen the case on its merits now.

"The fact is this is but another undisguised attempt on the part of "the surviving Rani's to get back into their own hands the management of "the estate, which for their common benefit was taken away from them "by the decree. Their last attempt was in 1887 when they applied to the "District Court to remove the receiver and manager appointed by it on "the ground that he was no longer necessary, a contingency for which it "will already have been noticed the decree itself had provided. But the "District Court dismissed the application, and this Court confirmed the "order, and on appeal to the Judicial Committee of the Privy Council, "their Lordships delivered a judgment on the 24th April 1890, dismissing "the appeal and observing that the Court 'had exercised a very sound "discretion' in not removing its receiver. This Court in its order of the

"18th December 1888 when granting the certificate for appeal to Her "Majesty in Council, remarked as follows —'More than 20 years have "'passed since that decree and we are of opinion that the same reasons "'which in 1868 made the appointment of a receiver imperatively neces- "'sary still exist in all their force Old age and 20 years more of that "'seclusion which is the lot of ladies of exalted rank in this country can "'hardly have made their Highnesses better fitted for the management of "'an estate annual income is more than 1½ lacs of rupees and which "'was valued in 1868 as worth about 68 lacs of rupees (the moveable "'party in jewels and cash alone being worth nearly 20 lacs)' Nothing "is urged to show that the Ranis are at this moment in any fitter posi- "tion to manage their own [126] affairs than they were then, but all "that is now done is to raise a technical objection which strikes at the "very root of the decree, for, if it were allowed, the decree would become "a dead letter owing to the demise of the first defendant, during whose "life-time alone the petitioners require us to find it was to remain in "force Then fresh disputes and litigation would arise to be terminated "only by the passing of another decree in terms similar to this one, the "estate in the meanwhile having been wasted This is not a desirable "result, and we have no hesitation for the reasons we have stated in "rejecting the application and it is rejected accordingly"

On the appeal, of four of the petitioners, Mr. *J. D Mayne*, appeared for the appellants

The respondents did not appear

It was argued in support of the petition that the language of the decree of the 8th May 1868 was in excess of that which the judgment of the same date had authorized The judgment had not decided the question whether the appointment of the receiver and manager should be permanent The judgment had proceeded on the personal unfitness of the widow first entrusted with the management Whether or not the receivership should continue after the rights of other widows according to their seniority, under the terms of the gift by the Government, had accrued, was a question that had not been brought before the Court, and the judgment had not disposed of it The decree, however, had established the permanence of the receivership As a matter of jurisdiction, however, the Court could not decide upon the claims of the widows, whose future rights had not been made the subject of any demand or of any issue Reference was made to Section 206 of the Code of Civil Procedure The rights of the widows had been secured to them by the terms of the Government order at the time when the gift was made in 1862

At the end of the argument for the appellant, their Lordships' judgment was delivered by LORD MACNAGHTEN:—

JUDGMENT

Their Lordships are of opinion that there is no ground for this application and that the appeal fails They think that the decree of the 8th of May 1868 is in accordance with the judgment pronounced and with the practice of the Court The judgment of the Court declares that the matter for their consideration was "the future preservation and management of the whole property with [127] a view to the interests of all parties": the portion of the decree which is objected to was, in the opinion of their Lordships, necessary for the security and preservation of the property There is nothing in the decree to prevent the appellants, if they

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think fit, applying for the discharge of the receiver and manager, and there is nothing to prevent the Court putting the senior widow living in the management of the property if the Court is satisfied that she is a fit and proper person to manage it on behalf of all the persons interested.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs *Lawford, Waterhouse,* and *Lawford.*

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19 M. 127.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

KAMALAKSHI (*Plaintiff*), *Appellant v.* RAMASAMI CHETTI (*Defendant No.* 6), *Respondent.**
[10th, 17th, and 29th April and 16th December, 1895.]

Hindu law—Devadasi—Adoption by temple dancing woman—Right of adoptive daughter—Civil procedure Code, Sections 440, 568—*Suit by infant without a next friend —Evidence taken on remand*

Suit by the adoptive daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother The plaintiff was 17 years old at the time the suit was instituted and she did not sue by a next friend. No objection was taken by the defendants, on the ground that the plaintiff could not sue without a next friend, until the case came before the Court of first appeal at which time the plaintiff had attained majority. On second appeal, the High Court directed the return of a finding on the issue (previously framed but not tried) whether the plaintiff's adoption was valid. Fresh evidence was taken and the finding was that the tdoption was made with the intention that the girl should be prostituted while she was still a minor.

[128] *Held,* (1) that seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend, until after she had attained her majority, the irregularity was waived;

(2) that the lower Court had power to take additional evidence on the issue remanded;

(3) that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention.

[R., 11 Cr. L.J. 327=6 Ind. Cas. 367 (369); 14 Cr. L.J. 33 (34)=13 Ind. Cas. 257= 24 M.L.J. 221=13 M.L.T. 131=(1913) M.W N. 207 (214); 17 Ind. Cas. 422 (423)=23 M.L.J. 493=12 M.L.T. 467=(1912) M.W.N. 1138; 7 O.C. 234 (236); 11 O. C. 159 (162)]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 121 of 1893, reversing the decree of H. Krishna Rau, District Munsif of Madura, in original suit No. 581 of 1891.

This was a suit instituted by the plaintiff at the age of 17 without a next friend against the trustees of the Minakshi Sundareswarar pagoda. It was alleged in the plaint that one Minammal, who died in 1879, was one of the dancing women attached to the pagoda, and as such entitled to the benefit of one of the temple endowments, that Minammal had taken in adoption the plaintiff who was accordingly entitled to succeed to her office

* Second Appeal No. 1785 of 1894.

and the emoluments attached to it, that the plaintiff could not enter on to the office until a pottu-thali had been tied on her in the temple, and that the defendants did not permit this to be done The prayer of the plaint was that the defendants be compelled to allow the thali to be tied in the temple, in view to the plaintiff performing the dancing service and enjoying the honours and endowment attached thereto

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The District Munsif passed a decree as prayed The District Judge reversed the decree and dismissed the suit on the ground that the claim was inadmissible as being in effect a claim by the plaintiff to be enlisted as a public prostitute

The plaintiff preferred this second appeal.

Mr *Parthasaradhi Ayyangar*, for appellant

Sundara Ayyar and *Ramanujachariar*, for respondent

JUDGMENT

SUBRAMANIA AYYAR, J —The first question raised in this case is whether the presentation of the plaint and the prosecution of the suit by the plaintiff (appellant) when she was yet a minor and without the aid of next friend were void or were mere irregularities which the defendants had by their conduct waived

In the recent case of *Doorga Mohun Dass* v *Tahir Ally* (1), Sale, J., said —" The reason why no proceeding can be taken by [129] an infant " without the assistance of a next friend is, as stated in Daniell's Chancery " Practice, 6th Edition, p 105, 'on account of an infant's supposed want " of discretion, and his inability to bind himself and make himself liable " for costs ' And it would seem that the rule was intended for the " protection and benefit of defendants, for it has been held that when a " defendant waives this benefit and protection, the suit may proceed " without a next friend " In *ex parte Brocklebank* (2), cited by the learned Judge in support of his opinion, all the Judges proceeded upon the view that an infant to whom a debt was due had a right to enforce the payment of it by means of a debtor's summons and proceedings in bankruptcy based thereon, and that the infant having sued out the writ in the action in his own name without a next friend, was an irregularity which was waived by the conduct of the defendant There is authority, therefore, for holding that the contention of the defendants (respondents) that the proceedings in the present case were altogether void cannot be supported It was no doubt open to the defendants to apply under Section 442, Civil Procedure Code, to have the plaint taken off the file, as it appeared on the face of the plaint itself that the plaintiff was a minor at the date of its presentation They not only omitted to do so, but throughout the trial raised no question on the point And when the District Munsif passed a decree against them, they preferred an appeal against it to the District Court making the plaintiff respondent, without getting a guardian *ad litem* appointed as if she were not a minor, even though at the time the appeal was preferred she was still under the age of 18 It is now too late for the defendants to object to the irregularities they complain of

The next question for decision is whether the plaintiff is entitled to the relief claimed by her, *viz* , that the defendants be directed to permit her to undergo the pottu-tying ceremony in the temple in accordance with the usage of the institution. The District Munsif held that she was entitled to the relief The District Judge, being of opinion, as I understand

(1) 22 C. 270 (274). (2) L R. 6 Ch., D. 358

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him, that the grant of such relief would be opposed to public policy as one tending to promote immorality, disagreed with the District Munsif and rejected the claim.

Now as to the ceremony itself, it seems to be quite simple in its nature. As its very name denotes, the material portion of it [130] consists of nothing more than tying within the precincts of the temple a circular piece of gold to the neck of the girl to be admitted as a temple dancer. (See the judgment of the Sessions Judge in *Regina* v. *Arunachellam* (1), a case connected with this same temple). So far, therefore, as the performance of the ceremony itself goes, there is nothing immoral in it. The District Judge's view probably rests upon the notorious fact that women who are temple dancers generally lead the life of prostitutes. That, however, in no way proves the existence of any true connection between the tying of the pottu and the immoral lives of those who undergo the ceremony. And it is scarcely necessary to say that, neither in theory nor in practice, is the dedication to the temple looked upon as essential to a woman of the dancing-girl caste becoming a prostitute. But, on the other hand, there is an immediate and clear connection between the ceremony in question and the mirasi office of dancer claimed by the plaintiff, inasmuch as the former is a necessary preliminary to her entering upon the duties of that office and to her anjoying the emoluments attached thereto. It is quite true that, in *ex-parte Padmavati* (2) and in *Regina* v. *Arunachellam* (1) already referred to, tying of pottu was one of the circumstances relied upon by the prosecution against the accused. But that was, of course, not for the purpose of establishing that the ceremony by itself amounted to an offence, but to throw light on the intention of the accused as to the course of life to which the minors were to be trained. The argument was the ceremony made the girls temple dancers; temple dancers usually became prostitutes; hence the object of the accused in obtaining possession of the girls was to train them up to a life of prostitution. It seems to me therefore that the said cases are not in conflict with the proposition that no true relation exists between the ceremony and the immoral life of the dancers. Consequently, if the defendants without lawful excuse refuse to allow the plaintiff to undergo the customary ceremoney said to be a pre-requisite to her entering upon the duties of her mirasi office, she is certainly entitled to redress. And I consider that we, sitting here as Judges, are not at liberty to upset any decisions admitting the right of members of the dancing-girl caste to remedy for violation of their civil rights, on the alleged ground that a change has taken place in the [131] sentiments of the large mass of the Hindu community in regard to the propriety of recognizing the usages of the said caste. As observed by Lord Campbell, L. C., in *Brook* v. *Brook* (3) "change of opinion on any great question may be a good reason for the Legislature changing the law, but can be no reason for Judges to vary their interpretation of the law."

In connection with the objection that the plaintiff is not entitled to the relief claimed, we were referred to *Johnson* v. *Shrewsbury and Birmingham Railway Company* (4) where Lord Justice Knight Bruce, when dealing with the question of specific performance of agreements for personal service, said that before the Court can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement it must be satisfied that the agreement is one ascribable to a class in which

(1) 1 M. 164 (165).
(2) 5 M.H.C.R. 415.
(3) 9 H.L.C. 209.
(4) 3 De Gex M. & G. 924

the Court has been accustomed or has certainly jurisdiction to interfere This observation is no doubt equally applicable to a case like this where specific relief of a somewhat novel description is claimed. But, as pointed out by the Lord Justice himself in the same case later on, the demand may be new specifically without being new in kind or in principle And in my view the novelty of the relief sought here belongs to the former class and not to the latter In support of this opinion I may, without in the slightest degree intending to suggest any invidious comparison between the menial office of a temple dancer and the dignified position of a mahant or head of a mutt, refer to *Giyana Sambandha Pandara Sannadhi* v *Kandasami Tambiram* (1), where the learned Chief Justice and Muttusami Ayyar, J , ordered the Subordinate Judge to direct the Pandara Sannadhi of Dharmapuram to invest the Tambiran who may be appointed as the head of the Tirupanandal mutt " with arukattu, sundravedam (certain ear ornaments) and cloth as usual "

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For the reasons stated above I come to the conclusion that the objection raised by the defendant to the relief prayed for on the score of immorality or novelty cannot be sustained, and that the plaintiff is entitled to the decree prayed for, if her claim is in other respects good

This leads me to consider the next and the most important question in the case, *viz* , whether the adoption of the plaintiff by Minammal, another female, is valid or invalid The District [132] Munsif dealt with this question very briefly, contenting himself with the single observation, " It is perfectly valid, such adoptions being recognized by law " The District Judge, being of opinion that the suit failed on another ground, expressed no opinion on this point The defendant's contention, that the adoption is invalid, appears to be based on the following allegations At the date of the adoption the plaintiff was a minor under the age of 16, the adoptive mother was a dancing woman attached to the temple and was leading an immoral life like other women of her class She took the plaintiff in adoption with the intention of dedicating her to the temple in the customary manner and devoting her to prostitution even before the completion of her 16th year. And they argue that the party who gave and the party who received the plaintiff in adoption under such circumstances committed an offence punishable under the Indian Penal Code which had come into force at the time, and consequently the plaintiff acquired no legal status or rights by such a violation of the public law of the country

Now, upon these allegations, two legal questions arise for consideration. The first is, assuming the defendant's above allegations to be true, was an offence committed under the said section of the Penal Code? And the second is, if an offence was so committed, could and did such a transaction confer on the plaintiff the status of an adopted daughter, and the rights claimed by her as incidents to such status?

As to the first question, in *Queen-Empress* v *Ramanna* (2), Parker, J., was of opinion that if a dancing woman, who was herself a prostitute, took a minor girl in adoption with the intention of training up the latter to follow the same course of life as herself, an offence under Section 373 would have been complete, even though the age of the adopted child prevented her immediate prostitution and allowed time for repentance, and even though one of the purposes of the adoption was that the child should inherit the property of the person adopting Muttusami Ayyar, J.,

(1) 10 M. 375 (508). (2) 12 M 273.

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said that if, in making the adoption, the intention was that the girl should be employed as a prostitute whilst she continues to be a minor, the accused might be liable. Upon the views thus expressed it follows that the party who gave and Minammal who took the plaintiff in adoption were guilty of an offence under the provisions of the [133] criminal law relied upon by the defendants, if the act complained of was committed under the circumstances alleged by them, notwithstanding that the act was called an adoption, which is ordinarily not a crime.

Upon the next question whether such an adoption entitles the plaintiff to claim through the said Minammal the office of dancing in the temple, which office is said to vest hereditarily in the family of Minammal, I have not been able to find any direct Indian decision; nor have we been referred to any such authority. In *ex-parte Padmavati* (1) Holloway and Innes, JJ., observed " the fact of a transaction being in violation of public law may prevent the arising of rights which would otherwise have the sanction of private law." This, however, was an incidental observation, and the point which I am now considering did not actually arise for decision there, I have therefore to deal with the question on principle. And there can be no doubt that the principle applicable to such cases is that laid down in the following words in a recent decision relating to an illegal agreement concerning property. " The general rule is that no rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred."—(*Younghusband* v. *Birmingham T. S. Co.* (2) a rule no doubt subject to certain exceptions, none of which, however, so far as I am aware, is relevant for our present purpose. I have not been able to find any case in which this principle was acted upon in respect of a transaction touching personal status entered into in contravention of law. But I fail to see any valid reason why the rule should not be applicable to such transactions also; when even such violations of private law known as unlawful agreements are rendered unactionable, it is difficult to understand how violations of public law known as crimes are to be treated differently. The object of the legislature in preventing Civil Courts from entertaining suits in the former class of cases can only be to discourage as much as possible such transgressions. And, as it would be absurd to suppose that the Legislature is less anxious to repress crimes, it would be unreasonable to hold that the prohibition against a civil suit exists in the former case only and not in the latter also. It seems to me therefore, that if a woman who makes an adoption under circumstances, which render the adoption an offence under Section 373, sues to enforce [134] rights alleged to have been created in her favour by that adoption, it would be impossible, consistently with established legal principles, to allow such a suit to be maintained. The reason for disallowing such a suit, borrowing the language of Johnson, J., who delivered the judgment of the Supreme Court of the United States in *Bank of the United States* v. *Owen* (3), is "no Court of Justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of the violations of law?" On behalf of the plaintiff it was however argued that as she herself did not commit any crime, she must be taken to stand on a different footing from that occupied by the guilty parties and that as she is willing to accept her changed situation, it would be but adding to the injury already sustained by her to refuse to

(1) 5 M.H.C.R. 415. (2) 36 American State Reports, 248. (3) 2 Peters, 539.

recognize her claim to the office and rights of Minammal who was responsible for the plaintiff's present condition Whether, if the question arises between the plaintiff and those who did her the injury, the doctrine of estoppel may be invoked in her favour, as it has sometimes been in the case of invalid adoptions under the ordinary Hindu law, is a matter on which it is not necessary to express any opinion now For, the defendants here are the managers of the temple, who had nothing to do with the transaction which the plaintiff wishes to take advantage of, and as against such persons how can the plaintiff rely upon a plea of estoppel? Her present claim must therefore stand or fall by the validity or invalidity of the adoption set up And it is not possible to hold, in a suit instituted by her, that to be valid which must be treated as invalid in a suit it instituted by Minammal, as has been already shown In this connection an observation of Searle, C J, in *Mill and Lumber Co.* v *Hayes* (1), though made in respect of an illegal agreement in restraint of trade is quite in point. He said, " The illegality vitiates the contract between the immediate parties as well as in respect to third parties " The reason for this is plain For whilst in cases of fraud and mistake the wrong is usually personal to the injured party and can be waived, it is different in cases of illegality In these the wrong is far-reaching and is done to society Consequently, in such cases the interests of individuals must be subservient to public welfare *Mc Namara* v [135] *Gargett* (2) I cannot, therefore, help arriving at the conclusion that the plaintiff's adoption is a nullity if it took place under the circumstances stated by the defendants and the plaintiff is not entitled to maintain her claim based as it is upon such an illegal transaction

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It this becomes necessary to ascertain whether the adoption was made as alleged by the defendants That it took place after the Penal Code came into force, that Minammal who took her in adoption was a temple dancer living by prostitution, and that the plaintiff was at the date of the adoption a minor under the age of 16 are, I understand, not questioned But whether in making the adoption the intention of Minammal was as asserted by the defendants, is a point on which there is no distinct admission, though the attempt which it is probable was made before the plaintiff completed her sixteenth year to get her registered as a temple dancer is important evidence that the original intention was to prostitute her even when she was a minor But whether it was so or not is a question of fact upon which it is not, open to us to express any opinion on second appeal The District Judge has not, as already stated, given any finding on the matter, and I would therefore call for a finding from him upon the seventh issue in the light of the observations of Muttusami Ayyar, and Parker, JJ, in *Queen Empress* v *Ramanna* (3) already quoted (See also the observations of Banerjee and Sale, JJ, in *Deputy Legal Remembrancer* v *Karuna Baistobi* (4) If the finding on this question is in favour of the plaintiff, the District Judge should also be asked to submit findings on issues 3, 4 and 5

The finding is to be returned within six weeks after the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court

BEST, J —The suit is by a woman of the dancing-girl caste for a decree directing the trustees of a temple in Madura to cause to be tied to her the dottu or thali without which she cannot be allowed to dance in

(1) 9 American State Reports, 212 (2) 13 American State Reports, 361
(3) 12 M. 273. (4) 22 C 164

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the temple or to enjoy the emoluments attached to the office of dancer. Plaintiff claims to be entitled to the office and emoluments as adopted daughter of one Minammal who died in 1879.

The District Munsif gave a decree as prayed, but that decree was reversed on appeal by the District Judge on the ground that [136] the suit is not maintainable, as the private right claimed by the plaintiff cannot arise except by transgression of a precept of public law. Hence this appeal by the plaintiff.

The public law here referred to by the Judge is contained in Section 372 of the Indian Penal Code, which makes punishable the disposing of girls for the purposes of prostitution; and the tying of pottu to a girl under 16 years of age and enrolling her as a dancing girl in a temple has been held to be such a disposal of her and therefore an offence punishable under the section above referred to. Plaintiff, however, is not under the age of 16 years. She expressly states in her plaint that the delay hitherto in getting the pottu tied was owing to the fear that it would be criminal, but that having come of age on the 1st August 1891 this suit was instituted (in October 1891).

It is contended before us on behalf of the respondent that the Courts cannot recognize an institution such as that of dancing girls, the object of which is prostitution and the gain to be derived from that source. *Chinna Ummayi* v. *Tegarai Chetti* (1) no doubt goes to this extent, and to the same effect are also the dicta of West, J., in *Mathura Naikin* v. *Esu Naikin* (2). But the opinions of West, J., on the subject in the latter case were dissented from by Muttusami Ayyar and Parker, JJ., in *Venkur* v. *Mahalinga* (3) and as remarked by Muttasami Ayyar J, "they were not necessary for the decision of that case." And it is open to question whether *Chinna Ummayi* v. *Tegarai Chetti* (1) has not been overruled by a subsequent decision reported in the same volume *Kamalam* v. *Sadagopa Sami* (4). No doubt the latter case was sought to be distinguished from the former on the ground of its including a claim for honours and income as appurtenant to the hereditary office of dancing girl which plaintiff was seeking to recover; but, as observed by Muttusami Ayyar, J., in *Venku* v. *Mahalinga* (3), "it is not clear how, if the custom which is the source of the hereditary right to the office is an immoral custom, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right."

Both in *Venku* v. *Mahalinga* (3) and in *Muttukannu* v. *Paramasami* (5) it was held that adoptions by dancing girls must be [137] recognized by the Courts, on the ground that the class of dancing women "being recognized by Hindu law as a separate class having a legal status, the usage of that class, in the absence of positive legislation to the contrary, regulates rights of status and of inheritance, adoption and survivorship." But the adoption in question in both those cases took place prior to the coming into force of the Indian Penal Code.

There is also the judgment of Sir Charles Sargent, C.J., and Candy, J., in *Tara Naikin* v. *Nana Lakshman* (6), in which occurs the following passage:—"The existence of dancing girls in connexion with temples is according to the ancient established usage of the country, and this Court would, in our opinion, be taking far too much upon itself to say that it is so opposed to "the legal consciousness" of the community at the present

(1) 1 M. 168. (2) 4 B. 545. (3) 11 M. 393.
(4) 1 M. 356. (5) 12 M. 214. (6) 14 B. 90.

day as to justify the Court in refusing to recognize existing endowments in connexion wtih such an institution."

As observed by Muttusami Ayyar, J., in *Queen-Empress* v. *Ramanna* (1), the giving and accepting of a minor for adoption by a dancing woman is not necessarily a criminal act, and is punishable as an offence under Sections 372 and 373 of the Penal Code only if the specific intent which makes the act criminal is established by cogent evidence "It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age, she should be allowed to elect etiher to marry or to follow the profession of her prostitute mother."

There is thus authority for the following positions (i) that the institution of dancing women cannot be ignored by the Courts and (ii) that adoption by such women is not necessarily illegal.

The case last cited is also authority for the position that, if the adoption was made with the intention of training the child to a life of prostitution, the act would be criminal, and I agree with my learned colleague in holding that the Courts cannot recognize as against the temple trustee rights claimed as arising from a criminal act.

I concur, therefore, in the order proposed by my learned colleague.

It has been further contended on behalf of respondent that the suit being brought by plaintiff when a minor without a next [133] friend was opposed to Section 440 of the Code of Civil Procedure and should have been dismissed by the District Munsif on that ground. The objection was not taken in the Court of First Instance—not in fact till appeal was preferred against the decree passed in plaintiff's favour. This was too late, see *ex-parte Brocklebank* (2) and *Beni Ram Bhutt* v. *Ram Lal Dhukri* (3). Plaintiff is now a major and was so also at the hearing of the appeal by the District Judge, and though she was a minor when defendant's appeal was preferred, he took no steps to have a guardian *ad litem* appointed for her. This objection must therefore be disallowed.

In compliance with the above order, the District Judge submitted the following finding.—

"The seventh issue, upon which I am directed by their Lordships of "the High Court to submit a finding, is whether the plaintiff is the "adopted daughter of Padmasani's daughter, Minammal, and whether the "adoption of the plaintiff is valid?

"As to the fact of adoption there is no longer any dispute and the "evidence of Padmasani, examined as the plaintiff's first witness, shows "that the plaintiff was two or three years old when she and her elder "sister Gnanambal were adopted by Minammal, who was 20 or 25 years "of age at the time and died a few years after the adoption was made.

"The validity of the plaintiff's adoption depends on the intention with "which it was made, and, if the intention was that the plaintiff should be "prostituted while she was still a minor, then under Section 373, Indian "Penal Code, the adoption was a criminal act out of which no private "rights can flow.

"On receipt of the order of remand from the High Court, I gave "notice to the parties to produce evidence necessary for determining the "question at issue, and my reason for so doing was, that the evidence "already on record was insufficient for the purpose. It was objected, on "behalf of the plaintiff, that I had no power to take additional evidence, "since I had not been authorized to do so by the order of remand.

(1) 12 M. 273. (2) L.R. 6 Ch. D 358. (3) 13 C 189

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"In support of this objection, reference was made to Section 562, Code of "Civil Procedure, but that section relates only to cases which are remanded "by an Appellate Court to Court of First Instance for trial upon the merits "[139] and implies that additional evidence is to be taken if necessary. "Hence it is in no way applicable to the present case, in which the order "of remand did not alter the position of this Court as an appellate court "deciding an issue which it had not decided before. An appellate court "is empowered by Sections 568 and 569, Code of Civil Procedure, to take "additional evidence for the substantial cause that the evidence on record "does not enable it to arrive at a decision. Hence four documents have "now been filed as Exhibits IV to VII, on behalf of the defendant-appel-"lant, who has also recalled and examined as his seventh and eighth "witnesses the persons whom he examined as his third and second "witnesses before the District Munsif, while the plaintiff has recalled her "sixth and fourth witnesses before the District Munsif and examined them "as her ninth and tenth witnesses"

* * * * * * * * *

"I find, therefore, that Minammal's intention in adopting the plaintiff "was to prostitute her while she was still a minor, that the adoption "was therefore a criminal act, and that it is consequently invalid."

This second appeal having came on for final hearing after return to the order of this Court, the Court (SUBRAMANIA AYYAR and DAVIES, JJ.) delivered the following:—

JUDGMENT (FINAL)

We agree with the Judge that he had the power to take additional evidence on the issues of fact remanded for trial. These were issues that had been framed but not tried, and we see nothing in Section 566, Code of Civil Procedure, that prohibits the lower Court from taking evidence on such issues under Section 568 so long as he complies with the requirements of that section.

The Dsitrict Judge's finding on the question of fact as to intention is supported by legal evidence. Accepting the finding, we dismiss the second appeal with costs.

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19 M. 140.

[140] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

NARAYANAN CHETTI AND OTHERS (*Defendants*), *Appellants in Appeal No.* 40 *and Respondents in Appeal No.* 122 *v.* ARUNACHELLAM CHETTI (*Plaintiff*), *Respondent in Appeal No.* 40 *and Appellant in No.* 122.* [12th and 18th July and 21st October, 1895.]

Civil Procedure Code, Section 608—Order for security to be furnished by respondent in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security

The present plaintiff purchased land brought to sale in execution of a decree and was put in possession. The sale was set aside by the High Court and the purchaser was ousted. He preferred an appeal to the Privy Council, and the High Court directed that security be given for the mesne profits and the due delivery of the property without waste in the event of the appeal being successful. The present defendants furnished security and executed a document under

* Appeals Nos. 40 and 122 of 1893.

which the plaintiff who had succeeded in the Privy Council now sued to enforce his rights. It appeared that after the date of the instrument abovementioned a payment was made from the income of the property in satisfaction of a decree obtained by the Zamindar against the present plaintiff for arrears of poruppu previously accrued due

Held, (1) that the order of the High Court requiring security to be furnished was not *ultra vires* and that the instrument abovementioned was enforceable,

(2) that the defendants who had given no presonal guarantee were not competent to put an end to the security under the provisions of the Contract Act relating to revocation of a surety,

(3) that on the right construction of the instrument the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the decision of the Privy Council;

(4) that the defendants should be credited with the amount paid in satisfaction of the decree for poruppu.

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[F., 33 C 927 (933)=3 C L J 67]

Cross appeals against the decree of Venkatarangayyar, Subordinate Judge of Madura East

Plaintiff sued to enforce his rights under an instrument, dated 16th February 1886, and executed by the defendant under the circumstances which appear below. In execution of the decree in original suit No. 44 of 1879 on the file of the Subordinate Court of Madura East, certain villages were brought to sale and were [141] purchased by the present plaintiff, who was put in possession under the orders of the Court on the 15th October 1882 The High Court by an order, dated 16th October 1883, set aside the sale The present plaintiff, having been dispossessed as the result of that order, preferred an appeal against it to the Privy Council The appeal having been admitted, the High Court on 13th April 1885 made an order in the following terms —" We direct that " the minors by their guardians (respondents) do furnish security to the " satisfaction of the Court of First Instance within three months from " this date for the mesne profits and the due delivery of the property " without waste if this Court's order is reversed."

The matter having accordingly come on before the Subordinate Judge, he made an order on the 9th May 1885 as follows —

" This comes on to-day for orders as to the amount for which the " original judgment-debtors are to furnish security Mr Srinivasiengar, " the purchaser's vakil, wants security for Rs 12,000 for mesne profits " for two years at Rs 6,000 per year, and for Rs 20,000 for due re-deli- " very of the property without waste Mr Narasimachariar, the judg- " ment-debtor's vakil, accepts the valuation given by the other side for " mesne profits and agrees to give security for two years' profits, but, as " regards the security for the due re-delivery, he says it will be sufficient " if his clients undertake to place the purchaser back in possession if " required I, therefore, consider that the judgment-debtors should lodge " some security to meet these contingencies The question, then, is for " what amount. I consider that in the circumstances of the case, secu- " rity for Rs 8,000 will be sufficient for this purpose

The Judgment-debtors will, therefore, lodge security on or before 13th July 1885 as already ordered for Rs. 15,000 "

The instrument of the 16th February 1886 above referred to, which was executed by the present defendants who furnished the required security, recited the above proceedings and comprised a description of immoveable property, which was therein stated to have been given as security in accordance with the above orders.

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On the 29th June 1888 the Privy Council reversed the order of the High Court by which the sale had been set aside. The plaintiff now sued as above to enforce his rights against the defendants. It appeared that subsequent to 16th February 1886 a payment was made from the income of the property in question in satisfaction of a decree obtained by the Zemindar against the [142] present plaintiff for arrears of poruppu previously accrued due. The Subordinate Judge passed a decree against the defendants personally and against the property comprised in the instrument for Rs. 9,543. Aganist this decree the plaintiff and defendants Nos. 3 and 4, respectively, preferred the present appeals.

The Advocate-General (Hon. Mr. *Spring Branson*) and *Krishnasami Ayyar*, for appellants in No. 40.)

Bhashyam Ayyangar and *Rangaramanuja Chariar*, for respondent.

Bhashyam Ayyangar and *Jivaji*, for appellant in No. 122.

Krishnasami Ayyar, for respondents.

JUDGMENT.

It will be convenient to deal first with the contention on the part of the defendants (appellants in No. 40) that there was no consideration for the undertaking given by them, because the order of this Court, dated the 18th April 1885, was an order which the Court had no power to pass under Section 608 of the Code of Civil Procedure. It is said that such an order could not be made against a respondent in a Privy Council Appeal, who had already been put in possession in execution of the decree appealed against.

On the other hand we are referred to a decision of the Privy Council, in *Mussumat Jariut-ool-Butool* v. *Mussamat Hoseinee Begum* (1), in which this point was considered with reference to the law as it stood under the Bengal Regulation of 1797. In that case it was held that it was competent to the Court to require security for protection of property during an appeal even after the execution of the decree. (See also *Sooruj Monee Dayee* v. *Sudanund Mohappattur* (2). In the face of these authorities we are unable to hold that the order was an illegal one; and even if it was, it is by no means clear that the undertaking given by the defendants at the request of the judgment-debtor or in consequence of the order was given without consideration.

It is then argued on the appellants' behalf that, although the undertaking given by them might in its inception be valid, it was competent to them to withdraw it at any time and release themselves and their property from all liability in the future. In the view we take of the document the provisions of the Contract Act relating to revocation of a surety are inapplicable, because no per-[143]sonal guarantee was given by the appellants. At the request and for the benefit of defendants Nos. 8 and 9 the appellants pledged certain property to secure the claim which Arunachellam might eventually have in respect of the mesne profits of the land which was allowed to remain in the possession of the same defendants. We do not understand on what principle the appellants can claim to withdraw their property from pledge before the event has happened on which the accrual of the claim secured by it depends. No authority was cited for the position that a pledge or mortgage given under such circumstances could be cancelled at the will of the person who has given it. The evidence, moreover, does not go beyond showing that the

(1) 10 M.I.A. 196.

(2) 12 W.R. 296.

appellants were desirous of being released from liability This contention of the appellants must, we think, fail

The questions which next arise relate to the construction of the bond. It is much to be regretted that a document of this importance should be drawn in such a slovenly way The order of the Subordinate Judge directing that security be given is also open to the charge of ambiguity The Judge who tried the case treated the document as one imposing a personal liability on the executants We can find no words to justify that view and Mr Bhashyam Ayyangar did not attempt to support it. To that extent, therefore, the appeal must be allowed

Then it is contended that the intention was that the executants should be liable for the mesne profits of two years only, and reliance is placed on the reference to two years contained in the order of the 9th May 1885 The real order, as it appears to us, is contained in the last two lines of the document in which no limit of time is fixed But, however that may be, we have to find the terms of the obligation in the document executed by the appellants, and, if they meant to limit their liability in point of time, they ought to have seen that words to that effect were introduced There is no such limit, but no the contrary it is clear that the mesne profits for which security is given are the mesne profits accruing up to the date of the decision of the pending appeal The other terminus, that is, the point of time from which the mesne profits are to be calculated is not stated in the document The parties might have agreed to make the executants responsible for the profits accruing since the date when Arunachellam was dispossessed; and for the respondent it is argued that the document should be [144] construed as if an agreement to that effect, were expressed in it In our opinion if it was intended to carry back the liability of the executants to an earlier date than the date of execution, the plaintiff, who was taking the document by way of security, ought to have taken care that express words to that effect were introduced In the absence of such words we think it must be taken to have been intended that the appellants should be chargeable with the profits which might accrue between the date of the bond and that of the decision by the Privy Council Subject to the limit of Rs. 15,000 expressed in the document and to certain questions about to be considered, the sum recoverable from the appellants is the amount of the mesne profits which accrued between the two dates above-mentioned The figures are given in our order of the 2nd November 1888, which figures were apparently adopted by both parties at the trial The above-mentioned two dates cover a period beginning in Fasli 1295 and ending with Fasli 1297 As to the profits of Fasli 1295, it will have to be ascertained how much was received after the 16th February 1886, the date of the bond

As to the profits of Fasli 1296, which are said to have been Rs 6,924-6-4, the appellants claim a deduction in their favour on account of a payment made from the collections towards a sum due by Arunachellam under a decree obtained against him by the Sivaganga Zemindar The payment was made by the receiver who was then in possession, and the decree obtained by the Zemindar related to arrears of 'poruppu' due to him by Arunachellam It appears to us that, as Arunachellam has had the benefit of this payment, and as the amount was subtracted from the profits which the defendants might otherwise have had, the appellants, being in the position of sureties, are entitled to deduct that amount from the profits of Fasli 1296 In this view it is immaterial that the 'poruppu' on account of which the payment was made was not the 'poruppu' of the

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current fasli. The exact amount of the payment must be ascertained. Another question is raised with regard to a sum of Rs. 2,456-6-8, which has been allowed against the plaintiff appellant in No. 122. No intelligible reason is given for the allowance and it is admitted that the amount did not arise from the profits of the land.

We must request the Subordinate Judge to have an account prepared on the lines above indicated, after holding such inquiry [146] and taking such evidence as may be necessary, and to submit the same within six weeks from the date of the receipt of this order.

In compliance with the above order, the Subordinate Judge submitted findings, and on receipt of which the High Court gave judgment as follows:—

JUDGMENT.

The result of the further finding is that Rs. 11,133-0-1 is due to the plaintiff. That sum will have to be substituted for Rs. 9,543-9-9. To the extent of the difference between these two sums the plaintiff's appeal is allowed and he will have or to pay proportionate costs of that appeal accordingly. In the other appeal No. 40, the defendants have failed, except as to the form of the decree, which must be amended by relieving them from personal liability. Substantially the defendants have failed in their appeal and must pay the cost of it.

There will be a decree for the plaintiff for the first-mentioned sum with interest at 6 per cent. from date of plaint till date of payment with a direction that, if the sum with interest thereon is not paid within six months from this date, the property will be sold.

The decree must also be amended by giving interest on costs allowed from date of decree.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

SANKARAN (*Defendant No. 1*), *Appellant v.* PARVATHI AND OTHERS (*Plaintiffs and Defendants Nos. 2 to 6*), *Respondents.**
[15th October, 1895.]

Civil Procedure Code, Section 13, Explanation 2, Section 43—Ground of defence not raised in previous suit—Relief not asked for in previous suit—Circumstances giving right to relief not known at date of previous suit.

The plaintiffs, who were the junior members of a Malabar edom of which [146] defendants Nos 3 to 5 were the senior members, sued to recover with mesne profits possession of certain property offering to pay the amount of a kanom advanced by defendant No. 1. It appeared that the land had been the subject of a kanom demise in 1865, that defendant No. 3, the then karnavan, had obtained in 1878 a decree for its redemption, the right to execute which he assigned to a stranger, who executed it, and took possession of the property, taking from the karnavan a new kanom deed. Subsequently defendants Nos. 4 and 5 obtained a decree for possession and the cancellation of both the assignment and the kanom deed; but this decree was attached in execution proceedings in another suit and purchased by defendant No. 1, who executed it, purchased the property, and deposited the kanom amount and took possession on 8th March 1884. The plaintiffs, who had meanwhile taken abortive proceedings to defeat

* Second Appeal No. 39 of 1895.

the first defendant's title instituted a suit in August 1884, praying for a decree that the sale to him be set aside, without praying for possession. It was now found that the plaintiffs at that time were not aware that defendant No. 1 was in possession and he did not plead that fact as a defence to the suit for a declaration merely:

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Held, (1) that the plaintiffs were not affected by constructive notice of the defendant's possession in 1884 by reason of the fact that their karnavan, with whom they were not acting, was aware of the defendant's previous application for execution, and that the suit was not barred by Civil Procedure Code, Section 43;

(2) that defendant No. 1 was not a trespasser merely, and the plaintiffs were entitled to a deduction of the profits for the whole period during which he was in possession in computing the amount payable by them before they recovered the land

Semble, that, apart from the question of the plaintiffs' notice of the first defendant's possession, since he had not pleaded possession in the suit of 1884, he could not fall back upon the fact that his possession dated from March 1884 as a ground of defence to the present action

SECOND appeal against the decree of R S Benson, District Judge of South Malabar, in appeal suit No 174 of 1893, modifying the decree of E K Krishnan, Subordinate Judge of South Malabar, in original suit No 8 of 1891

The plaintiffs sued to recover with mesne profits certain land to which they claimed to be entitled on paying, as they declared themselves ready and willing to do, a kanom amount deposited by defendant No 1

The property in question was the jenm of an edom, of which the plaintiffs and defendants Nos 3 to 6 were members In January 1865, the then karnavan of the edom demised the land on kanom to certain persons against whom the present defendant No 3, his successor in the office of karnavan, obtained a decree for redemption, in 1878 The right to execute that decree was assigned to one Echu Menon, a new kanomdar, and he executed it and obtained possession, and also obtained a demise on kanom [147] from his assignor The assignment was not approved of by defendants Nos 4 and 5, who set themselves up as the managers of the edom, and in 1882 they obtained a decree whereby both the assignment and the kanom were set aside and the properties ordered to be surrendered to them The present defendant No 1 was the assignee of a personal decree against defendants Nos 3 and 4, and in execution thereof he attached the decree of 1882, which was brought to sale, in execution and purchased by him. Meanwhile the plaintiffs having objected without avail to the attachment, filed a plaint praying that it be released and subsequently added a prayer for the cancellation of the sale also Their suit was ultimately dismissed on the ground that it was beyond the pecuniary jurisdiction of the Court in which the plaint was filed The plaintiffs then filed a suit in August 1884 in the Subordinate Court and obtained a decree setting aside the sale which was the relief asked for no prayer for possession being added Before the last mentioned suit was instituted, defendant No 1 had taken possession of the property on 8th March 1884, as purchaser at the Court sale in execution of the decree of 1882, having deposited Rs. 3,688 being the kanom amount

The Subordinate Judge passed a decree that the plaintiffs be put in possession on their paying the amount of the kanom together with arrears of porapad for nine years and compensation for improvements The District Judge on appeal modified this decree by increasing the amount payable by the plaintiffs to the defendants before they should take possession With reference to a plea that the plaintiffs were not entitled to

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a decree for possession in the present suit by reason of their having omitted to ask for it in the suit of 1884, the District Judge held that that circumstance did not constitute a defence, because it was not proved that the plaintiffs or their edom were aware of the fact of the first defendant's possession. He found that defendants Nos. 3 to 5 were both in 1884, and at the date of the present suit the Karnavan and the managers of the edom of which the plaintiffs were junior members.

The first defendant and the plaintiffs respectively filed a second appeal and a memorandum of objections against this decree.

Sundara Ayyar, for appellant.

Bhashyam Ayyangar and *Govinda Menon*, for respondents.

JUDGMENT.

It was open to the first defendant to plead in original suit No. 37 of 1884 that he was already in possession [**148**] and therefore that a suit for a declaration would not lie. He did not choose to do this, and therefore cannot fall back upon the fact that his possession dates from March 1884 as a ground of defence to the present action (Section 13), Code of Civil Procedure, Explanation 2. Independently of this, however, it is found as a fact that plaintiffs did not actually know that first defendant had obtained possession. We cannot infer that they had constructive knowledge, because their karnavan had notice of the application for the execution in December 1883. The plaintiffs are not acting with their karnavan, whose conduct has necessitated their acting independently of him, and therefore they are not affected by his knowledge, if such knowledge be proved. We do not think the decision in *Kunhiamma* v. *Kunhunni* (1) expresses dissent from the ground on which *Ambu* v. *Ketlilamma* (2) was decided, *i.e.*, that Section 43 only applies to cases in which the plaintiff had knowledge of the claim he was entitled to make; the only dissent expressed was to the view of the late Sir T. Muttusami Ayyar, J., that Section 283, Code of Civil Procedure, gives a special right to sue in opposition to the provisions of Section 42 of the Specific Relief Act.

The only other ground taken is as to mesne profits, and it is said that not more than three years' mesne profits could have been awarded. We do not, think, however, that first defendant can really be regarded as a trespasser. He stood in the shoes of Echu Menon and was entitled to possession until redeemed. The plaint has deducted the arrears of michavaram from the kanom amount due, and thus the calculation has proceeded on the right basis, though the relief has been erroneously described as mesne profits. The second appeal therefore fails and the memorandum of objections is not pressed. The second appeal and memorandum of objections are dismissed with costs.

(1) 16 M. 140. (2) 14 M. 23.

. 19 M. 149.

[149] APPELLATE CIVIL

1896
JAN. 6.

APPEL-
LATE
CIVIL.

19 M. 149.

Before Sir Arthur J. H Collins, Kt, Chief Justice, and Mr Justice Parker

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RAMASAMI (*Appellant*), *Petitioner* v STREERAMULU CHETTI AND OTHERS (*Respondents*) *Counter-petitioners* *

[20th December, 1895 and 6th January, 1896]

Limitation Act—Act XV of 1877, Schedule II, Article 36—Misfeasance—Indian Companies Act—Act VI of 1882, Section 214—Application against directors for refund of money improperly distributed

An application was made in 1894 under Indian Companies Act of 1882, Section 214, by an official liquidator appointed in 1891 praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders

Held, that the application was not barred by limitation

APPEAL against an order of Mr. Justice Shephard in the matter of a limited company in liquidation dismissing an application under Indian Companies Act, 1882, Section 214. The application was made by the official liquidator for the refund by the directors and trustees of a sum alleged to have been wrongfully distributed among the shareholders more than two years before the date of the application

The official liquidator preferred this appeal.

Pattabhirama Ayyar, for appellant

Mr *J G Smith*, for respondents

JUDGMENT

The learned Judge has written no judgment in this case, but, as far as we can gather his reasons for the dismissal of the application, he held that it was barred under Article 36 of the second schedule of the Limitation Act. The application was made under Section 214 of the Indian Companies Act, 1882, by the liquidator appointed by the Court in 1891 praying that the directors and trustees of the company be ordered to pay over to the liquidator the sum of Rs 5,550 which had been distributed among the shareholders

The application seems to have been before the learned Judge on several occasions, and on 27th February 1895 he had apparently [150] decided to make an order against the directors, reserving for consideration the form of the order. But on the 7th March 1895 the objection was first started by Mr. R. F Grant, the Counsel for the directors, that the application was barred under Article 36, inasmuch as the act complained of was a misfeasance and not a breach of trust, and that the application was made more than two years after the liquidator became aware of the facts The learned Judge allowed the objection and dismissed the application, but without costs.

It appears to have escaped the notice of the learned Judge that Article 36 of the second schedule of the Limitation Act refers only to suits and not to applications A clear distinction is drawn under the Limitation Act between suits, appeals and applications They are treated in three distinct divisions of the second schedule The present case is not a suit but it is an application under Section 214, Act VI of 1882, to compel the directors to repay money which has been misapplied Article 36 has therefore no application

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* Original Side Appeal No 35 of 1895

1896 JAN. 6. — APPELLATE CIVIL. — 19 M. 149.

On the question whether the act complained of was a breach of trust or not we may point out that in an application under Section 165 of the English Companies Act, 1862, (which corresponds with Section 214 of the Indian Companies Act, 1882), it was held that the relationship of trustee and *cestui que trust* subsist between the directors of Joint Stock Companies and the shareholders; see *In re Exchange Banking Company* (1); also *In re National Funds Assurance Company* (2), and *In re Oxford Benefit Building and Investment Society* (3). In the *New Fleming, Spinning and Weaving Company* v. *Kessouji Naik* (4) it was held that the misfeasance of a director was a breach of trust. The case referred to by the learned Counsel *Poole's case* (5) is one of an entirely different character.

We must reverse the order of the learned Judge and remand the application to the original side in order that a fresh order may be passed. The appellant is entitled to the costs of this appeal and the costs on the original side will follow the result.

[Reporter's Note—The same point is decided in *Connell* v. *Himalaya Bank*, 18 A. 12.]

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19 M. 151=5 M.L.J. 279.

[151] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

PAYA MATATHIL APPU (*Plaintiff*), *Appellant v.* KOVAMEL AMINA (*Defendants*), *Respondents.**
[11th October, 1895.]

Civil Procedure Code—Act XIV of 1882, Sections 32, 559, 587—Addition of parties on appeal—Transfer of Property Act—Act IV of 1882, Section 91—Right to redeem

A verumpattom tenant in Malabar claiming under a lease from the ottidar is entitled to redeem the prior kanom.

The Court on second appeal is competent to bring on to the record persons who had been originally joined in the suit but were not joined in the lower appellate Court.

[F, 6 O.C. 159 (165); R., 29 A 679 (681)=4 A L.J. 703=(1907) A.W.N. 227; 17 C.L J 384=17 Ind. Cas. 1 (3).]

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 331 of 1893, reversing the decree of S. Subbayyar, Subordinate Judge of Tellicherry, in original suit No. 7 of 1893.

The plaint sets forth that the properties described in the plaint schedule which were once the Jenm of Chikkikalath Illah Govindan Nambudiri, are now according to a Jenm deed granted by his heirs on the 22nd February 1891 the Jenm of the first defendant, that one Kovamel Muthan the father of defendants 3 to 5 and grandfather of defendants 6 and 7 had held the properties under the said Nambudiri on a kanom of Rs. 600 and 3 puramkadams of Rs. 200, 142 and 250 under deeds granted by him in Kumbhom 1027 (February-March 1852), 25th Tulam 1030 (9th November 1855), 12th Makaram (23rd January), and 25th Kadakam 1034 (8th August 1859), respectively; that after the death of the said Muthan, the

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* Second Appeal No. 873 of 1894.

(1) L.R. 21 Ch. D. 519. (2) L.R. 10 Ch. D. 118. (3) L.R. 35 Ch. D. 502.
(4) 9 B. 373. (5) L.R. 9 Ch. D. 322.

defendants 4 to 7 transferred their right to the third defendant, that the latter is now in possession of the properties by virue of the said transfer deed, dated Vrichigom 1068 (November-December 1892) or thereabouts as mortgagee, and that defendants 8 and 9 are occupants of the properties, that the said Govindan Nambudiri having received a further sum of Rs. 158 from the second defendant's predecessor, the deceased Udaya Varma Rajah of Edavalath Kovilagam, executed to him in 1031 (1855-1856) a deed [152] demising these properties on an otti for Rs 900 including the amount of prior charges and authorizing him to recover possession from the tenants, that on the strength of this otti deed the said Udaya Varma Rajah and Govindan Nambudiri jointly instituted O.S No 119 of 1856 in the Munsif's Court of Kadathanad against the said Muthan and others for recovery of these properties, and on the 6th February 1861 obtained a decree ordering restoration of the properties on payment to them of the kanom and puramkadom amounts, that the properties were, subsequent to the decree, leased to the plaintiff by the second defendant on 27th Dhanu 1068 (9th January 1893) on a Parapad of 10 dangalies of paddy and that on the strength of this deed the plaintiff is now entitled to recover these properties on payment of the said kanom and puramkadom amounts

1895 Oct. 11.

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19 M. 151=5 M.L.J. 279.

The Subordinate Judge held that the plaintiff's averments were established overruling an objection that the instrument of the 7th August 1856 was, on its right construction, a deed of conditional sale, finding that it was a puramkadom deed merely and he passed a redemption decree on the terms that the plaintiffs should pay the kanom and puramkadom amounts The District Judge reversed this decree on the ground that the plaintiff was not entitled to redeem He referred on this point to Transfer of Property Act, Section 61, and *Radha Pershad Misser* v. *Monohur Das* (1) and *Kasumunnissa Bibee* v *Nilratna Bose* (2) He also referred to Transfer of Property Act, Section 98, and observed that a Malabar kanom is an anomalous mortgage and that the local Malabar usage afforded no justification of the plaintiff's claim to redeem

Plaintiff preferred this second appeal

Bhashyam Ayyangar and *Sankara Menon*, for appellant

Sankaran Nayar and *Kannan Nambiar*, for respondents

JUDGMENT

We think it is competent to the Court to add parties who were defendants in the Court of First Instance though not joined as respondents in the lower appellate Court In the case referred to, *Raman Nambiar* v. *Kapali* (3), the party was not added by the Court, but by the appellant himself. Section 559 occurs in the chapter of the Code relating to appeals from original decrees, and it is by Section 587 that this section is so far as may [153] be made applicable to second appeals We do not think it was intended to preclude the Court from adding in second appeal persons who had been originally joined in the suit We are unable to follow the decision in *Chunni* v. *Lala Ram* (4)

The Judge considers that a verumpattom tenant claiming under a lease executed by the ottidar is not in a position to redeem the prior kanom. He observes that the lessee is not mentioned specifically in Section 91 of the Transfer of Property Act as belonging to the class of persons entitled to redeem, and that under a lease, as defined in Section 105, he is not

(1) 6 C 317 (2) 8 C. 79.
(3) S.A 165 of 1894 unreported. (4) 16 A 5

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described as taking an interest in the property, but only a right to possession.

In our opinion the word "interest" is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant or a person having a charge.

No doubt there has been no precedent for this suit in Malabar; but that circumstance is not conclusive. The general principle is laid down by Fry, L.J., in *Tarn* v *Turner* (1). "According to the general law of "the land a person who claims as lessee under a mortgagor after the "mortgage, and has thereby derived an interest in the equity of redemp-"tion, has the right to redeem." The Calcutta cases only illustrate the rule and do not form any exception So long as the plaintiff has an interest validly entitling him to possession, he is in a position to redeem.

We must therefore reverse the decree and remand the appeal for disposal.

Respondents are to pay costs of this appeal. The other costs will follow the result.

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19 M. 154.

[154] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (*Plaintiffs*), *Appellants v.* SARANGAPANI MUDALIAR *Defendant*), *Respondent*.* [5th and 18th December, 1895]

Limitation Act—Act XV of 1877, Section 23, Schedule II, Articles 144 *and* 149—*Encroachment on public highway—Once a highway always a highway—Suit by municipality to remove encroachment—Prescriptive right.*

The Municipality of Madras sued to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than forty five years before the suit:

Held, assuming that the land in question was originally included in the street, that the defendant had acquired a title by adverse possession against the Municipallity, which was not entitled to call in aid the provisions of Limitation Act, Schedule II, Article 149.

[R., 25 M. 635 (647); 28 M. 505 (507)=15 M L J. 416; 30 M. 245 (248)=17 M L.J. 174; 13 C L.J. 625 (629)=6 Ind Cas. 392; 17 Ind. Cas. 158 (161)=23 M.L.J. 479=12 M.L T 405=(1912) M.W.N. 1080 (1084)]

APPEAL against the decree of P. Srinivasa Rau, Judge of the Madras City Civil Court, in original suit No. 160 of 1894.

The plaintiffs were the Municipal Commissioners for the City of Madras, and they sued to recover a piece of land in the possession of the defendant as forming part of Mint Street. It was alleged that the defendant had wrongfully encroached upon the land in question which was 53 feet long 9 feet wide, and had erected a pial and pavement thereon in front of his house. The defendant pleaded that the land was never the property of the plaintiffs, that he had acquired a title thereto by prescription if not otherwise, and that the suit was barred by limitation. The defendant and his predecessors in title had long been in possession of the

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* City Civil Court Appeal No. 14 of 1895.

(1) 1 L.R. 39 Ch. D. at page 468

house above mentioned for which they held the Collector's certificate, and also of the land in dispute, for which until 1893 no certificate had been issued. In February 1893 he applied for such certificate, admitting that his title-deeds did not include the land in question. The plaint averred that the encroachment complained of came to their knowledge on or about the last-mentioned date, that the encroachment complained of constituted a continuous wrong, and that the defendant could acquire no statutory title in respect of the [155] land encroached on for the reason that it formed part of a public highway

1895 DEC. 18. — APPELLATE CIVIL. — 19 M. 154.

The Court of First Instance dismissed the suit.

The plaintiffs preferred this appeal.

Mr. *R. F. Grant*, for appellants.

Mr. *K. Brown*, for respondent

JUDGMENT

This is a suit in ejectment brought by the Municipal Commissioners for the Town of Madras for the purpose of recovering from the defendant a small piece of ground in Mint Street now covered by the pavement and pial in front of the defendant's house The plaintiffs allege that this piece of ground was originally included in the street which, by successive Acts of the Legislature, has been vested in the Municipal Commissioners for the use of the public They are unable to state the exact date of the encroachment, but say the same came to their knowledge in February 1893 when the defendant applied for a certificate for the said ground from the Collector of Madras. They allege that the defendant could acquire no statutory title to land which forms part of the public highway, but that even if the Act of Limitation does apply, the suit is not barred

The defendant bought the house in 1861 and it is admitted that the site now covered by the pial and pavement is not included in the measurements given in his title deeds It is clear, however, that this pial and pavement were in existence long before the defendant's purchase. The City Civil Judge finds that they have been certainly in existence for forty-five years and probably for a much longer period. No witnesses have been called who can recollect the house without them The earliest Collector's certificate for the house (Exhibit F) is dated 9th June 1824 and this mentions a previous possession of twenty years, so that it may be taken that the house at all events has been in existence since 1804 The plan on the reverse of the certificate gives the ' Salay Street ' as the western boundary of the house, and this description is repeated in the sale-deed F small 2, dated the 2nd of December 1830 Accepting the finding of the Judge that the pial has been in existence at any rate for forty-five years, it follows that it existed for at least eighteen years before any legislation in India vested the streets of Madras in the Municipal Commissioners of the City

The next question is whether the ground now covered by the pavement and pial was ever really part of the street at all. The [156] City Civil Judge has found that this is not proved, and we agree with him that there is no evidence that the actual site now so occupied has ever been used by the public as part of the street No doubt if the survey plan C was conclusive, the inference might be drawn that the measurements of the street should be taken from main wall to main wall, which would include the site in question in the street But it is not shown under what authority the measurements were so calculated, and it is certain that the pial was in existence long before this survey plan was made in 1858,

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At the same time there is no doubt that the boundaries given in Exhibit F 1 do favour the plaintiffs' contention, and had the inference from this document been supported by any evidence of user, we should have been disposed to hold that the land must originally have formed part of the street. The evidence does not enable us to come to any certain conclusion, but we are able to dispose of the suit upon other grounds.

Assuming therefore for the purpose of the argument that the site was originally included in the street, we have no doubt that, if the general rules of prescription and limitation apply, the defendant has long ago acquired a title by adverse possession The site would at any rate have become vested in the municipality by Act IX of 1865, and we agree with the City Civil Judge that a corporation is not entitled to claim the benefit of Article 149, Schedule II of the Limitation Act. That article only applies to suits brought by or on behalf of the Secretary of State, and there is no authority for the proposition that when the Crown has once ceded property to an individual or corporation it does (or can) also cede at the same time any right or privilege inherent in the Sovereign Power. The grantee of the property stands in respect of the property granted in the same position as any other proprietor.

An attempt, however, is made to distinguish the present case on the ground that the municipality as trustee of the public for the street is entitled to claim the benefit of the English maxim 'once a highway always a highway' and to contend that no lapse of time can convert part of a street into private property, since the obstruction to the public is a common nuisance and containing injury, Section 23 of the Limitation Act.

The English maxim 'once a highway always a highway' is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the [157] case before us this legal fiction peculiar to English Law cannot arise, for there is no question of any easement whatever. The street itself and the soil thereof is vested in the municipality in trust for public, so that there is no question of a dominant or servient heritage. Both are united in the same person, *i.e.*, in the proprietor, and we are referred to no authority for holding that the public, any more than a private proprietor, is to be exempted from the consequences of its own laches. The principles laid down in *Mann* v. *Brodie* (1) seem entirely applicable. The question is not really one of a continuing wrong, but of a completed trespass. It is a contest between adjacent proprietors of whom one has, it is said acquired by adverse possession some portion of the land of the other. If there had been any question of user, it would have been sufficient to say that there is no evidence of any user by the public as a highway of that portion of the property now covered by the pavement and pial. As laid down by Lord Blackburn in *Mann* v. *Brodie* (1) "the question in short is as to "possession by the public or against the public for a period of forty years, "and not, as in England, as to user by the public for such an undefined "time, and in such a manner and under such circumstances as to justify "the inference that an owner in fee had dedicated."

Holding therefore that the defendant has, by adverse possession for over twelve years, acquired a legal title, we must confirm the decree of the learned Judge and dismiss the appeal with costs.

Wilson & King:—attorneys for appellants.

Branson & Branson:—attorneys for respondent.

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(1) L. R. 10 App. Cases 387.

1895 April 18.

APPELLATE CIVIL

19 M. 157.

19 M. 157.

APPELLATE CIVIL

Before Mr Justice Subramania Ayyar

KELU MULACHERI NAYAR AND OTHERS (*Plaintiff*), *Appellants* v CHENDU AND OTHERS (*Defendants*), *Respondents* *

[12th March and 18th April, 1895]

Civil Procedure Code, Sections 562, 566—Order of remand when legal—Duty of Appellate Court when addition of parties and amendment of issues is necessary

In a suit by mortgagees to redeem a prior mortgage, issues were framed and tried and disposed of in favour of the plaintiffs as to the questions whether the [158] plaintiffs' mortgage was valid, whether the mortgage sought to be redeemed had been discharged, and whether the suit was barred by limitation, the Court of First Appeal was of opinion that these questions had not been properly considered, and set aside the decree for the plaintiffs and directed that a fresh trial be held, certain fresh parties being brought on the record

Held, (1) that the order of remand was illegal,

(2) that the Lower Appellate Court should have joined the persons necessary for the suit, and should have so altered or added to the issues to raise all questions properly arising, and should have referred them for trial to the Court of First Instance

[F., 1 Bom L R 29 (31); R., 23 A 167 (170), 12 C L J. 368 (374)=7 Ind Cas 75, 12 C P L R 119 (121)]

APPEAL against the order of O. Chandu Menon, Subordinate Judge of South Canara, in appeal suit No 50 of 1893, reversing the decree of J Lobo, District Munsif of Kasaragod, in original suit No 225 of 1892.

Suit for redemption. In 1874 the land in question was mortgaged by one Chendakelakara to the ancestor of defendants Nos 1 and 2 In 1878 the land was again mortgaged to defendants Nos 1 and 2 by Chendakelakara's brother In 1889 the land was mortgaged for a term of sixty years to the plaintiffs Nos 1 and 2 and the ancestor of plaintiff No 3 by an instrument which provided that the mortgagees were to discharge the mortgage of 1874 The defendants Nos. 1 and 2 questioned the title of the plaintiffs' mortgagors, and pleaded that in March 1879 Chendakelakara, who was admittedly the head of the family, executed a further mortgage in their favour for Rs 1,000, which included the prior mortgages and consequently that the present suit which was brought to redeem the mortgage of 1874 should be dismissed The District Munsif passed a decree for the plaintiffs

On appeal the Subordinate Judge held that the question of the validity and effect of the mortgage of 1879 had not been duly tried, nor the questions raised as to the title of plaintiffs' mortgagor and as to limitation, and in the result he said: "I set aside the decree of the Lower Court and "direct that the suit be restored to the file and that the person or persons "whom the defendants allege to be the successors of Chendakelakara, and "also the plaintiffs' mortgagors be made parties to the suit, and a fresh "trial be held with reference to the foregoing remarks and a decision "*de novo* on the merits of the case be passed."

The plaintiffs preferred this appeal under Civil Procedure Code, Section 588, Clause 28.

Madhava Rau, for appellants.

[159] *Narayana Rau*, for respondents.

* Appeal against Order No. 3 of 1894

1896 APRIL 18. — APPELLATE CIVIL. — 19 M. 157.

JUDGMENT.

As laid down in *Ramachandra Joishi* v. *Hazi Kassim* (1) the condition necessary to a remand under Section 562 as the section now stands is the omission to determine the merits. This condition did not exist in the present case as the District Munsif had disposed of the case on the merits. The order of remand passed by the Subordinate Judge must, therefore, be held to be illegal. The case to which I was referred on behalf of the respondent is distinguishable from the present case, inasmuch as there the order of remand was passed by the High Court, which could not deal with the merits under Section 565, the provisions whereof have to be read with those of Sections 562 and 564. And these sections are under Section 587 applicable to second appeals only as far as may be. There is thus in the matter in question no analogy between the position of the High Court hearing a second appeal and that of a Court hearing a first appeal (*Ganesh Bhikaji Juvekar* v. *Bhikaji Krishna Juvekar* (2). The next contention on behalf of the respondents was that, as the Subordinate Judge found it necessary to direct that certain persons who had not been impleaded in the Court of First Instance be joined as parties to the suit, the proper thing to do was to remand the case. There is, however, nothing in Section 562 to warrant this contention. In the circumstances of the case, the proper course for the Subordinate Judge was to join the person whom he found necessary as parties to the suit, to alter or amend the issues already framed, or frame fresh issues so as to raise all questions properly arising in the suit as it stands after the addition of the said persons as parties, and refer them for trial to the District Munsif under Section 566 (see the observations of the Judges in *Ganesh Bhikaji Juvekar* v. *Bhikaji Krishna Juvekar* (2).

The order of the Subordinate Judge should, therefore, be set aside. The appeal should be restored to the file and proceeded with according to law.

The costs of this appeal will be costs in the cause.

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19 M. 160.

[160] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Davies.

ARUMGAM PILLAI (*Plaintiff*), *Appellant* v. PERIASAMI AND ANOTHER (*Defendants*), *Respondents*.*

[3rd, 4th and 17th February, 1896.]

Mortgage in consolidation of prior mortgages—Want of registration—Secondary evidence—Extinction—Decree to redeem prior mortgages.

In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively:

Held, that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid.

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* Second Appeal No. 163 of 1895.

(1) 16 M. 207. (2) 10 B. 398.

1896 FEB. 17. APPELLATE CIVIL. 19 M. 160.

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East) in appeal suit No 225 of 1894, reversing the decree of A. David, District Munsif, Tirumangalam, in original suit No. 434 of 1892.

Suit to redeem a mortgage, dated 14th May 1867 and executed to secure repayment of Rs. 655.

The mortgage document was not produced having been lost and it was admitted that it had not been registered It appeared that it had been executed in consolidation of two previous mortgages for Rs. 316 and Rs. 35, dated respectively, 1856 and 1860 The District Munsif passed a decree as prayed on the mortgage sued on and with regard to the plaintiff's title he said.

"It is true that the mortgage of 1867 was not registered, but the admissions of the second defendant and of the first defendant's grandfather above noticed are, I think, sufficient to justify a finding in favour of the genuineness of the mortgage On the principles laid down in *Madhava* v. *Narayana* (1), *Sankaran* v *Periasami* (2) and *Maidin Saiba* v. *Nagapa* (3), I hold that the first defendant acquired by possession for more than twelve years the limited interest of a mortgagee and that his mortgage right has become valid [161] Whatever defect there was at the inception of the mortgage was subsequently removed by lapse of time. I am of opinion that the mortgages set up by the plantiff are genuine and valid as against the defendants "

The Subordinate Judge reversed his decree holding that the want of registration prevented the admission of secondary evidence and was fatal to the suit

The plaintiff preferred this second appeal

Bhashyam Ayyangar and *Krishnasami Ayyar*, for appellant

Mr *Parthasaradhi Ayyangar*, for respondents

JUDGMENT

We agree with the Subordinate Judge that the mortgage of 1867 could not be proved inasmuch as it was not registered, but we do not consider that the previous mortgages of 1856 and 1860 were altogether extinguished by the mortgage of 1867 They were no doubt consolidated in that mortgage But when that mortgage is found to be inoperative owing to non-observance of the registration law, the two previous mortgages can be revived for the purpose, at least, of showing that the possession of the defendants is that of mortgagees of the plaintiff, the mortgagor If this relationship is established between the parties, the plaintiff has clearly a right to redeem the earlier mortgages as his right of redemption has not been lost through the sixty years' bar of limitation This is the principle laid down in *Kunhi Kutti Nair* v *Kutty Maraccar* (4), and followed again in *Unnian* v *Rama* (5), and we do not think it has been departed from in the case of *Krishna Pillai* v *Rangasami Pillai* (6) In this latter case, the learned Judges would not allow a mortgage that had not been pleaded and that had only been admitted in other proceedings to be set up in lieu of the plaint mortgage when that failed But that is not the case here. The plaintiff pleaded the two previous mortgages, upon which he now wishes to rely, and the second issue had reference to their existence and genuineness and was accordingly framed in the plural number,

(1) 9 M 244 (2) 13 M 467 (3) 7 B 96
(4) 4 M.H.C.R 359 (5) 8 M 415 (6) 18 M 462.

1896 FEB. 17. — APPEL-LATE CIVIL. — 19 M. 160.

showing that all the three mortgages were considered by the Court of First Instance. Indeed, the finding of the District Munsif is that the mortgages, again in the plural number, set up by the plaintiff were valid and binding as against the defendants. If then the Subordinate Judge should find that the two previous mortgages, *viz.*, those of 1856 and 1860 are genuine and valid [162] either by independent proof or by admissions of the defendants or their predecessors in title, we think the plaintiff is entitled to redeem them. We, therefore, reverse the decree of the lower appellate Court and remand the appeal for rehearing on the issue above indicated and the other issues arising in the case. If a decree for redemption should follow, it will be left for the Subordinate Judge to determine what amount should be paid by the plaintiff to the defendants as the mortgage amount. The sums due on the mortgages of 1856 and 1860 are Rs. 316 and Rs. 35, respectively. But the amount due according to the inoperative mortgage of 1867 is Rs. 655, and we observe that the plaintiff has offered to pay this larger amount.

As we have allowed the second appeal on the ground stated, it is unneccessary for us to determine the other point raised as to the interest of the defendants in the property being in any case the limited interest of a mortgagee and therefore liable to redemption.

The costs hitherto incurred will abide and follow the result and be provided for in the revised decree.

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19 M. 162.

APPELLATE CIVIL.

Before Mr. Justice Shephard.

RAJESWARA RAU AND OTHERS (*Plaintiffs*), *Appellants v.* HARI BABANDHU AND OTHERS (*Defendants*), *Respondents.**
[12th and 17th September, 1895.]

Decree payable by instalments—Default in payment—Waiver—Civil Procedure Code, Section 258.

A decree was passed for the payment of a sum of money in four annual instalments, the first payment to be made on 11th October 1888; and it was further provided that if default were made in the payment of any instalment then without reference to the other instalments the whole amount should be paid with interest. The decree holder applied in October 1893 for execution in respect of the instalments for 1890 and 1891:

Held, that the application was not barred by limitation, if default in respect of the instalment of 1889 had been waived, and acceptance of part-payment was material as evidence of such waiver and should be considered, although payment had not been certified under Civil Procedure Code, Section 258.

[163] APPEAL against an order of J. P. Fiddian, District Judge of Ganjam, reversing the order of the District Munsif of Berhampur in execution petition No. 622 of 1893 in original suit No. 308 of 1887.

In original suit No. 308 of 1887 on the file of the District Munsif of Berhampur a razinama decree was passed in favour of plaintiff for Rs. 208 payable in four instalments of Rs. 52 each due on 11th October of years 1888 to 1891. It was further provided that interest was payable every month, and that on failure to pay any one instalment, the whole amount

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* Appeal against Appellate Order No. 40 of 1895.

was to be paid at once. Defendants contended that the first two instalments were not paid and therefore the whole amount became due on the 11th October 1888, and that if the first instalment only was paid, the balance became due on the 11th October 1889, and the present application made on the 7th October 1893 is time-barred. The Munsif found the payments were made and the petition not barred.

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On appeal the District Judge reversed the order apparently on the ground (i) that the evidence did not show that the full amount due was paid in 1888 or 1889, and (ii) on the ground that these payments were not certified to the Court under Section 258 of the Civil Procedure Code

The petitioner appealed to the High Court.

Mr. *H. G. Wedderburn* and *Ranga Chariar* for appellant. The decree-holder may waive the default. The clause is for the benefit of the decree-holder. The provision as to the whole amount being recoverable at once if default is made does not affect the admissibility of the application for execution, because that provision has never been enforced and the obligation to pay is still subsisting (*Appayya* v. *Papayya* (1). The creditor waived the default by accepting an overdue instalment (*Ramculpo Bhattacharji* v *Ramchunder Shome* (2) and *Mon Mohun Roy* v. *Durga Churn Gooee* (3)) The Judge should have recognized the payments, although not certified to the Court under Section 258, Civil Procedure Code.

Ethiraja and *Sivagnanam*, for respondents.

JUDGMENT.

The decree passed on the 11th October 1887 provided for the payment of a certain sum in four annual instalments, the date fixed being the 11th of October 1888 and the following years; and it was further provided that if default were [164] made in the payment of any instalment, then, without reference to the succeeding instalments, the whole amount should be paid with interest at Rs 1-8-0 per cent. per mensem. The present application for execution of the decree in respect of the instalments due in 1890 and 1891 was made on the 7th October 1893 This application is clearly not barred by the law of limitation if payment was made of the first two instalments, or if the decree-holder waived the judgment-debtor's default The decree-holder adduces evidence to show that payments were made in 1888 and 1889, and this evidence was accepted by the District Munsif.

The District Judge's finding on the point is not a positive finding, and as a finding in the reversal of a Court of First Instance is most unsatisfactory. Apparently the District Judge considers that some payments may have been made in those years, although the whole instalments were not paid The proof of any payment made in respect of the instalment of 1889 is, however, clearly material, because such payment accepted by the decree-holder would be evidence of waiver by the latter If there was waiver of the default in that year, the balance payable under the decree did not become payable until default was made in the next year, and that default would fall within three years of the date of the application. I think the Judge was also wrong in refusing to recognize payments, because they were not certified to the Court under the 258th section (*Hurri Pershad Chowdhry* v. *Nasib Sing* (4). If there was no payment in 1888 and 1889, and no waiver of the default, I think the Judge was right in dismissing the application. The case just cited is an authority for this position which in my opinion, is clearly the right one, and I do

(1) 3 M. 256, (2) 14 C. 352 (3) 15 C 502 (4) 21 C. 542

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not think that the decision in *Appayya* v. *Papayya* (1) obliges me to take the contrary view. The point which arises here was not the actual point decided in that case. The decision in *Venkatasami* v. *Sanyasi* (2) to which I was referred is consistent with the view which I adopt.

I must reverse the order and remand the appeal to the District Court for disposal. Costs will follow the result.

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19 M. 165.

[165] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

THE SECRETARY OF STATE FOR INDIA (*Defendant*), *Appellant* v. KOTA BAPANAMMA GARU (*Claimant*), *Respondent*.*
[1st October, and 4th December, 1895.]

Forest Act—Act V of 1882, Madras—Burden of Proof—Shifting of burden of proof—Limitation Act—Act XV of 1877, Article 149.

Portions of certain land, which had been taken up by Government as forest reserve, were claimed by one who had admittedly been in possession and enjoyment of them for thirty years The Government failed to establish any subsisting title of its own:

Held, (1) that the burden of proof had been shifted on to the Government and had not been discharged and accordingly that the claim should be allowed

(2) Article 149 of the Limitation Act applies only to suits brought by, or on behalf of, the Secretary of State

[F., 33 M. 1=5 Ind. Cas 882 (883)=20 M.L.J. 60=7 M.L.T. 128; R., 33 M. 173 (175)=4 Ind. Cas 1070=5 Ind. Cas 121=20 M.L.J. 71=6 M.L.T. 306; 13 P.L.R 1903.]

SECOND appeal against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 20 of 1893, reversing the decisions of the Forest Settlement-officer, Godavari, in the matter of certain claims by the owner of the Gangole estate to various plots of land recently taken a forest reserve belonging to a Government village.

The District Judge decided in favour of the claimant.

This second appeal was preferred on behalf of the Secretary of State represented by the Forest officer of the Godavari district.

The Government Pleader (Mr. *E. B. Powell*), for appellant.

Pattabhirama Ayyar and *Sriramulu Sastri*, for respondent.

JUDGMENT.

The question in this appeal is whether the plots three and four in the plan which have been taken up as forest reserve belong to the Government village of Pedda Kopalli or to the claimant's village of Lakshminarayana Devupeta. The District Judge found in favour of the claimant.

It is admitted that the two plots have, for the last thirty years, been in the possession of the claimant, but the Government pleader contends that, under the Madras Forest Act, it is for the claimant to make out his title in the first instance; that claimant has not produced his sale-deed, nor has he proved as against Government an [166] adverse possession of sixty years. It is alleged that the Bhubund accounts proved

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* Second Appeal No. 2 of 1895.

(1) 3 M. 256. (2) Appeal against Order No. 100 of 1893 unreported.

Government possession up to 1854, and therefore that the presumption that claimant's thirty years' possession continued from an earlier period is rebutted. 1895 DEC. 4.

There is, however, a clear finding of the District Judge in paragraph 15 of his judgment that there is no satisfactory proof of possession at any time, or of title, in the Government We may point out that the limitation of sixty years prescribed by Article 149 of the Limitation Act only applies to suits brought by, or on behalf of, the Secretary of State The presumption of the Madras Forest Act is that all *unoccupied* land is at the disposal of Government, but if the land be really occupied when a notification is published under Section 4, it will be ground for presuming that the occupant is the *prima facie* owner and shifting the onus on to Government (see the remarks of this Court in the *Periya Kalrayen case* (1)) Granted that it is incumbent upon the claimant in the first instance under Sections 4 to 10 to prove some *prima facie* ground of ownership before Government can be called upon to disprove his title or prove its own, the onus is certainly shifted when the claimant starts with an admitted possession and enjoyment for thirty years The Government could not compel the claimant to prove sixty years' possession, but must show a subsisting title of its own *Secretary of State* v *Vira Rayan* (2), *Secretary of State for India* v. *Bavotti Haji* (3) and the presumption in favour of Government is only as regards unoccupied land

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Even assuming the Bhubund accounts X and XI to be genuine documents, Exhibit G shows cultivation of these three hamlets in 1865 by the claimant, and the omission of their names in Exhibits VIII and IX is no more significant than the omission of Jillellagudem, which is admitted to belong to claimant. It is not however necessary to consider the documents since the onus has been shifted on to Government, and the finding is that no subsisting title has been proved

The District Judge states that there is no dispute as to boundaries, and that the tracts comprised in the notification admittedly fall within the three hamlets

The second appeal is dismissed with costs

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19 M. 167=6 M.L J. 24.

[167] APPELLATE CIVIL

Before Mr Justice Best.

TIMMANNA BANTA (*Counter-petitioner*), *Petitioner* v. MAHABALA BHATTA (*Petitioner*) *Respondent* *

[19th, 20th and 27th August, 1895]

Civil Procedure Code, Sections 311, 588, *Clauses* 16 *and* 28, *and Section* 622

Land having been sold in execution of a decree, one claiming that it had been held by the judgment-debtor benami for him applied that the sale be cancelled under Section 311. He was not a party to the decree, and on that ground his petition was dismissed. The Appellate Court was of opinion that it had been wrongly dismissed and remanded the case to be disposed of on the merit

Held, on revision, (1) that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable

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* Civil Revision Petition No 604 of 1894.

(1) S A 190 of 1888 unreported (2) 9 M 175 (3) 15 M 315

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(2) that the fact of the petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under Section 311.

[R., 28 B. 450 (451).]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of O. Chandu Menon, Subordinate Judge of South Canara, on miscellaneous appeal No. 25 of 1894, setting aside the order of the District Munsif of Kasargode on miscellaneous petition No. 27 of 1894. By the proceedings sought to be revised, the Subordinate Judge directed the District Munsif to restore to his file and dispose of on the merits a petition under Section 311 of the Civil Procedure Code, which prayed that the auction-sale of certain land should be cancelled. The petitioner was not a party to the decree, in execution of which the land in question was attached and sold, and his case was that the land was his property and that the execution proceedings had been carried on by the decree-holder and judgment-debtor in collusion. The District Munsif dismissed the petition on the ground that the petitioner being a stranger to the decree was not entitled to relief under Section 311. The Subordinate Judge held that this view was wrong and made the order now sought to be revised.

The present petition was preferred by the purchaser at the auction-sale.

Narayana Rau, for petitioner.

Sankaran Nayar, for respondent.

JUDGMENT.

[168] The preliminary objection is taken that, as the order sought to be revised is one remanding the case and therefore appealable under Clause 28 of Section 588 of the Code of Civil Procedure, this petition for revision under Section 622 is not maintainable. On the other hand, it is contended for the petitioner that the order in question being one passed under Section 588 (Article* 16), any further appeal is barred by the last paragraph of the same section, which says that "orders passed in appeals under this section shall be final."

Clause 28 must, I think, be read with the final paragraph, and so read, it must, I think, be held not to apply to orders of remand made in appeals under the same section.

The preliminary objection is therefore disallowed. Then the question is whether the Subordinate Judge is wrong in holding that the counter-petitioner has a *locus standi* under Section 311 of the Code. The case in *Abdul Huq Mozoomdar* v. *Mohini Mohun Shaha* (1), on which the Subordinate Judge rests his order, has no doubt been overruled by a subsequent decision of a Full Bench of the Calcutta High Court, which is to be found in *Asmutunnissa Begum* v. *Ashruff Ali* (2), and this latter decision was followed by this Court in *Subbarayadu* v. *Pedda Subbarazu* (3). But as is pointed out by Petheram, C. J., in the recent case of *Abdul Gani* v. *Dunne* (4), the Full Bench decision in *Asmutunnissa Begum* v. *Ashruff Ali* (2) does not exclude the right to come in under Section 311 of any person whose interest would pass by the sale. As remarked by Ghose, J., in the same case, the test is "whether the petitioner would be entitled to bring "a suit to contest the sale or to recover the property," and it has been

* "*Article*" seems to be a misprint for "*clause*"—*Ed.*

(1) 14 C. 240. (2) 15 C. 488. (3) 16 M. 476. (4) 20 C. 418.

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held that the beneficial owner is bound by a decree passed against the benamidar.

The case of the counter-petitioner is, that the first defendant in the suit against whom the decree was obtained was merely a benamidar of the village and that, lands therein which belong to the petitioner have been sold without proper proclamation, &c

The decision in *Asmutunnissa Begum* v *Ashruff Ali* (1) and *Abdul Gani* v. *Dunne* (2) are both authorities for upholding the Subordinate Judge's order.

This petition is dismissed with costs.

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19 M. 169.

[169] APPELLATE CIVIL

Before Mr. Justice Shephard and Mr. Justice Best

THE BRITISH INDIA STEAM NAVIGATION COMPANY (*Defendants*), *Appellants* v IBRAHIM SULAIMAN AND OTHERS (*Plaintiffs*), *Respondents*.*
[5th, 17th aid 25th September, 1895]

Bill of lading—Cargo unclaimed on arrival of ship—Rights of shipowner to land goods—Damages by rain—Harbour Trust Act (Madras)—Act II of 1886

The defendants' steamship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs who on that date were not authorised to receive them The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but, as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trust for storage pending delivery to the consignees On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain for which they now sued the defendants:

Held, (1) that where the consignees were unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and ware-housing the goods, and that delivery to the Harbour Trust for custody was not wrongful.

(2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed

APPEAL under Section 15 of the Letters Patent against the decision of Muttusami Ayyar, J , under Section 617, Civil Procedure Code, upon a case stated by the Chief Judge of the Presidency Small Cause Court under Section 69 of Act XV of 1882.

The facts appear sufficiently from the letter of reference which was as follows:—

" The plaintiffs claim Rs 709-3-11 as damages sustained by them between the 4th and 8th December 1891 in respect of 248 bags of grain, part of a shipment of grain per S S. *Fultalah*, consigned to plaintiffs at Madras, and which the defendants were employed by the plaintiffs to land, and which, owing to the defendants' neglect and default by allowing them to be exposed to rain, became damaged

[170] The defendants deny the employment to land as alleged, or that they did land, that the damage, if any, was caused by plaintiffs' own conduct, that the damages claimed are excessive and plead that they are not indebted.

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*Letters Patent Appeal No 42 of 1894

(1) 15 C. 488. (2) 20 C. 418.

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The facts of the case are that plaintiffs were the consignees of a cargo of grain from Calcutta per S.S. *Fultalah*, a ship belonging to the defendants' company which arrived at the port of Madras on the 4th December 1891, that, prior to the arrival of the steamer, Messrs. Binny and Company, the agents of the defendants' company here, directed Messrs. P. Ramanjulu Naidu and Sons to be in readiness to land the cargo from the *Fultalah*, and that on the arrival of the *Fultalah* the said Messrs. P. Ramanjulu Naidu and Sons, acting under such directions, landed the *Fultalah's* cargo including that portion of it which included plaintiffs' consignment, and that this landing of cargo by Messrs. P. Ramanjulu Naidu and Sons was according to the custom of the defendants at this port, and that it was acquiesced in by the plaintiffs. Landing of "coast or bag cargo," the evidence establishes according to the custom of the port of Madras, is effected by landing it on the beach, but in this case a portion of the cargo of the *Fultalah* including the bags as to which plaintiffs claim damages were, for the convenience of the ship, landed at the pier—a proceeding which entails extra expense, &c. This landing on the pier of portion of plaintiffs' cargo was on the 4th December 1891.

On the 4th December plaintiffs had no authority to receive their consignment, and Messrs. P. Ramanjulu Naidu and Sons had no authority to deliver to them any goods. The authority to deliver plaintiffs' consignment to them was signed by Messrs. Binny and Company on the 7th December and is marked No. 4.

I find on the evidence that the first intimation given to plaintiffs that part of their consignment had been landed on the pier was on the 8th December, and that rain fell on the morning of the 8th December between 3 and 4 A.M., and that when plaintiffs' people first saw their bags, some of them had been damaged by rain.

It is a further fact that no delivery of any of the bags landed on the pier was taken by plaintiffs till 11th December, and it is proved that rain fell off and on for a week from 8th December. There is no evidence to show the specific damage suffered up to 8th December nor of its increase up to the 11th December.

[171] On these facts I have given a judgment for the plaintiffs for Rs. 100 damages holding that the landing was the act of the defendants and that the landing of a portion of plaintiffs' consignment on the pier was an unusual and unauthorized act, and damage was in consequence caused.

The defendants, however, contended that, under Clause 1 of the Bill of Lading No. 1, they had right to land the cargo, and that the contract for delivery was completed by the discharge from the ship into the boat of their agent. Landing during the argument was admitted by defendants' professional advisers to include delivery. The defendants' attorney having required me to state a case for the opinion of the High Court, I beg to submit the following question:—

"Whether, upon the facts as stated and found by me and above "recited, my judgment deciding that plaintiffs are entitled to Rs. 100 "damages by reason of the defendants' conduct in the landing and deli"very of a portion of plaintiffs' consignment is correct."

The material portion of the bill of lading was as follows:—

"The company to have the option of delivering these goods into "receiving ship or landing them at consignee's risk and expense, as per "scale of charges to be seen at the agents' offices, the company having "lien on all or any part of the goods, against expenses incurred on th

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" whole shipment The company's liability shall cease as soon as the " packages are free of the ship's tackle, after which they shall not be res- " ponsible for any loss or damage however caused "

Branson & Branson, for plaintiffs

Mr *K. Brown*, for the defendants

MUTTUSAMI AYYAR, J —This is a case stated for the opinion of this Court by the learned Chief Judge of the Court of Small Causes at Madras The plaintiffs are the consignees of a cargo of grain shipped from Calcutta to Madras per S.S. *Fultalah*, which belongs to the defendants' British India Steam Navigation Company, Limited The ship arrived at the port of Madras on the 4th December 1891, and prior to its arrival Messrs Binny and Company, defendants' agents at Madras had directed Ramanjulu and Company to land the cargo Accordingly Ramanjulu and Company landed the cargo So far as the landing was concerned, it is found to be in accordance with the custom of the port and to have been [172] acquiesced in by the plaintiffs But, according to that custom, landing is ordinarily effected by landing the cargo on the beach; but, for the convenience of the ship, Ramanjulu Nayudu and Company landed a portion of the plaintiffs' consignment at the pier on the 4th December 1891, though by so doing greater expense was entailed on the consignee On the 4th December Ramanjulu Nayadu and Company had no authority to deliver, and the plaintiffs had no authority to receive the consignment, the authority to deliver being signed by Binny and Company only on the 7th December It was on the 8th December that intimation was given to plaintiffs for the first time that a portion of their consignment was landed on the pier, but on the morning of that day between 3 and 4 A M., there was rain When the plaintiffs' men first saw the bags of grain, some of them were damaged, the cargo landed on the pier was only delivered to the plaintiffs on the 11th December For one week after the 8th December, rain continued to fall off and on There is no evidence to show the specific damage suffered up to 8th December or its increase up to 11th December On these facts the learned Chief Judge gave judgment for plaintiffs for Rs 100 damages, contingent on the opinion of this Court upon the case stated for its decision He held that the landing was the act of the defendants, that the landing of a portion of the consignment on the pier was unauthorized and that damage resulted therefrom. He disallowed the defendants' contention that under clause (1) of the Bill of Lading No. 1, the defendants' obligation to deliver was fully satisfied when the cargo was discharged from the ship into boats The contention before me is that defendants' obligation was fulfilled upon the true construction of the bill of lading when the cargo left the ship's tackles. But the bill of lading provides that the company is to have the option of delivering the goods into the receiving ship or of landing them at consignee's risk and expense as per scale of charges to be seen at the agents' office, the company having a lien on all or any part of the goods against expenses incurred on the whole shipment, and that the company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage however caused. It goes on to state that, " If stored in receiving ship, godown, or upon " any wharf, all risks of fire, dacoity vermin or otherwise shall be with " the merchant, &c " Under the bill [173] of lading the defendants clearly had the option of landing, and in the case now before me they elected to land, but landed a portion of the consignment on the pier for the ship's convenience contrary to the custom of the port. It was admitted by the

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defendants' solicitors that landing included delivery and Ramanjulu Nayudu and Company are found by the learned Chief Judge to be defendants' agents. I am of opinion that the decision of the learned Chief Judge is correct, and I answer the question referred to this Court in the affirmative.

Against this decision the defendants preferred an appeal under Section 15 of the Letters Patent.

J. G. Smith, for the defendants. Appellants contended that it is the duty of the consignee to take delivery of cargo, and if he does not within reasonable time, shipowner may warehouse the goods (*Meyerstein* v. *Barber* (1)). The consignee may demand delivery into boats and, if he does so, shipowner will be liable for wharfage charges (*Syeds* v. *Hey* (2)), that the plaintiffs had no delivery telegram and made no demand. The shipowner is not bound to give notice of the ship's arrival to the consignee (*Harman* v. *Clarke* (3)). After the cargo left the ship's tackling, defendants not responsible (*Mackinnon* v. *Minchin* (4)), (*Bullock Brothers* v. *Toay Aung* (5)). Defendants delivered the goods to the Harbour Trust to be stored, subject to the ship's lien for freight—Madras Act II of 1886, Section 52.

Mr. *W. Grant*, for respondents. No appeal lies. This decision under Section 617, Civil Procedure Code, by Muttusami Ayyar, J., is not a judgment. Defendants are carriers and were bound to land according to custom of the port. The custom is to land in the beach and not in the pier. Landing at the pier entailed extra expense on the consignees, and they did not authorise such landing. There was no delivery to consignees (*Bourne* v. *Gatliffe* (6)).

JUDGMENT.

This is an appeal under the Letters Patent against the decision of Sir T. Muttusami Ayyar, J., upon a case referred to the High Court by the Chief Judge of the Presidency Small Cause Court. It was objected on the plaintiffs' behalf that no appeal lay; but we were of opinion that the decision was a judgment within the meaning of the clause of the Letters Patent. Moreover, it has to be observed that, under the rules of the High [174] Court, the reference ought, in the first instance, to have been heard before a bench of two Judges.

The question raised is whether under the circumstances stated the defendants' company is liable for damage suffered by goods in consequence of their being exposed to rain on the pier where they were landed by the company. The opinion of Sir T. Muttusami Ayyar, J., which was in accordance with that expressed by the learned Chief Judge, was based on the finding that the landing of the goods by the company on the pier was an unusual and unauthorized act. It is found that the steamer arrived at Madras on the 4th December 1891, and that the defendants' agents unloaded the cargo and landed the plaintiffs' bags of grain on the pier. Under the bill of lading, the company has the option of landing the goods. From the date when the goods were so landed till the 11th December, when the plaintiffs took delivery of them, the goods remained in the custody of the Harbour authorities, and it was in that interval of time that the mischief which gives rise to the action occurred. At the time when the ship arrived and the goods were landed, it appears that the plaintiffs were not possessed of the bill of lading; they

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(1) L.R. 2 C.P. 38. (2) 4 T.R. 260. (3) 4 Camp. 159.
(4) 6 M. H. C. R. 353. (5) 24 W.R. 74. (6) 7 Manning and Granger 850.

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did not know of the landing of the goods until the 8th December, and we infer that before that day they had taken no action with regard to them We also infer from the absence of any finding to the contrary, that it was not the fault of the company that the plaintiffs did not have the bill of lading at an earlier date This being so, the case is one in which the company were not in a position to deliver the goods immediately to the plaintiffs either at the ship's side or on the beach The master of a ship on its arrival in port is clearly not bound to seek out the consignees of cargo, nor is he bound to wait more than a reasonable time His responsibility cannot be prolonged for the convenience of consignees If they are not in a position to take delivery in the ordinary way, which, as appears in this case, is on the beach, the master has the option of landing the goods and warehousing them (*Meyerstein* v. *Barber* (1)).

The existence of the option possessed by the company under the circumstances of this case appears to have been overlooked both by the learned Chief Judge and by Sir T Muttusami Ayyar, J , when they say that the landing of the goods was an unauthorized and unusual act. Neither in the judgment of the former, nor [175] in the case, which does not give a complete statement of the facts, is it explained what would have become of the goods if they had been landed on the beach, and it is not easy to understand what difference it can make to consignees whether their goods, having to be warehoused, are taken to their destination by the route adopted in this case or by the beach The only difference apparently lies in the expense. It would be most unreasonable to hold that under no circumstances masters of ships landing cargo in Madras can use the facilities which the Harbour Trust Act affords The course may be unusual, but it is another thing to say that custom prohibits it, and we do not think it was intended so to find. There are two grounds on which the defendants might be held liable. Negligence might be proved against them, or it might be charged that they had failed to deliver the goods.

There is no evidence of negligence on their part in their handling of the goods, nor is it suggested that the Harbour authorities are not persons to whom goods may be properly entrusted It is true that the latter did not take good care of the bales, but that circumstance cannot make the defendants liable, if otherwise they were free from blame

The other ground of liability also fails when once it is admitted that, in the absence of the consignees, the Company were entitled to land the goods and put them in the charge of some third person No other delivery is, under the circumstances, possible The learned Chief Judge referred to the case of *Bourne* v. *Gatliffe* (2) The decision in that case, which turned upon the pleadings, rests upon a ground which is absent in the present case. The plea was held to be bad, because it did not show that the captain had a right to land the goods, or that a reasonable time had elapsed to enable the consignees to come and receive them. Under these circumstances, it is intelligible that the delivery not being shown to be at a usual place, was held not to be a delivery to the consignees That decision affords no authority for the position that the delivery in the circumstances of the present case was not in accordance with the contract The case of *Mackinnon* v. *Minchin* (3) resembles more closely the present case, the bill of lading appears to have been similar and there too the

(1) L.R. 2 C.P 38. (2) 7 Manning and Granger, 850 (3) 6 M H C.R. 353.

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consignee did not present himself to take delivery. We think that the [176] conclusion at which the Chief Judge arrived is wrong and that judgment ought to have been given for the defendants. The costs in this Court will be costs of the suit and follow the result.

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19 M. 176=6 M.L.J. 62.

APPELLATE CIVIL.

Before Sir Arthur, J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KUNHI MAMOD (*Defendant No.* 1), *Appellant v.* KUNHI MOIDIN (*Plaintiff*), *Respondent.** [24th January, 1896.]

Muhamadan law—Relinquishment of rights of inheritance—Relinquishment executed, before ancestor's death.

A Muhamadan sued to recover his share of the property by his mother deceased. It appeared that before her death he had by a registered deed in consideration of Rs. 150 renounced all his claims on her estate:

Held, that the renunciation was binding on the plaintiff.

[R., 33 A. 457 (461)=8 A L J 275= Ind Cas 530.]

SECOND appeal against the decree of A. Venkataramana Pai, Subordinate Judge of Calicut, in appeal suit No. 538 of 1894, modifying the decree of P. Govinda Menon, District Munsif of Betutnod, in original suit No. 482 of 1892.

The plaintiff sued to recover his one-half share in the estate of his mother who died in 1890. The first defendant was the plaintiff's brother and he pleaded that by a registered document, dated the 15th March 1884, and executed by the plaintiff in favour of his mother, the plaintiff had in consideration of Rs. 150 paid to him in respect of the share in her estate to which he would become entitled on her death acknowledged satisfaction of all his claims thereto and admitted that he had no longer any right whatever to her properties.

The Distrct Munsif held that this instrument was invalid for the reason that the rights thereby renounced had not then vested and he passed a decree for plaintiff. This decree was confirmed with a slight modification by the Subordinate Judge.

[177] Defendant No. 1 preferred this second appeal.

Subramania Sastri, for appellant.

Respondent was not represented.

JUDGMENT.

The Courts below have allowed plaintiff a share in items 1, 3, 5, 6, 7 and 9 in Schedule A on the strength of the decision in *Mussumant Khanum Jan* v. *Mussumat Jan Bebee* (1). We have referred to the report itself, and are of opinion that the case is not one of any great authority. It is true that the majority of the Muhamadan Law officers expressed the opinion that the renunciation was not valid on the ground that the right had not vested, but the opinion was not unanimous, and eventually the Sadr Court held that the receipt of the money had not been satisfactorily proved. Here, however, it is not denied that plaintiff received the money,

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* Second Appeal No. 132 of 1895.

(1) 4 S. D. A. 210=Ben. I. D. (O.S.) 799.

and there is the further difference that the right had vested, but that provision was made for the mother by setting apart some property for her maintenance for her life, after which the plaintiff accepted the money value of his share. *Prima facie* there is nothing illegal in the transaction and in the absence of clear proof that it is forbidden by Muhammadan law, we think plaintiff should be held to be bound by it

The only other point taken is as to the moveables, but this is a question of fact on which the Subordinate Judge has given a finding, though the evidence upon which it is based is rather vague.

The decree must be modified by disallowing plaintiff's claim to items 1, 3, 5, 6, 7 and 9 in Schedule A and in other respects confirmed

The appellant will be allowed the costs of the appeal

We do not interfere with the award of costs in the Courts below

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[178] ORIGINAL CIVIL

Before Mr. Justice Subramania Ayyar.

KUPPUSAMI NAIDU, *Plaintiff* v SMITH AND COMPANY, *Defendants* *

[25th October, 1895]

Building Contract—Breach—Power of re-entry—Certificate of architect, how far conclusive

By a building contract entered into between plaintiff and defendants, it was agreed that plaintiff should erect certain premises on behalf of the defendants at the rates specified in the bill of quantities annexed The agreement provided that defendants should pay the plaintiff at the rate of 90 per cent upon the value of work executed and materials laid down as certified by the architect, and that should defendants make default in so doing for a period beyond fourteen days after the amount thereof should have been certified, plaintiff should be at liberty to suspend the works and require payment of all works executed and materials laid down The agreement further provided that, if the contractor should suspend or delay the performance of his part of the contract, the defendants might through their architect give notice requiring the works to be proceeded with and in case of default on the part of the contractor for a period of twenty-eight days might enter upon and take possession of the premises It was further provided that the decision of the architect with respect to the amount, state, and condition of the works actually executed or in respect to any questions that may arise shall be final During the continuance of the works disputes arose as to the amount due to the plaintiff although certified by the architect as agreed which the defendants did not pay, and in consequence plaintiff refused to continue the work Whereupon defendants after giving due notice entered upon the premises Plaintiff sued for damages in consequence of the defendants having taken possession and for the balance due on the accounts

Held, (1) that the defendants committed a breach of the contract by refusing to pay the full amount due under the architect's certificate,

(2) that the plaintiff having thereupon rescinded the contract which he was not entitled to do, the defendants were entitled after due notice to enter and take possession,

(3) that in the absence of proof of collusion between the architect and the plaintiff, the defendants were bound by the architect's certificate as to the amount due to the plaintiff.

THE plaintiff agreed to build for the defendants certain premises under a written contract, dated 21st August 1893, whereby William Norman

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* Civil Suit No 127 of 1894

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Pogson was appointed architect. The following portions of the said contract are material:—

[179] Paragraph 13. "If the contractor shall suspend or delay the performance of his part of this contract, Messrs. W. E. Smith and Company by and through their architect may give to the contractor notice requiring the works to be proceeded with, and in case of default on the part of the contractor for a period of twenty-eight days, it shall be lawful for Messrs. W. F. Smith and Company by their architect to enter upon and take possession of the works.

Paragraph 14. "When the value of the works executed and materials laid down upon the site for use in executing the works and not included in any other former certificates shall, from time to time, amount to the sum of Rs. 3,000 (but not exceed Rs. 6,000 per mensem) at the architect's reasonable discretion, the contractor shall receive payment at the rate of ninety per cent. upon such value certified for by the architect.

Paragraph 16. "If Messrs. W. E. Smith and Company shall make default in paying any moneys to which the contractor may become entitled for a period beyond fourteen days after the amount thereof shall have been certified, the contractor shall be at liberty to suspend the works and to require payment for all works executed and all materials laid down on the site and for any loss which he may sustain upon any goods or materials purchased for the works, and in such case the contractor shall not be bound to proceed further with the works contracted for. The contractor shall be entitled to such interest and at such rate as the architect shall certify upon all moneys payable to him payments of which have been unduly delayed.

Paragraph 17. "The decision of the said William Norman Pogson with respect to the amount state and condition of the works actually executed, or in respect to any and every question that may arise concerning the construction of the present contract or the said plans or drawing specification, bill of quantities for or in any wise relating thereto shall be final and binding and without any appeal whatever."

The work appears to have been in progress from October 1893 to May 1894 when the plaintiff stopped building. In February 1894, certain iron columns for the building works arrived in Madras, and at the instance of Mr. Pogson the defendants advanced Rs. 1,000 to enable plaintiff to pay for them, and it was agreed that the amount so advanced should be adjusted at the time of the next certificate, although there was a dispute [180] with regard to the mode in which the adjustment was to be made. The next certificate for Rs. 6,840 was granted on the 4th April 1894, and was presented to defendants who paid on the 6th April Rs. 200, and on the 7th April Rs. 3,500; but further payments were postponed pending the receipt of some information from the architect, who furnished an account showing that, after deducting Rs. 10,226 already received by the plaintiff up to 4th April including the Rs. 1,000 paid on 16th February for the iron columns, the balance due to plaintiff was Rs. 7,082-8-0. With regard to further payment on this certificate, disputes arose and eventually on 14th April defendants paid the plaintiff a further sum of Rs. 2,140, making up the total payments on this certificate to Rs. 5,840 out of Rs. 6,840, the total amount due under the certificate less ten per cent. provided by the contract. The deficiency of Rs. 1,000 seems to have arisen from the fact that the defendants deducted this amount from the money due under this certificate, while the plaintiff

alleged as the Court found, that credit had already been given to defendants for this Rs. 1,000 by the architect when giving his previous certificate. Further correspondence ensued in which the architect tried to convince the defendants of their mistake but without effect; and on the 21st May the plaintiff gave notice to the defendants that he suspended work and asked for the settlement of all his accounts within ten days. On the 31st May plaintiff wrote insisting on payment of the amount of the certificate in full, and defendants wrote to the architect asking him to tell the plaintiff that they would pay him Rs 1,000 less 10 per cent On the 1st June plaintiff wrote to the architect that he wanted to be paid the full amount as per bill of works. On the 5th June the defendants wrote to the plaintiff that if he delayed in proceeding with the work for twenty-eight days they will take possession of the premises and proceed to complete the work. On the 6th July the defendants offered through the architect to pay the plaintiff Rs. 2,500 on condition he resumed work at once On the 9th July plaintiff replied saying that the matter was in the hands of his solicitor On the 10th July, defendants took possession of the premises.

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Mr. *J. H. M. Ryan* and Mr *F. H Bakewell*, for plaintiff

Mr. *K. Brown* and Mr *R. F. Grant*, for defendants

JUDGMENT.

The plaintiff Coopooswamy Naidu sues the defendants Messrs. Smith and Company for the sum of Rs. 21,984-13-4 [181] said to be due to him in consequence of their having broken the contract entered into by him with them on the 23rd August 1893, with reference to the construction of their new premises on which he had been working from October 1893 till May 1894 when he stopped building The defendants deny the breach alleged and their liability to pay the amount claimed The main questions for determination are (1) Did the defendants break the contract? (2) What amount if any are they bound to pay? These questions involve the decision of certain subsidiary points which will be dealt with in their proper place under the respective heads. Now as to the first question the facts, so far as they are material to it, appear so clearly in the written communications, which passed from time to time between the parties and between one or other of them, and Mr. Pogson appointed as the architect of the building that for a clear comprehension of them I need scarcely do more than set out the correspondence quoting the words of the particular communications when necessary and add my own observations as to the two or three circumstances about which there is some dispute.

It is sufficient to begin with what occurred since February 1894. In that month, certain iron columns which had been ordered by the plaintiff arrived at Madras. Though according to the contract the defendants were not bound to pay the plaintiff any money except for work actually executed or materials laid down upon the site of the building and certified to by the architect, yet, at the instance of Mr. Pogson, the defendants advanced to the plaintiff on the 16th February Rs. 1,000 to enable him to pay for the said columns. That the amount was to be adjusted at the time of the next certificate is admitted by both parties, although there is a dispute as to the particular mode in which the adjustment was to be made. On behalf of the plaintiff it is sought to be established that Mr. Pogson was to give credit for the said amount and give a certificate for the balance, whilst on behalf of the defendants it is urged that the understanding was

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that they themselves should deduct the amount when payment on account of the next certificate is made. Oral evidence has been adduced in support of these respective contentions. But I am not inclined to accept either version. My opinion is that at the time the advance was made neither party thought it necessary to define that in adjusting the amount the procedure was to be the one [182] or the other. And considering that the adjustment was to take place without much delay, it is hardly likely that the parties felt any necessity for being so precise in the matter as they are now anxious to make out. If any distinct arrangement was entered into about the money, some writing would have passed stating the exact understanding which would not have been left to depend upon mere memory. I believe there was no definite agreement in the matter, a view which is confirmed by Mr. Pogson's letter of the 15th February, wherein he asks the defendants to pay the amount on account as well as by Exhibit 41, the plaintiff's receipt for it dated the 16th, in which the payment is endorsed in similar terms.

The next certificate previously spoken of was granted on the 4th April 1894, Exhibit C, and was presented by the plaintiff to the defendant, who paid him on the 6th, Rs. 200 and on the 7th, Rs. 3,500. They appear to have postponed further payment pending the receipt of some information for which they had applied to Mr. Pogson. He says that he sent them Exhibit DD which is headed "items of works comprising the third instalment of payment" and which shows that, after deducting Rs. 10,226 received by the plaintiff up to the 4th April including the Rs. 1,000 paid on the 16th February for the iron columns, the balance due to him was Rs. 7,082-8-0. The defendants say that Exhibit DD never reached them, but it seems to me they are wrong in saying so. I think that this is the enclosure referred to in Exhibit CC written by the defendants to Mr. Pogson on the 9th April and which runs "with reference to the "enclosure and at the request of Mr. Cormac (the clerk of the works "appointed by the defendants) we have to return the certificate and to "ask that you will be so good as to alter the amount to Rs. 5,885." For these figures appeared to have been arrived at by deducting from Rs. 7,082-8-0, the sum of Rs. 1,000 and the 10 per cent. (a deduction provided for under paragraph 13 of the contract) on the balance Rs. 6,082-8-0. The exact sum would be Rs. 5,374-8-0 instead of Rs. 5,385. What the small difference of Rs. 10-8-0 consisted of does not appear, but the language of Exhibit CC clearly points to the enclosure being different from the certificate which the defendants wanted to be modified. However this may be on the very next day Mr. Pogson addressed the defendant Exhibit EE which ought to be quoted. He writes "I measured up "the works and send you the bill of quantities, Exhibit FF). [183] The "present value of the works is Rs. 19,491 accordingly the certificate I "granted for Rs. 7,600 is quite reasonable and fair. I trust, under these "circumstances, you will pay the amount certified for. I went over the "amount with Mr. Cormac here yesterday and this morning my measure-"ments show that my certificate valuation is below the value." On the 14th April the defendants paid the plaintiff Rs. 2,140, which brought up the total payment to Rs. 5,840. On the same day they wrote to Mr. Pogson "we have paid to Mr. Coopooswamy as per your certificate "We have done this under protest there being several items in the "bill (FF) that will have to be adjusted on your return to Madras." In making the statement "we have paid Coopooswamy as per your certificate," the defendants seem to have ignored the fact that Mr. Pogson

had already included the Rs 1,000 paid in February in the Rs. 10,226 for which he gave credit to the defendants in arriving at the balance in Exhibits DD and FF, and to have thought that they were entitled to treat that amount as a payment towards the amount of Exhibit C For otherwise the defendants would have had to pay the plaintiff Rs 6,840, *i.e.*, the amount of the certificate less 10 per cent The plaintiff, however, was not satisfied and he wrote to the defendants on the 21st April complaining that he had not received full payment (Exhibit D) The defendants' reply to this dated the same day runs. " In reply to your " docket we consider the amount of Mr. Pogson's certificate has been fully " paid. As regards the Rs. 1,000 advanced you for iron work, Mr. Pogson " at the time said it was to be deducted from your next bill, this we have " done; until Mr. Pogson's return we can do nothing in the matter." On the 28th April the plaintiff wrote to Mr. Pogson that he had received only Rs 5,840, and asked him to give a fresh certificate to enable him to get full amount for works done up to that date. In forwarding the said letter, Mr Pogson wrote on the same day to the defendants thus " I " herewith enclose a letter from your contractor, wherein he says that he " has only received part of the payment of my certificate, I cannot " understand this, for on the 21st instant you write to me and say that " you have paid him the full amount of Rs 6,700 (? 7,600) less of course " 10 per cent as per agreement I think there must be some misunder- " standing, so kindly explain " The defendants do not appear to have answered Mr Pogson at once. They however wrote to him on the 14th [184] May (Exhibit JJ) wherein after taking objection to several items mentioned in the bill of works conclude with the observation that they had deducted out of the amount of the certificate Rs 1,000 advanced for the iron work. On the 7th May, Mr. Pogson replied by Exhibit KK, in which he enters into an explanation as to the items objected to by the defendants, which it is unnecessary to repeat But his observations as to the Rs. 1,000 ought to be quoted. He says " In regard " to the Rs 1,000 advance for iron works, the figure your clerk gave me " from your ledger was Rs 10,226, which included this advance In " consideration that I granted only Rs 7,600, in lieu of the actual amount " of Rs. 9,265-9-11. I fail to see why you should dispute my certificate " at all. The contractor complained bitterly, because I would not grant " him the full amount of Rs. 9,265-9-11 and says it is impossible for " him to advance the works unless his dues are paid in whole, however I " refused to listen to his pleadings. You may fully depend upon me that I " will not be too lenient in granting him excess payment as I fully know " and feel that I am responsible for all money spent. On the other hand, " I must ask you to remember the terms of the agreement, wherein, it " says that the architect shall decide the amount due to the contractor " and that his decision shall be final and binding and without appeal " See clause 17 The keeping back of the payments on certificate beyond " fourteen days exposes you to the contractor's enforcing Clause 16 and " breaking the agreement, and this is what I seriously wish to avoid." But the explanation had no immediate effect upon the defendants, and the plaintiff on the 21st May gave notice to the defendants that he suspended work and asked for a settlement of all his accounts within ten days (Exhibit G). On the next day Messrs. Barclay, Morgan and Orr replied on behalf of the defendants stating that the latter had committed no default (for which a reason is assigned by the solicitors which I shall consider later on) and calling upon the plaintiff to proceed with the works at

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once, and on his failing to do so, that will be treated as a breach of his agreement and the contract put an end to. On the 31st May, the plaintiff answered by Exhibit J, wherein he insisted upon compliance with his previous demand. The defendants relented and wrote to Mr. Pogson asking him to tell the plaintiff that they would pay him Rs. 1,000 less 10 per cent. if he would call on them (Exhibit K). But the plaintiff on the 1st June wrote to Mr. [185] Pogson that he wanted to be paid the full amount as per bill of works FF. On the 5th June the defendants wrote to the plaintiff that, if he delayed in proceeding with the work for 28 days, they will take possession of the premises and proceed to complete the work. The plaintiff, however, took no notice of the communication. On the 6th July the defendants offered through Mr. Pogson to pay the plaintiff Rs. 2,500 on condition he resumed work at once. On the 9th July, the plaintiff replied to say that the matter was in the hands of his solicitors Messrs. Branson and Branson (Exhibit P). This was sent by Mr. Pogson to the defendants on the 11th, and they took possession on the 12th.

Having thus stated, though at some length, nearly all that appears to me to be necessary for the proper understanding of the question under consideration, I shall now proceed to deal with the points at issue.

Now the plaintiff's contention is that the defendants broke the contract by withholding payment of the Rs. 1,000 required to make up the Rs. 6,840 due to him under the certificate (Exhibit C) less 10 per cent. and secondly by taking possession of the premises on the 12th July and proceeding with the work. I shall first take up the former contention. The answer of the defendants to this is that, according to the proper construction of the 14th paragraph of the contract, the plaintiff was not entitled to claim in any one month payment of more than Rs. 5,400, *i.e.*, Rs. 6,000 less 10 per cent. The portion of the said paragraph material for the present purpose runs, " when the value of the works executed and " materials laid down upon the site for use in executing the works and not " included in any other former certificate shall, from time to time, " amount to the sum of Rs. 3,000, but not exceed Rs. 6,000 per mensem " at the architect's reasonable discretion, the contractor shall receive pay- " ment at the rate of 90 per cent. upon such value certified by the architect " until the value of the works actually executed shall amount to 50 per cent. " of the full amount of the contract." The manifest and immediate object of the clause is to point out how the architect should, in granting certificates during the progress of the building, *distribute* the value of the work done or materials laid down upon the site over the period that may elapse between the commencement of the work and the time when the value of the works actually executed comes up to 50 per cent. of the full amount of the contract, as is unquestionably shown by [186] the existence in the clause of the term " per." That the above is the correct interpretation of the term will appear from the judgment of Lord Selborne in *Pryee* v. *Monmouthshire Canal and Railway Companies* (1) where in construing the words " per ton per mile not exceeding," the following passage occurs: " And I agree with Lord Justice James that " the Latin preposition '*per*,' as it is adopted into our popular language " and as it is, here used, properly and primarily signifies the distribution " of the charge over the whole aggregate weight of goods for the whole

(1) L.R. 4 App. Cases, 216.

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"aggregate distance that they are conveyed tons and miles being mention- "ed only as common measures of weight and distance convenient for the "measurements which this maximum scale would necessarily require." And it is hardly necessary to say that the term has the same meaning when it is used, as it here is, with reference to a word denoting time, as it has when it governs words indicating quantity or distance as it did in the case above referred to.

To illustrate my meaning, suppose the plaintiff had laid down upon the premises, in the very first month he commenced to work, materials of the value of Rs 12,000. The architect would have had to distribute the amount over that and the next month, and give to the plaintiff, if he applied for it, one certificate for half the amount in the former and another for the remainder in the latter month But suppose the plaintiff had chosen to wait and asked at the end of the two months one certificate for the whole amount, could the architect have refused to comply with the request? On the face of the clause in question, I fail to see anything to prevent the grant of such a certificate. And considering that, by multiplying the maximum mentioned in the clause by the number of months which have expired since the commencement of the work, the defendants could ascertain the possible limit of their liability to the contractor, I do not see what reasons there are for thinking that they were not expected to be ready to meet such liability If, however, the intention was as alleged on behalf of the defendants that whatever the amount of a certificate or certificates granted in accordance with the rules laid down for the architect's guidance may be, the defendants had not to pay more than a certain amount in any one month, why was that not stated in plain and unambiguous language? A few words such as [187] "provided Messrs Smith and Company shall not be liable to pay in any one month a sum exceeding" would have aptly conveyed the alleged intention. But why instead of that simple course, this round-about and to my mind almost unintelligible way of expressing the alleged intention was adopted, I find it difficult to understand It is quite true that the direction to the architect to distribute the amounts to be certified in the manner prescribed would, in some measures, affect the amounts to be paid until the 50 per cent limit is reached. But that would be only as an indirect result of the provisions which were inserted for a different purpose The construction suggested on behalf of the defendants makes what would thus be consequential and secondary the primary object and involves a serious modification of the sense of the clause according to its ordinary and grammatical interpretation Moreover the conduct of the defendants themselves shows that the construction suggested on their behalf is an afterthought During the cross examination of the plaintiff the learned Senior Council for the defendants wanted to be allowed to prove by oral evidence that the words "but not exceed Rs 6,000" in the paragraph in question were inserted for the express purpose now alleged. If this were a fact one would expect that the defendants would have taken the present objection the moment the certificate (Exhibit C) was presented for payment. But singularly enough in none of the letters to the plaintiff or to Mr Pogson is there a word about it. It was left for their solicitors to make the discovery for the construction in question is first suggested in their letter to the plaintiff, dated the 22nd May 1894. Exhibit H, already referred to. I have therefore no hesitation in holding that the defendants' contention is unsustainable, and that in refusing to pay for more than fourteen days allowed by the contract the

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Rs. 1,000 due to the plaintiff under Exhibit C even after it was pointed out by Mr. Pogson that the advance for the iron columns had been included in Rs. 10,226 for which he had given the defendants credit in framing the certificate, they broke one of the terms of the contract.

The second point is whether there was a further breach of contract on the part of the defendants in their having entered into possession in the middle of July for the purpose of taking steps to complete the works, which had been at a standstill since 22nd May. The contention of the plaintiff is that in consequence of the [188] defendants' failure to pay the Rs. 1,000 he suspended the work, but temporarily under paragraph 16 of the contract and that the defendants' interference during the period of suspension was not lawful. The contention on the other side is that the suspension was not merely temporary that there was a complete cessation of work and recission of the contract and that their taking possession was lawful I agree with the defendants on grounds which I shall now consider *seriatim*.

In the first place I am of opinion that the plaintiff did not merely suspend the work for a time, but that he, in consequence of the defendants' default, rescinded the contract as he was empowered to do under the paragraph referred to, which after providing that the plaintiff may suspend the work and demand payment of moneys due to him adds " and in such case the contractor shall not be bound to proceed further with the works." That the plaintiff did enforce this clause is clear from Exhibit G, wherein on the 21st May he wrote to the defendants " I beg " you will take notice that I have suspended all works connected with " your new building as you have failed to fulfil several considerations " written in the agreement, dated 21st August 1893, and I am also " afraid to continue the work further as you have more than once in- " terfered with me against the agreement, and I therefore beg you will " be pleased to settle all my accounts connected with the above work " within ten days from this day, *after which I am not responsible for* " *the loss or damage sustained by your property in the new premises.*" Even if I were in error in inferring from the said letter that the plaintiff intended to enforce the clause of paragraph 16 quoted above, it seems, to me that the letter coupled with his subsequent conduct brings the case within the latter part of the rule laid down in *Mersey Steel and Iron Company* v. *Naylor Benzon and Co.* (1) where Lord Selbourne states it thus " according to the authorities, and according to sound reason " and principle the parties might have so conducted themselves as to " release each other from the contract and that one party might have so " conducted himself as to leave it at the option of the other party to relieve " himself from a further performance of the contract." Admittedly subsequent " to the date of G the plaintiff was requested several times to go on [189] with the work; but he persistently refused to comply with the " demand. The fair inference to be drawn from it is that he treated the contract as at an end in consequence of the default of the defendants, who though, of course, liable to pay him according to the contract what was still then due to him, were, however, thereby released from liability to future performance. Another ground on which the resumption of possession is justified is that the defendants being dissatisfied with the suspension of the work gave the plaintiff under paragraph 13 of the contract notice (Exhibit N) on the 5th June calling upon him to go on with the

(1) L.R. 9 App. Cases, 434.

work and as the plaintiff did nothing for more than the 28th days specified in the paragraph, the defendants had every right to enter into possession which they accordingly did These facts are admitted and the provisions relied upon in my opinion entirely support the defendants' contention. Should it however be thought that paragraph 16 of the contract must be read independently of 13 and that the provisions of the latter are inapplicable to suspension under the former, even then, it cannot, I think, be rightly argued that the plaintiff was entitled to stop the work as long as he pleased, simply because paragraph 16 specifies no time during which such suspension may last For " the fact that time is not specified or not " so specified as to be of the essence of the contract does not affect the " general right of either party to require completion on the other part " within reasonable time and give notice of his intention to rescind the " contract if the default is continued " Pollock on Contracts, 6th edition, 488, *Green* v *Sevin* (1) Moreover it having been held that the Court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract, *Macbrayde* v *Weekes* (2) having regard to the fact that any delay in cases like the present would prove detrimental to the building owner and taking also into consideration that in cases falling within paragraph 13, delay for more than four weeks after notice is expressly made improper, I think the refusal by the plaintiff to go on with the work from 22nd May to the middle of July was, according to the authorities, such as to entitle the [190] defendants to rescind the contract and enter into possession I accordingly hold that there was no breach of contract on the part of the defendants in having done so

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The next question is as to the amount to which the plaintiff is entitled. The claim for Rs 12,000 stated to be the damages due to the plaintiff in consequence of the defendants having taken possession in July fails, as I have arrived at the conclusion, that the resumption of possession was rightful.

The remaining question is what is the amount due to the plaintiff by the defendants on account of their failure to pay the Rs. 1,000, the balance due under the certificate (Exhibit C) and the consequent breach of contract. The plaintiff's right in this respect is clearly defined in paragraph 16 of the contract itself, which entitles him only " to payment for all " works executed and for all materials laid down on the site and for any " loss which he may sustain upon any goods or materials purchased for " the works." These explicit provisions, however, have, for some reason or other, not been attended to in framing the plaint, the schedule to which does not state the value of work done or the materials laid down upon the site or loss sustained, but instead gives the prices of materials alleged to have been purchased and details of other expenses said to have been incurred by the plaintiff in connection with the building in general And nearly half the time taken up by the trial was spent in investigating the question of the truth and correctness of the statements in the said schedule. In thus departing from the plain directions of the contract the plaintiff has followed an entirely erroneous course and consequently I refrain from discussing the evidence adduced with respect to this part of the case. I would only observe that, even if I were of opinion that the claim thus made by the plaintiff were regular, I should hesitate very much

(1) L. R. 13 Ch. D. 599 (2) 22 Beav 533.

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to allow it without considerable reductions, since the oral evidence in support of it, which is chiefly that of the plaintiff, has to be received with great caution as his cross examination clearly shows, and since the accounts (Exhibit 2 series) produced to corroborate the oral testimony appear to be books not kept in the usual course of business, but prepared in view to this litigation. (His Lordship, after discussing the evidence for plaintiff, as to the amount due and declining to act upon it, continued as follows):—

[191] I now pass to consider that of Mr. Stephens, called on behalf of the defendants. I am unable to accept this either, except as to the items appearing at the end of Exhibit 44, and amounting to Rs. 2,960-12-7, the correctness of which I see no reason to question. In coming to this conclusion, I am not to be understood as in any way doubting Mr. Stephens' veracity; for he appeared to me to be a disinterested and straightforward witness. But as observed by Denman, J., in *Stevenson* v. *Watson* (1), " it frequently happens that there will be skilled architects " called on one side and on the other, who very often honestly differ as " to the proper mode of measuring up and disagree to the extent of " hundreds of pounds as to what is owing under a bill of quantities." Further the evidence of architects as to valuation is in truth expert testimony, which the Court has little means of testing except perhaps where the conduct of the parties interested furnishes some sort of guide to forming an opinion in the matter as, I think, is the case in the present instance. Testing it in this way, though Mr. Stephens' measurements appear to be very accurate, his rates I conclude, are lower than they should be. For, if, as Mr. Stephens thinks, that up to the 10 April the work executed and materials laid down upon the site amounted to only about Rs. 13,600 in round numbers it is scarcely likely that the defendants who, from the correspondence produced in this case, appeared to have exercised great watchfulness over the works, notwithstanding the employment by them of Mr. Pogson and a competent clerk of the works Mr. Cormac, lately an Assistant Engineer in the Public Works Department, would not only have paid the plaintiff over Rs. 15,000, but also consented to give him the further sum of Rs. 2,500, which they offered through Mr. Pogson on the 6th July (Exhibit O).

It remains for me to deal with Exhibit FF, dated the 10th April, submitted by Mr. Pogson in his capacity of architect under the contract to the defendants in consequence of the objections taken by them to Exhibit DD and the certificate (Exhibit C) and which (FF) was clearly intended to be a decision (see Exhibit KK) under paragraph XVII of the contract, whereby the architect's decision " with respect to the amount, state " and condition of the works actually executed or in respect to any and " every question that may arise concerning the construction of the [192] " present contract or the said plans or drawing specification bill of quantities for or in anywise relating thereto shall be final and binding and " without any appeal." The defendants impeach this valuation on the ground of collusion between Mr. Pogson and the plaintiff. The only allegation made in support of the plea of collusion is that there was, unknown to the defendants, a contract between Mr. Pogson and the plaintiff, that the latter was to pay the former $2\frac{1}{2}$ per cent. on the estimated value of the buildings for his services as a quantity surveyor and that such

(1) L.R. 4 C.P.D. 161.

contract gave Mr Pogson an interest which rendered him incompetent to give a binding decision. On behalf of the plaintiff the existence of the alleged agreement is denied. But assuming for argument that there was such an agreement, I fail to see how it was likely to render Mr. Pogson partial to the plaintiff as against the defendants who were under a contract to pay Mr Pogson at the rate of 5 per cent. On the contrary, I should think the alleged agreement would only go to reduce somewhat the "unindifferency" (as it was called in *Ranger* v *Great Western Railway Company* (1), that Mr. Pogson would otherwise, upon the defendants' theory, have shown to them Be this as it may, the point is whether, supposing that Mr. Pogson acquired in consequence of the alleged contract an interest as stated, it affects the validity of his decision as contended on behalf of the defendants In this connection their counsel, during the argument, treated Mr Pogson as if he were an arbitrator The authorities on this point are not however very decisive as will be seen from a few to which I shall refer In *Scott* v *Corporation of Liverpool* (2) Lord Chelmsford, L C., observes—"But where the contract provides for "the determination of the claims and liabilities themselves of the con- "tractor by the judgment of some particular person this would be in- "correctly called a provision for submission to arbitration as no dispute "can exist in such a case as everything being dependent upon the decision "of the individual named and till he has spoken no rights can arise which "can be enforced either at law or in equity."

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In *Wadsworth* v. *Smith* (3) *Cockburn*, C. J., says "I am of opinion "that in Section 17 by 'an agreement or submission or arbitration by "consent' is meant an agreement by which it is intended by the parties "that the matter shall be submitted to a judicial enquiry [193] before a "person chosen between them instead of being left to the ordinary pro- "ceedings of a Court of law and not merely left to the uncontrolled and "off-hand decision of some architect or surveyor to be appointed by one "of the parties only. Here the clause in question gives the defendant "power to put an end to the agreement if there is unreasonable delay "or unsatisfactory conduct on the part of the plaintiff, such delay or "unsatisfactory conduct to be ascertained and decided in writing by "Messrs. Scargill and Clarke, the defendants' architects, for the time "being against whose decision there shall be no appeal I am by no "means disposed to say that this amounts to a submission to arbitration, "although it is certainly wider and different from many of the ordinary "clauses as to the certificates of architects which have occurred in cases "under building contracts and which have been determined to be binding "on the builder and not to be clauses of arbitration." Blackburn, J, remarks "where by an agreement the right of one of the parties to have "or do a particular thing is made to depend upon the determination of a "third person that is not a submission to arbitration nor is the determina- "tion an award, but where there is an agreement that any dispute about a "particular thing shall be enquired of and determined by a person named "that may amount to a submission to arbitration and the determination "though in the form of a certificate be an award." Hannen, J., says "I "think this is not an agreement or submission to arbitration. The clause "in question seems to me no more than an extension of the ordinary clause "in building contracts, that the certificate of the architect shall be conclu-

(1) 5 H. L. C. 88 (2) 3 De G. & J 368. (3) L R 6 Q B. 336.

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"sive as to the work done and the mode of doing it." Perhaps the statement most favourable to the contention put forward on behalf of the defendants is a dictum of Denman, J., in *Stevenson* v. *Watson* (1) already referred to, wherein the architect's duties are stated to be "very analogous to the duties of an arbitrator;" but this is qualified by the statement "I do not intend to hold that he is to all "intents and purposes an arbitrator." But supposing that the being interested is necessarily a disqualification in arbitrators in the strict legal sense a question on which I express no opinion—it does not follow that the same is true with reference to persons occupying the position which Mr. Pogson occupied here. In support of this view it is sufficient to refer to the observations of Baron [194] Bramwell in *Ellis* v. *Hooper* (2) in which a dispute having arisen as to the result of a horse race, the stewards (who by the rules of the course were to be arbiters of all disputes) decided against a horse against which one of them had made a bet, it was held that the decision of the stewards was not invalid on the ground of one of them being an interested arbitrator. Baron Bramwell said "the question put by my brother Watson "in the course of the argument seems to be decisive, *viz.*, is there "any implied condition that the appointed arbitrators or judges shall be "without power if one of them becomes interested in the event of the race? "If none exist, then, is there any general proposition of law that whenever "a dispute referred to one or several persons, his or their power shall "cease if any of them becomes interested in the event. I know of no "such rule. When the parties agree to refer a matter they may, if they "please, insert a condition to that effect; but if they do not why should "we make such a condition for them?" (*Ellis* v. *Hooper*, (2). And these observations were referred to with approval by Muttusami Ayyar, J., in *The Secretary of State for India* v. *Arathoon* (3). Since, in the contract here, there is no condition that Mr. Pogson should not be interested, the agreement set up cannot take away his power to act or in any way render his decision not binding. Though such is the conclusion at which I have arrived with reference to the legal aspect of the question, I wish to add that in point of fact no such agreement has been proved. It is quite true that Mr. Pogson says he is entitled to receive, in addition to what he gets from the defendants, 2½ per cent. from the plaintiff, in consideration of the latter making use of the bill of quantities prepared by him (Mr. Pogson). He however does not base his right to this remuneration on any express promise by the plaintiff, but in an indefinite way refers it to a usage prevailing in England which. Mr. Pogson thinks, has been adopted in Madras also. The usage relied on (upheld by Mathew and A. L. Smith, JJ., in *North* v. *Basset* (4) and the contract implied in consequence of it are "that the builder pays the quantity surveyor and puts the amount of the "fees upon the amount of his tender. First of all the building owner agrees "to hand over the money for the quantity surveyor's fees to the builder "and the builder agrees to hold it for the quantity surveyor and the latter "agrees that [195] he shall hold it." In the present case there is really no evidence to show that the above usage has been imported into and prevails in this city and as to whether the plaintiff's tender contained any reference to the 2½ per cent. in question, there is an irreconcilable conflict of evidence which makes it difficult to determine what the truth is. But even assuming that the usage and the tender in accordance with

(1) L. R. 4 C.P.D. (161).
(2) 3 H. and No. 767.
(3) 5 M. 173, (181).
(4) 1 Q. B. D. (1892) 336.

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it have been made out, I fail to see how they hlep the defendants. For, as pointed out in the case cited, the contract to be implied from those facts is a tripartite contract which brings all the parties—the builder, the building owner and the surveyor together and to which consequently defendants would necessarily be parties; but not, as alleged here, an arrangement entered into behind the back and without the knowledge of the building owner. The charge of collusion therefore fails, and Exhibit F F must be held to be binding upon the defendants, subject to an unimportant modification with reference to the item of Rs 526, which includes a sum allowed for stained glass admittedly not delivered upon the premises a modification that is permissible, since the architect's certificate can be attacked not only for fraud but for evident mistake also (*Hennessy* v. *Metzger* (1)).

Even if my view as to the conclusive character of Exhibit F F be wrong, I am inclined to hold that the amount therein mentioned represents the cost of the work done and materials delivered at the site more correctly than either the subsequent valuation of Mr. Pogson or that of Mr. Stephens and Exhibit B prepared by the plaintiff about the time of Exhibit F F and checked by Mr. Cormac, goes to confirm my view, because, even after making allowance for one or two items not checked by Mr Cormac, there is not much difference between the amount of Exhibit B and that of Exhibit F F No doubt Mr. Cormac did not take any accurate measurements when he checked the amount, but considering his long experience as an Engineer of some standing and the zeal which he appears to have throughout displayed in the interest of his employers, I am inclined to think that the figures in Exhibit B, as altered by Mr. Cormac, substantially corroborate those in Exhibit F F which, accordingly, I adopt subject to the disallowance on account of the stained glass, not supplied, of Rs 263, which in the absence of any evidence on the point is in my opinion, the proper [196] amount to deduct being a moiety of the sum allowed for the stained glass windows With reference to the loss sustained on articles purchased for use in the defendants' premises, there is no satisfactory evidence, as I entirely disbelieve what the plaintiff says as to the amount alleged to have been advanced to Chander Singh which is possibly the only item that can be said to fall under this head, though even that is extremely doubtful.

Upon these findings the amount to which the plaintiff is entitled is Rs 6,992 as shown below:—

	Rs
Total amount specified in F F .	19,491
Deduct	263
Balance	19,228
Add the amount at the end of Exhibit 44	2,960
Total .	22,188
Deduct the amount already received by the plaintiff	15,196
Balance ..	6,992

(1) 43 American State Reports, 270

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There will be a decree for the plaintiff for the sum of Rs. 6,992, with interest at six per cent. per annum from the 31st July 1894, the date of the plaint to the date of payment.

As to costs the plaintiff on the one hand has failed to establish the breach alleged to have taken place in July and his claim to the Rupees 12,000-said to be damages sustained by him in consequence of such breach. Further the course adopted by him in putting the other portion of his claim on a footing different from that on which it ought to have been put has led to the irrelevant enquiry which took up a considerable time. On the other hand, there was a breach of contract on the part of the defendants who, moreover, have not succeeded in proving the plea of collusion. In these circumstances the proper order to make is to direct that the plaintiff pay his own costs and the defendants theirs.

Branson & Branson, attorneys for plaintiff.

Barclay, Morgan & Orr, attorneys for defendants.

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19 M. 197=5 M.L.J. 193.

[197] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

VIJENDRA TIRTHA SWAMI (*Petitioner*) *v.* SUDHINDRA TIRTHA SWAMI AND OTHERS, (*Respondents.*)*
[26th March, 1895.]

Civil Procedure Code, Sections 407, 409.

On hearing a petition under Section 409 for leave to sue *in forma pauperis*, the Court must decide whether the petitioner has at the date of the petition, a subsisting cause of action capable of enforcement, and where the cause of action is barred by *res judicata* or limitation, the petition must fail.

[**Overruled**, 13 M.L.J. 292 (295) **(F.B.)**; **F.**, 4 M.L.T. 302 (303); **R.**, 20 A. 299 (301); 13 M.L.J. 425 (426).]

PETITION under Section 622 of the Civil Procedure Code praying the High Court to revise the order of O. Chundu Menon, Subordinate Judge of South Canara, in miscellaneous petition No. 278 of 1893.

Petitioner applied for leave to sue *in forma pauperis* for a declaration that he was the guru of the Puttige Mutt in Udipi and to recover from the counter-petitioner, the present guru, all the property, moveable and immoveable, belonging to the mutt. The counter-petitioner pleaded that the suit was *res judicata*, because it had been decided by the High Court in appeal suit No. 66 of 1881 that petitioner (a minor at that time) was a bastard and unfit to be ordained as swami by the guru, and that petitioner as well as his guru had been excommunicated from caste by proper authority. He further alleged that petitioner was a party to that decree, being represented by a proper guardian, and that, after attaining majority, he applied for review without success. The counter-petitioner further pleaded that the suit was barred by limitation, since more than nine years had elapsed since the date of that decree (26th October 1883) and more than six years from the date on which petitioner attained his majority.

The Subordinate Judge considered that it was competent for him to consider these questions at this stage, relying on *Chattarpal Singh* v.

* Civil Revision Petition No. 31 of 1894.

Raja Ram (1), *Dulari* v *Vallabdas Pragji* (2), *Tarramoney* [198] *Dabee* v. *Hurro Mohun Chatterjee* (3) and *Gunga Dass Adhikaree* v *Baboo Khettur Nath Bose* (4) and, on consideration of the facts, finding that the plaintiff's right was barred by *res judicata* and limitation, dismissed the petition.

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The petitioner appealed to the High Court

Pattabhirama Ayyar, for petitioner

Ramachandra Rau Saheb, for respondents

JUDGMENT

It is contended for the petitioner that the Subordinate Judge acted illegally and without jurisdiction in taking evidence and going into the questions whether the plaintiff's claim was *res judicata* and whether it was barred by limitation I cannot accept this contention. Section 409, Civil Procedure Code, permits the Court to take evidence and hear the parties for the purpose of determining whether the applicant is or is not subject to any of the prohibitions specified in Section 407 Under the latter section, the application may be refused if the appellant fails to satisfy the Court that he has a right to sue This has been construed to mean that the appellant should show that he has a good subsisting cause of action capable of enforcement in Court—*Chattarpal Singh* v *Raja Ram* (1).

I think, therefore, the Subordinate Judge was empowered to consider the questions raised before him by the counter-petitioner The case of *Koka Ranganayaka Ammal* v *Koka Venkatachellapati Nayudu* (5) is not really in conflict with this view. I do not understand that case to lay down that the Court is bound by the allegations in the application and can hold no inquiry whatsoever as to whether there is any foundation for those allegations or not Such a view would be opposed to the provisions of Section 409, which permits the Court to take evidence

It is next argued that even if the Subordinate Judge had power to consider the questions of *res judicata* and limitation, his conclusion against the petitioner is unwarranted by the circumstances of the case I am unable to take this view It is true that in a case where there is ground for reasonable doubt, leave should be granted and not refused But this case I consider is a very clear case I therefore hold that the Subordinate Judge was right in concluding that the claim was *res judicata*. I dismiss the petition with costs.

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[199] APPELLATE CIVIL

Before Mr Justice Subramania Ayyar

RAMA REDDI (*Petitioner*), *Appellant*, *v.* PAPI REDDI AND ANOTHER (*Counter-petitioners*), *Respondents*.* [5th and 9th April, 1895]

Succession Certificate Act—Act VII of 1889, *Sections* 6, 19—*Appeal*

Where a minor petitioner represented by the Court of Wards applied for a Succession Certificate under Act VII of 1889, and the District Court granted the certificate, but ordered security to be given by the Court of Wards: *Held*, that no appeal lay from the order requiring security

[F., 6 Ind. Cas. 599=7 M.L.T. 246=(1910) M W N 265, 5 O C 213 (215)]

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* Appeal against Order No 8 of 1894

(1) 7 A. 661. (2) 13 B 126 (3) 11 B.L.R. App 23
(4) 14 W.R. 281. (5) 4 M. 323.

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THE petitioner, the minor son of one Tippi Reddy deceased represented by the Court of Wards, applied to the District Court for a certificate to collect debts due to the estate of his undivided paternal uncle Papi Reddy and also other debts due to the estate of his late undivided cousin Venkata Reddy deceased. The petition was opposed by Kamatchi Ammal, widow of the late Venkata Reddy, who alleged an adoption to her deceased husband.

The District Judge passed the following order:—" Adoption by " deceased is alleged by counter-petitioner and denied by petitioner. I " cannot decide this summarily. Certificate to petitioner on security by " Court of Wards or Collector. Time two months."

The petitioner appealed on the ground that the District Judge was wrong in demanding security.

The Government Pleader (*Mr. Powell*), for appellant.

Mahadeva Ayyar, for respondent, objected that no appeal lay.

JUDGMENT.

The District Judge passed an order directing that a certificate do issue in favour of the appellant, a minor under the Court of Wards on security being given on his behalf. This appeal is against so much of the order as relates to security. The respondent takes the preliminary objection that no appeal lies against that portion of the order which is appealed against.

Referring to a contention that an appeal lies in such cases, Muttusamy Ayyar, J., in *Sundara Ammal* v. *Kullappa Chetti* (1), observed as follows:—

[200] " Having regard to the language of Section 19, it does not " appear that an appeal is allowed. It suggests an intention to allow no " appeal except as to the grant of certificate as was held with reference to " Act XXVII of 1860 in *Monmohinee Dassee* v. *Khetter* " *Gopaul Dey* (2)." Following this view I hold that the objection taken by the respondent is good. The appeal fails and is dismissed with costs.

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ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

THE MADRAS HINDU MUTUAL BENEFIT PERMANENT FUND, (*Plaintiffs*) *v.* RAGAVA CHETTI AND ANOTHER, (*Defendants*).*
[5th September, 1895.]

Indian Companies Act—Act X of 1866, Section 4—Unregistered association—Mortgage illegality of—Estoppel.

In 1868 The Madras Hindu Mutual Benefit Permanent Fund was created for the purpose of enabling Hindus to assist one another and invest their savings chiefly on landed property, and the doing all such other things as are incidental or conducive to the attainment of the above objects. By the rules of the said fund, which was not registered under the Indian Companies Act X of 1866, it was provided that the members should pay subscriptions at the rate of Rs. 2-8-0 per share per mensem for seven years from the date of admission and that at the end of the seven years Rs. 250 shall be paid in full discharge of each share. It was further provided that subscribers shall be entitled to borrow money from the said fund at interest that a reserve fund be formed and distributed

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*Civil Suit No. 118 of 1894.

(1) Appeal against Order No. 15 of 1894, unreported. (See 5 M. L. J. 36).
(2) I. C. 127.

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once every five years to the subscribers and that surplus collections be distributed among the subscribers annually In 1868 defendant's father borrowed money on mortgage from the fund in accordance with the rules, and the amount was admittedly due at the time of suit The fund was wound up under an order of the High Court, dated 15th September 1877, during the life-time of defendant's father, who, however, took no active part in those proceedings It further appeared that, on the execution of the mortgage, the defendant's father (the mortgagor) took a lease from the mortgagees of the houses mortgaged and retained possession of them as tenant:

Held, that the association had for its object the acquisition of gain, that as the association consisted of more than twenty members and was not registered, its formation was forbidden by the Indian Companies Act X of 1866, Section 4, that the [201] suit mortgage having for its object the carrying out of the illegal purpose of the association was an illegal transaction and that the suit must fail.

Held further, that the defendants were not estopped from setting up the plea of illegality either by the order of 1877 or by reason of their predecessor in title having attorned to the fund.

[R., 38 C. 512 (515)=13 C L J 693=10 Ind Cas 467, 13 C.W N 937 (939), 16 Ind Cas. 30 (32)=23 M L J. 301 (304)=12 M L T 211=(1912) M W N 882, 21 M L J 1077 (1084)=10 M L T 385 (387)=(1911) 2 M W N 461]

The facts of the case are as follows:—

The plaintiffs, the official liquidators of an association, called the Madras Hindu Mutual Benefit Permanent Fund, sue for the recovery of Rs. 4,845-4-0 by the sale of two houses in Triplicane mortgaged to the fund under an instrument, dated 16th December 1868, and executed by one Parthasaradhi Chetti, the father of the defendants, and at or about the same time he executed an agreement with the association by which he became tenant of the mortgaged property on payment of a monthly rental. The late Parthasaradhi Chetti was a member of the association, and the principal amount secured by the mortgage was lent to him as such member under the rules of the association The loan and the mortgage were admitted, and the suit was decided on questions of law The association was wound up by order of the Court, dated 15th September 1877.

Mr. *K. Brown*, for plaintiff.

Mr *J H. M. Ryan*, for defendants

JUDGMENT

This is a suit by the official liquidators of an association, called the Madras Hindu Mutual Benefit Permanent Fund for the recovery of Rs. 4,845-4-0 by the sale of two houses in Triplicane mortgaged under an instrument, dated the 16th December 1868, executed by the father of the defendants, the late Parthasarathi Chetti, a member of the association, for Rs 3,750 lent to him as such member under the rules of the association. The loan and the mortgage are admitted, as it is only on questions of law that the parties are at issue

The first of the questions is whether the mortgage sued upon is an illegal transaction as is contended on behalf of the defendants The validity of this contention depends upon the answer to the question whether the said association is one falling within the latter part of Section 4 of the Indian Companies Act, which runs as follows —

" No company, association, or partnership consisting of more than " twenty persons shall be formed after the commencement of this Act; " for the purpose of carrying on any business (other than [202] banking,) " that has for its object the acquisition of gain by the company, asso- " ciation or partnership, or by the individual members thereof, unless it

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"is registered as a company under this Act, or is formed in pursuance of "some other Act or of Letters Patent." Now the Madras Hindu Mutual Benefit Permanent Fund, which was not formed for carrying on the business of Banking, consisted of more than twenty persons. It was formed after the said Act had come into force, and not in pursuance of any other Act, or of Letters Patent. Consequently, if its purpose or one of its purposes was to carry on *business* that had for its object the *acquisition of gain* by the association or by the individual members thereof, it became an absolutely illegal association since it was not registered as a company under the Act, the words of Section 4 being in the language of Brett, L. J., imperative and prohibitory and negative (*in re Padstow Total Loss and Collision Assurance Association* (1)). otherwise the association must be held to have been a lawful one.

To obtain a complete and accurate idea of the purpose for which the association was formed, not only paragraph 3 of the memorandum of association, which purports to describe it, but some of the rules framed by the association have also to be taken into consideration. The said third paragraph states the objects to be "to enable Hindus to assist one "another and invest their savings chiefly on landed property, and the "doing all such other things as are incidental or conducive to the "attainment of the above objects." Rule 6 provides for the payment of subscriptions of Rs. 2-8-0 per mensem per share by the members of the association. Rule 27 renders subscribers falling into arrears liable to pay interest on such arrears. Rule 12 directs that the account of the share or shares of every subscriber shall be closed on the expiration of seven years from the date of his admission, and Rs. 250 per share shall be paid in full discharge of his claim. Rules 13 to 25 and Rules 30 relate to the grant from the funds of the association of loans to such of the subscribers as are desirous of borrowing from it and to other matters connected with such loans. Rule 31 prescribes the rates of interest to be charged on arrears of subscription and on the loans to be granted to the subscribers. Rule 37 provides for the closing of the accounts of the association for setting apart a certain amount of money [203] towards the formation of a reserve fund, and for the distribution of the *surplus* collections among the subscribers annually. Rule 39 directs that the *reserve fund* shall be broken up once in five years and be divided among the subscribers.

The observations relied upon on behalf of the defendants, made by Brett, M. R. in *Shaw* v. *Benson* (2), the circumstances of which are very similar to those of the present case are exactly in point. There the M. R. says "If a man lends money to a friend on one occasion even "at interest, he is not carrying on a 'business,' but if he forms a fund "of £1,000 and, from time to time lends money out of it, he is then "lending money to different persons at interest. Every one would say "that this is the 'business of lending money, for it is carried on so long "as any profit can be made. The object is to lend money at intervals "upon successive contracts, therefore the Thornhill Arms Society carries "on a 'business.' A society is not within Section 4 of the Companies "Act, 1862, unless its business has for its object the 'acquisition of "gain.' But Thornhill Arms Society lends money at interest; therefore "it is an association carrying on a 'business' having for its object the "'acquisition of gain.' Perhaps the association itself does not 'gain'

(1) L.R. 20 Ch. D. 146. (2) L. R. 11 Q. B. D. 570.

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"any profit by the 'business,' but the individual members do, and this "seems to be sufficient to bring the society within the prohibition of "the section . . . . The Thornhill Arms Society carries on a "business producing a gain, of which each shareholder may partake "The members are divided into members who lend and members who "borrow money. I do not see what the borrowing members gain; "but lending, members gain and each member has the possibility of "acquiring gain Therefore the Thronhill Arms Society is prohibited "by the Companies Act, 1862, Section 4, and is illegal " The argument "which might be suggested against the above view that the words in "Section 4 " by the individual members thereof " mean " by *all* the "individual members thereof is referred to and noticed by the M R "as well as by the Lords Justices and is rejected as pointed out by "Fry, L J , on the ground that too minute or hypercritical a considera- "tion of the terms of the section was not to be adopted, and that the "Act should be so construed as to carry out the manifest intention of "the Legislature." Upon the authority of this decision and on that of the *Jennings* v. *Hammond* (1) [204] approved of therein, I must hold that the Hindu Mutual Benefit Permanent Fund falls within Section 4 of Act X of 1866 (which is almost identical in its terms with Section 4 of the English Statute) and is illegal *In re Siddall* (2) was strongly relied upon on behalf of the plaintiff There the association was formed for the objection of purchasing a freehold estate and reselling it in allotments to the members of the association The deed was executed by all the members, the name of each, the number of his allotment, the total amount he was to pay, and the amount of his monthly payment to be made in respect of it being specified in the schedule to the deed The property was vested in trustees and its management was vested in a President, Vice-President, Secretary and a committee The deed contained provisions for the conveyance to the members of their allotments when they had paid up the whole amount payable in respect of them and for the forfeiture and sale of the allotments of defaulting members Powers were given to the committee to make roads, drains, &c , on the land and the trustees were given the powers of borrowing money on mortgage with the consent of the general meeting When all the mortgages had been paid off and all the allotments had been conveyed the society was to come to an end It was held by the Court of Appeal (Baggallay, Bowen and Fry, L JJ) that the association was not formed for the purpose of carrying on any business that had for its object the acquisition of gain. The Lords Justices express themselves, however, in terms which seem to indicate that their decision might have been different but for earlier cases of *Crowther* v. *Thorley* (3) and *Smith* v *Anderson* (4) by which they were bound. And Baggalay, L J., observed, "I must confess that, if I had had to decide *Smith* v *Anderson*, I "possibly should not have entirely agreed with all that was decided in it "My views would to some extent have gone with those of the late Sir "George Jessel whose decision was reversed " Further, even assuming that the decisions *in re Siddall* (2) and the cases, which it followed, were sound in themselves, it is clear that they are quite distinguishable from the present case inasmuch as in none of them the object of the association was to carry on the business of lending money for the acquisition of gain as is the case here [205] In this respect as well as in many others the present case very closely resembles *Jennings* v *Hammond* (1) and

(1) L.R 9 Q.B D 225. (2) L. R. 29 Ch D. 1
(3) 32 W. R 330. (4) L R 15 Ch D 247 (5) L R. 11 Q. B D 563 (572)

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Shaw v. *Benson* (5) cited above which, therefore, notwithstanding the doubt expressed by Lindley, L. J., I think in the absence of any decisions on Section 4 of the Indian Act I shall not be justified in declining to follow. Having arrived at this conclusion I must also hold that the mortgage on which this suit is based is an illegal transaction inasmuch as it had for its object the carrying out of the illegal purposes of the association and it was exactly for similar reasons the promissory notes sued upon in *Jennings* v. *Hammond* (1) and in *Shaw* v. *Benson* (2) were held to be illegal. The plaintiffs however contend that the defendants are estopped from setting up the plea I have dealt with above and seek to support that contention in two ways.

First, it is said that the order of Busteed, J., dated the 15th September 1877, directing that the association in question be wound up bars the defendants from raising the question of illegality herein as much as it was open to their father to raise it before the order was passed. Now there is nothing to show that the late Parthasaradhi Chetti, either directly or indirectly, took any part in the judicial proceedings which resulted in the said order. But it is urged on behalf of the plaintiffs that Parthasaradhi could have as a member of the association intervened if he wished in the said proceedings, and, therefore, the circumstances that he was not actually a party to the order does not affect the binding character of the adjudication. No authority was, however, cited in support of that proposition. Assuming that the principle that a party who has had full notice and has had the opportunity of availing himself of the contest, but has omitted to take advantage of such opportunity will be bound by the decision is applicable to proceedings connected with the winding up of companies, the point for consideration in the present case is in what circumstances an order like that of the 15th September 1877 is to be held to be conclusive.

The authorities on this point seem to be very few. In *ex-parte Hargrove & Co.* (3); Sir George Jessel, M.R., says: "As I understand the "decision in the case of the *London Marine Insurance* [206] *Associa-* "*tion* (4) (which followed other cases), where the application is "to strike out a debt or to obtain an order for a call or anything, which "may be called a subsidiary application on the winding up, it is not "open to any party to say that the winding up order ought not to have "been made. Therefore an objection which amounts to this that there "was no jurisdiction to make the winding up order, or that the wind- "ing up order for some other reason ought not to have been made is "not in the present case admissible." The only other authority that I am aware of is a passage in the judgment of Lord Halsbury in the case of *in re Bowling and Welby's Contract* (5) to which my attention "was drawn on behalf of the plaintiffs. Lord Halsbury observes: "That "leads me to consider what is the effect of the order that has been "made for winding up, and which in some senses may be said to have "been *res judicata*. I should think it probable that the order appealed "against is binding on the association as an association and on every- "body claiming under it or taking title under it." Now the present suit is certainly in no sense a subsidiary application or proceeding in the winding up of The Madras Hindu Mutual Benefit Permanent Fund within the meaning of the ruling of Sir G. Jessel quoted above. And with reference to the dictum of Lord Halsbury cited on behalf of the plaintiffs, it is difficult to understand how the defendants are properly

(1) L.R. 9 Q.B.D. 225.
(2) L.R. 11 Q.B.D. 563 (572).
(3) L.R. 10 Ch. App. 545.
(4) L.R. 8 Eq. 176.
(5) (1895) 1 Ch. 667 (668).

to be held as claiming under or taking title under the association represented by the plaintiffs, since the former are the representatives of the mortgagor whilst the latter are the mortgagees and since in truth it is the latter that derive their title from the person whom the defendants represent. I think, therefore, that the contention that the defendants are estopped from pleading the illegality in question fails in so far as it is based on the order of September 1877

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The second way in which the plea of estoppel is sought to be supported on behalf of the plaintiffs is this The mortgage instrument sued upon having provided that the possession of the mortgaged property should pass to the mortgagees, the mortgagor at the same time executed another instrument whereby he agreed to retain possession of the property as their tenant on a rent of Rs 18-8-0 per mensem It is argued that as such tenant the late mortgagor was and the defendants his representatives are [207] precluded from questioning that the plaintiffs have a valid title as mortgagees as it was in that capacity they let the property in December 1868

As a matter of fact there is no doubt that the two contracts are parts of one and the same transaction In point of law, however, they are either distinct from each other and separate or are connected with one another and inseparable. The contention in question has to be dealt with with reference to both these aspects

I shall first take up the view that the mortgage is distinct and separate from the letting

So far as the latter is concerned, there is no doubt that the defendants are prevented from saying that their landlord had no right to let the houses, and it is also quite clear that the estoppel applies to all matters connected with, or arising out of the contract by which the relation of landlord and tenant was created The estoppel could not, however, extend further and affect matters quite outside that contract In *Carpenter* v *Buller*, PARKE, B , said, " If a distinct statement of a particular fact is made in a recital of a bond or other instrument under seal and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital But there is no authority to show that a party to the instrument would be estopped in an action by the other party not founded on the deed and wholly collateral to it, to dispute the fact so admitted, though the recitals would certainly be evidence " (1) Yet the principle underlying the rule so laid down and followed in numerous cases, of which *in re Simpson* (2) is, I believe, the latest, seems to me to be fully applicable to this case also For the right to recover the amount in question by the sale of the property mortgaged accrues under the contract of mortgage and is absolutely unconnected with the letting, which ex-hypothesi is distinct from the mortgage In the view under consideration, therefore, the plaintiff's argument on the point cannot be upheld

I shall now examine the point with reference to the other view, *viz* , that the two contracts are inseparable parts of one and the same transaction. If this be correct, it follows that the illegality which affects the mortgage taints the letting also. And in the fact [208] of a clear legislative enactment like Section 4 of the Companies' Act, the law recognises no estoppel as between persons who are *in pari delicto*, as the parties

(1) 8 M. & W 212 (213). (2) L R 2 Ch. D 89

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in the present case are. In *Fairtitle* v. *Gilbert* (1), which related to a case of mortgage by trustees, who had no power, according to the Act of Parliament under which they purported to act, to grant the mortgage, Ashurst, J., said, " This deed, therefore, cannot operate in direct opposition to an " Act of Parliament which negatives the estoppel." The observations of Lord Denman, C. J., *Levy* v. *Horne* (2), with reference to the statement of the law made by Ashurst, J., in *Fairtitle* v. *Gilbert* (1) would seem to confine the rule laid down in the latter decision to cases in which the parties were aware or ought to be presumed to have been aware of the provisions of the enactment which prohibits the transaction impeached. In the present case it is unquestionable that the mortgagees as well as the mortgagor as members of the association must be taken to have known the provisions of Section 4 of the Act X of 1866, making the registration of such associations compulsory and rendering unregistered associations illegal. *Barrow's case* (3) is another authority for the proposition that in a case like the present there is no estoppel. There Bacon, V. C., says " But the doctrine of estoppel cannot be applied to " an Act of Parliament. Estoppel only applies to a contract " *inter partes*, and it is not competent to parties to a contract to estop " themselves or anybody else in the face of an Act of Parliament. . . . " I am of opinion that, as between the parties to this contract, there " was no estoppel; they contracted to do a thing which in the result it " was unlawful to do and which could only have been made lawful by " registration."

It thus appears to me that whichever of the two views discussed above is taken the contention of estoppel urged on behalf of the plaintiffs is unsustainable, and the suit must fail on the ground of illegality relied upon on behalf of the defendants.

The result is the suit is dismissed but without costs, since the defendants are the legal representatives of one who was a party to the illegality that has led to the dismissal of the suit.

Champion & Biligiri, attorneys for plaintiffs.

Wilson & King, attorneys for defendants.

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19 M. 209=1 Weir 850.

[209] APPELLATE CRIMINAL.

Before Mr Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS *v.* BHASHYAM CHETTI.*

[15th January, 1896.]

Madras City Police Act—Act III of 1888, *Sections* 42, 45, 47.

Where a Magistrate has recorded that an accused person has pleaded guilty, an affidavit to the contrary sworn to by the accused is not admissible in evidence on revision by the High Court.

In Madras City Police Act III of 1888, Section 47, the words "all or any of the other articles seized" include money or securities for money seized by the police under Section 42. The Magistrate is not bound to hold any enquiry as to whether the money and other things seized were used or intended to be used for the purpose of gaming.

APPEAL against the sentence of Sultan Mohidin Sahib, Presidency Magistrate, Black Town, and petition under Sections 435 and 439,

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* Criminal Appeal No. 618 of 1895, and Criminal Revision Case No. 571 of 1895.

(1) 2 T. R. 169 (171). (2) 3 Q. B. 757. (3) L. R. 14 Ch. D. 441.

Criminal Procedure Code, praying the High Court to revise the order of the said Magistrate in Calender Case No 19476 of 1895 directing the forfeiture of certain jewels and money found, and seized under Section 45 of the Madras City Police Act

1896 JAN. 15. — APPELLATE CRIMINAL. — 19 M. 209=1 Weir 850.

In this case the accused were charged before Sultan Mohidin Sahib, Presidency Magistrate, under Section 45 of the Madras City Police Act III of 1888

The Magistrate recorded that both the accused pleaded guilty and fined the first accused Rs 300 and the second Rs 100 He further ordered that certain of the jewels and the money found should be forfeited and the cards destroyed

The first accused filed his petition to revise the proceedings of the Magistrate and tendered in evidence an affidavit executed by himself setting forth that he did not plead guilty

The following are the material sections of the Act referred to —

Section 42 —If the Commissioner has reason to believe that any enclosed place or building is used as a common gaming house, he may by his warrant give authority to any Police officer above the rank of a constable to enter, with such assistance as may be found necessary, by night or by day and by force if necessary, any such enclosed place or building and to arrest all persons found therein, and to seize all instruments of gaming and all moneys and securities for money and articles of value reasonably suspected to have been used or intended [**210**] to be used for the purpose of gaming which are found therein, and to search all parts of such enclosed place or building and also the persons found therein

Section 45 —Whoever opens, keeps, or uses or permits to be used any common gaming house or conducts or assists in conducting the business of any common gaming house, or advances or furnishes money for gaming therein, shall be liable on conviction to fine not exceeding five hundred rupees, or to imprisonment not excluding three months or to both

Section 47 —On conviction of any person for keeping a common gaming house, or being present therein for the purpose of gaming, all the instruments of gaming, found therein may be destroyed by order of the Magistrate, and such Magistrate may order all or any of the other articles seized, or the proceeds thereof, to be forfeited

Krishnama Chariar, for (appellant) petitioner

The Crown Prosecutor in support of the conviction and order

JUDGMENT

We cannot admit the affidavit of the petitioner which it is sought to use for the purpose of showing that he did not plead guilty. If there was any mistake about the matter, it is the Vakil and not the client who ought to have made an affidavit

We cannot say that the sentence is excessive and must therefore dismiss the appeal

With regard to the articles forfeited it is argued that money and securities for money being specially mentioned in Section 42 of the Act cannot be intended to be denoted by the term 'articles' used in Section 47. In our opinion, however, the phrase " all or any of the other articles " seized " is large enough to cover money or securities for money when seized The narrow construction which it is sought to put on Section 47 would have the effect of making the seizure of money under Section 42 an useless ceremony

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It is then said that the Magistrate ought to have enquired as to whether the money and other things seized were used or intended to be used for the purpose of gaming. Section 47, however, under which the Magistrate is empowered to order a forfeiture, does not require that he should make any such enquiry. It is sufficient that the articles have, in fact, been seized by the Commissioner of Police under circumstances of reasonable suspicion entertained by him.

The Magistrate has a discretion in the matter, and, while he is entitled to presume that the action of the Police authorities has been regular, he would, no doubt, not order a forfeiture in a case where he had reason to believe that the seizure had been irregularly made. In the present case there does not appear to have been any ground for the Magistrate doubting the correctness or regularity of the proceedings of the Police. We must dismiss the petition.

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19 M. 211.

[211] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

ALAGAPPA MUDALIAR (*Plaintiff*), *Appellant* v. SIVARAMASUNDARA MUDALIAR AND OTHERS (*Defendants*), *Respondents*.*
[26th September, 1894, and 9th July, 1895.]

Suit for specific performance of agreement for partition—Alienation of the management of a public charity—Illegal—Effect of partial illegality—Civil Procedure Code, Section 28.

In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the higest price and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangement:

Held, that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement, it might be enforced as to the rest of the property;

Held further, with reference to Section 28 of the Civil Procedure Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement.

[R., 27 M. 192=13 M.L.J. 341 (345); 10 Bom. L.R. 545 (550); 3 Ind. Cas. 104 (105)= 19 M.L. J. 485=6 M.L.T. 161.]

APPEAL against the decree of S Gopalachariar, Subordinate Judge of Tinnevelly, in original suit No. 36 of 1889.

The plaintiff and defendants Nos. 1 and 2 are brothers. Defendant No. 3 is the son of defendant No. 1. The suit was brought by the plaintiff against the defendants to enforce, by execution of a partition deed, the terms of an arrangement as to partition come to by the brothers in the presence of mediators in May 1888 and to declare the rights of the parties. The property set forth in the schedules to the plaint included *inter alia* two items, *viz.*, certain lands in Vachakarapatti described in Schedule II-B and the chattram of Vachakarapatti and the lands attached thereto described in Schedule II-C. With regard to the other items of

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* Appeal No. 23 of 1894.

[N. B.—The first portion, preliminary to final judgment, is also in a way reported in 4 M.L.J. 288.—ED.]

property set forth in the plaint schedules, the Subordinate Judge found them liable to partition, and there was no appeal against this finding of fact. Part of the arrangement sought to be enforced by the plaintiff was to the effect that the three brothers had agreed that the following plaint properties should be sold by auction and that to that brother who bid the highest amount, the other two brothers should relinquish their right in the property sold, [212] that out of the auction-purchase money the debts due by the family should be deducted and the balance if any divided into three equal parts amongst the three brothers. The property so auctioned consisted of—

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(1) the private right in the property in Schedule II-B;
(2) the huk and all other rights in the properties in Schedule II-C,
(3) Rs. 81,700 the sum remaining in first defendant's hands out of the said charity funds,
(4) the outstandings due in that village.

The auction took place and plaintiff purchased for Rs. 7,750. There were certain other particulars arranged in the draft partition deed which are immaterial.

The Subordinate Judge found the arrangement established, but held that, inasmuch as it purported to transfer rights in regard to the charity properties in Schedule II-C and the right of managing them to the plaintiff, it was illegal, and further held that, as the arrangement could not be upheld with regard to such charity properties, the plaintiff was not entitled to any relief with regard to the other properties included in the arrangement. He therefore dismissed the suit.

Plaintiff preferred this appeal.

Subramania Ayyar and *Krishnasami Ayyar*, for appellant.

Ramachandra Rau Saheb, Bhashyam Ayyangar, Ramakrishna Ayyar, Tiruvenkatachariar, and *Seshachariar*, for respondents.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) made the following

ORDER.

This is an appeal from the decree of the Subordinate Judge dismissing the suit without costs. The judgment of the Subordinate Judge which, on the substantial issues of fact (the first, second, third and sixth), is in the plaintiff's favour, proceeds upon certain grounds of law upon which also the arguments in the hearing of the appeal turned. The Judge's findings on the facts were not questioned. It is found as a fact that by agreement between the three brothers a sale of certain properties by auction was effected and the plaintiff became the purchaser. The terms of the whole arrangement are set out in Exhibit E. This sale included among other things the *huk* right of Vachakarapatti choultry, the lands attached to the choultry and certain other lands, the *kudivaram* of which is vested in the family. As to these latter, it is asserted on [213] the defendants' behalf that they also are part of the charity property. There has been no finding on the point.

The Vachakarapatti choultry is one of several charities managed by the family to which the parties belong. It is admittedly a public charity. There is no direct evidence as the conditions fixed by the founder for the management of the choultry, and its property or for the devolution of the right of management. In the inam statement made by the plaintiff's father Thitharappa, Chidambaranatha, who is described as the latter's

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great-grandfather and manager of the charity, appears under the heading 'the name of the original holder.' In another column it is said "the inam was granted to my ancestors by the Carnatic Rajahs for the purpose of conducting charity in the choultry, &c." Thitharappa, it appears, was one of three brothers, who, having previously divided among themselves their family property, in 1871 proceeded to divide the family charities. It is recited in the deed of 26th May 1871 that it was at first settled to manage in common the charities attached to the family, but that they had since come to another arrangement with regard to the same. Under that arrangement the choultry now in question fell to the share of the plaintiff's father. He died in July 1877 leaving two sons Alagappa and Sivaramasundara, the plaintiff and defendant No. 1, and a third, then a minor, now defendant No. 2. In the same year it was agreed between the two adult brothers that, although the hukdarship was common to the three, it should be registered in the name of the eldest, the defendant No. 1 This is all the evidence adduced with regard to the management of the choultry, and it is not likely that more would be forthcoming, inasmuch as it appears from the pedigree that the grandfather and the great-grandfather of Thitharappa each left only one son. Judging from the scanty materials available, we think it must be taken to have been the intention of the founder of the choultry that the office of management should be held in common by the family of the original holder. No other rule of succession can well be suggested. The fact that in 1871 a division of the charties then belonging to the family took place is by itself no ground for holding that any other rule than that above stated holds good with regard to this choultry. It was argued by the plaintiff's vakil that, although the office of superintending religious or charitable institutions cannot be alienated like ordinary property, it is competent to any one member of the family [**214**] interested to renounce or waive his right in the matter (*Mancharam* v. *Pranshankar* (1)). Our attention was also called to the cases in which it has been held that one person may, by force of the law of limitation, lose his right to such an office and another may in the same manner acquire it. It is true that there is an apparent inconsistency in holding that by operation of law an alienation may be effected which cannot be effected by an act of the party. It may be suggested that the explanation lies in the fact that the law of limitation is a law of a general and positive character and that no exemption from it is allowed in the case of charitable or religious offices. It is well settled that such offices cannot be alienated by the act of parties. The question then in whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers their right of control, and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights. But the transaction now before us is of a very different character. It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of the plaintiff and his heirs to the exclusion of his brothers. In our opinion it makes no difference that the alienee is a member of the same family (see *Kuppa*

(1) 6 B. 298.

v. *Dorasami* (1) and *Narayana* v *Ranga* (2)) We think the Subordinate Judge was right in holding the alienation to be invalid 1895 July 9. — Appellate Civil. — 19 M. 211.

The next question is whether the Judge was right, in consequence of this ruling and for the other reasons given by him, in dismissing the suit altogether. His main reason for dismissing it was that in his view the stipulation that a formal document should be drawn up and registered showed that neither party intended to be bound until that was done The Judge refers to *Ridgway* v *Wharton* (3) In our judgment the Subordinate Judge has misunderstood the law and the observations made in the case cited [215]The plain question is whether in fact the terms of the agreement have been definitively settled, or whether the matter rests in the stage of negotiation Here there is no doubt that the terms of the arrangement had been finally determined There was a full and complete agreement between the parties, and they must, as observed by Lord Cranworth, be bound by it, notwithstanding that they intended to have a formal agreement drawn up

Then it is said that, as part of the agreement is void and therefore cannot be enforced, the plaintiff ought not to have a decree for specific performance as to the remainder But for the offer made before us by the plaintiff's vakil there would certainly be a difficulty in decreeing specific performance in part The plaintiff is by the contract under an obligation to pay Rs 7,500 as the price of two properties It is not clear whether he has paid the money or not However he is willing to pay it as the price of the property only in respect of which the agreement is lawful That being so, no question arises as to the apportionment of the money between the legal and the illegal parts of the transaction. The plaintiff being content to pay the whole consideration, we see no reason why the defendants should not be compelled to perform that part of the contract which is lawful The defendants' vakil could not suggest that there would be anything inequitable in such a decree, he only objected that the plaintiff's offer was not made in the Court below This is a matter with which we can deal in our order as to costs

On behalf of the defendant No 3, the minor son of defendant No. 1, a further objection is taken to the frame of the suit It is said that he was improperly made a party to a suit for specific performance, because he was not a party to the contract and no other cause of action could properly be joined in this suit It is clear that against him there can be no decree for specific performance, and indeed the plaintiff does not ask for such relief against him But the plaintiff is interested in having him before the Court in order to obtain an adjudication against him as well with regard to the existence of the contract as with regard to the question whether the contract is of such a nature as to be binding on him The objection that such a decree as is required against the defendant No 3 is one which cannot be combined with a decree for specific performance against the other defendants appears to us to be met by Section 28 of the Code of Civil Procedure According to that [216] section all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter The reasons for giving this latitude are explained in *Honduras Railway Company* v *Tucker* (4), where also specific performance was part of the relief claimed We observe that this authority is not mentioned in *Luckumsey*

(1) 6 M 76
(2) 15 M 183
(3) 6 H.L C 238
(4) L.R 2 Ex D 301.

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Ookerda v. *Fozulla Cassumbhoy* (1), a case somewhat resembling the present. It appears to us that there is here one and the same matter, namely, the contract between the plaintiff and his adult brothers, in respect of which he has a right to relief against them and also against the minor defendant. It is immaterial that the relief is not the same in both cases (see *Janokinath Mookerjee* v. *Ramrunjun Chuckerbutty* (2) and *Rajdhur Chowdhry* v. *Kali Kristna Bhuttacharjya* (3)). Certainly the present case is within the reason of the rule, for it would be most inconvenient to leave to be decided in another suit against the minor defendant the questions above mentioned Of these questions, the latter has been left undetermined, although in the written statement of the minor defendant there is an allegation that the arrangement between the three brothers is prejudicial to his interests. If the plaintiff desires to have any decree against the minor defendant, there must be a finding on the issue whether the said arrangement was made in fraud of the interests of the minor defendant. There must also be findings on the eighth, ninth, tenth and eleventh issues.

As to the memoranda of objections, we see no reason to interfere in the matter of costs, in which the Subordinate Judge has exercised his discretion.

The following were the issues sent back for a finding:—

Is item B in second schedule the property of the family or of the chattram?

Are the debts mentioned in plaint schedule true?

Have plaintiff and second defendant misappropriated properties mentioned in the schedule to the first defendant's written statement?

Has plaintiff paid first defendant Rs. 1,529-5-4 and second defendant Rs. 1,598-13-6?

[217] The Subordinate Judge found that the kudi right belonged to the family and not to the choultry, that the debts in plaint schedule are true, that the misappropriation was not proved and gave no finding as to the eleventh issue. With regard to the new issue he said "the first "defendant must be deemed to have acted as the manager in respect of "his branch, and in such capacity it was competent to him to enter into "an arrangement for division with his brothers, and such arrangement "is binding on third defendant in the absence of fraud or detriment, neither "of which is proved."

On receipt of the above finding the case came on for final hearing before SHEPHARD and BEST, JJ.

Krishnasami Ayyar, for appellant.

Ramachandra Rau Saheb, *Bhashyam Ayyangar*, *Ramakrishna Ayyar*, *Tiruvenkatachariar* and *Seshacharnar*, for respondents.

JUDGMENT.

The eighth issue raises the question whether the family of the parties possesses any interest in the lands comprised in Schedule II-B. The plaintiff's contention is that while the *melvaram* is admittedly part of the charity estate, the *kudivaram* in those lands belongs to the family. According to the memorandum made on the 26th May 1888, the property declared to have been purchased by the plaintiff for Rs. 7,750 was the choultry at Vachakarapatti. It is more particularly described in Exhibit D as "the *huk* right of Vachakarapatti choultry, the lands the registry of

(1) 5 B. 177. (2) 4 C. 949. (3) 8 C. 963.

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which stands in the names of Alagappa Mudaliar and Shanmugasundara Mudaliar in No 6, the decree razinamah, and all other deeds in respect of the said choultry, Rs 747 being in possession of Sivaramasundara Mudaliar, and Rs 70 from the *tirvah* of Sekanapuram and all the lands pertaining to Vachakarapatti choultry together with all the rights and privileges thereof "

The property now claimed as family property consists of the lands registered in the names of Alagappa Mudaliar and Shanmugasundara Mudaliar The circumstance that they are specifically mentioned in Exhibit D is regarded by the Subordinate Judge as indicating that they were not chattram lands In our opinion the language is equivocal, and, taking Exhibit D with Exhibit E, we do not think that any inference in the plaintiff's favour can be drawn from it, rather the contrary Similarly with regard to the security bond (Exhibit R), the language of it is consistent with either view Seeing that the writer styled himself *kukdar*, we think he might, with perfect honesty, describe the charity lands as [218] his lands The fact that he so designates them in such a document is no ground for the inference that he treated the lands as his own to the exclusion of the right of the charity The fact is that the family treated the charity and its property as their own

There is no documentary evidence distinctly showing that the family claimed the *kudivaram* of these lands No patta or village accounts are produced The Subordinate Judge refers to the evidence of certain witnesses. The third witness is the only witness who has no direct interest in these lands His evidence is not specific as to the lands in question, the plaintiff's vakil was unable to show what the receipts mentioned by him proved The other two witnesses are the parties themselves

The defendant No 1 says that the lands were previously entered in the name of the chattram and that he was no party to the transfer to the names of the plaintiff and defendant No 2 The plaintiff on the other hand is unable to say in whose name the lands stood in his father's time, and he has no voucher to show that they stood in his father's name He professes not to know how they came to be transferred to himself and the second defendant It cannot therefore be according to him that the transfer was made by common consent as the plaintiff s vakil contends

We cannot agree with the Subordinate Judge in thinking that the evidence as to enjoyment proves the alleged possession of the *kudivaram* by the family

The result is that we must hold that so much of the agreement as relates to the auction sale in consideration of the Rs 7,750 cannot be enforced

As, however, this arrangement is clearly separate from the rest of the agreement, we see no reason why the plaintiff should not have partial relief There is no dispute as to the findings on issues 1, 2, 3 and 6 It is unnecessary to decide the issues numbered 9, 10 and 11 The finding on the new issue is not challenged

The decree of the Lower Court must be reversed and the plaintiff must have a decree as prayed except so far as regards the property included in Schedules II-B and II-C attached to the plaint, as to which property the plaintiff must be declared to be jointly entitled to management with the defendants Nos 1 and 2•

Under the circumstances we think each party should pay his own costs

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[219] APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

NARAYANA KOTHAN (*Defendant No. 2*), *Appellant v.* KALIANASUNDARAM PILLAI (*Plaintiff No. 2*), *Respondent.**
[24th April and 28th August, 1895.]

Sale in execution—Insanity of judgment-debtor intervening before—Civil Procedure Code, Sections 456, 459, 460—*Act XXXV of* 1858.

A suit was brought by V, to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to decree and prior to sale he has been declared insane under Act XXXV of 1858. The second defendant was the auction purchaser:

Held by Best, J, that objection can be taken under Section 311, Civil Procedure Code, on the above grounds before the sale has been confirmed and certificate granted.

Held by Subramania Ayyar, J., that these facts only amounted to a material irregularity within Section 311, Civil Procedure Code, and that the plaintiff must prove substantial injury.

[R., 22 M. 119 (125).]

SECOND appeal against the decree of C Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 824 of 1892, reversing the decree of V. T. Subramania Pillai, District Munsif of Kumbakonam, in original suit No. 275 of 1889.

Ramasami Sastri, defendant No. 1, herein obtained an ex-parte decree on 24th June 1887 against Vythilingam, the first plaintiff, herein in original suit No. 58 of 1887 on the file of the District Munsif of Kumbakonam for Rs. 1,198 on the basis of three promissory notes. Ramasami Sastri put the decree in execution. The District Collector as Agent to the Court of Wards filed a petition on 22nd October 1888 asking for stay of execution on the ground that Vythilingam was of unsound mind that he was not represented by a guardian and that a suit was going to be filed to have the said decree set aside. This petition was rejected on 22nd November 1888. On 29th July 1889, the Collector brought the present suit against Ramasami Sastri and one Narayana Kothan, second defendant, who had purchased Vythilingam's house in execution of the said decree, but it was dismissed on 17th April 1890. On 16th July 1891, Vythilingam presented a review [220] petition against this dismissal and joined his adopted son as second plaintiff and the assignee of the decree in original suit No. 58 of 1887 as third defendant Whereupon the suit was restored to the file.

In the plaint it was alleged that the three promissory notes had been fraudulently got up by Ramasami Sastri and others, that Vythilingam was sued on them when he was of unsound mind and a decree obtained, that, in execution, Vythilingam's property worth Rs. 1,000 was irregularly sold for Rs. 100, that, as Vythilingam's estate including the property sold was under the Collector's management and as he (the Collector) was not made a party either to the suit or to the execution proceedings, the decree and the sale were invalid and would not bind him (Vythilingam), and that they should therefore be set aside.

* Second Appeal No. 46 of 1894.

Ramasami Sastri, first defendant, contended that the suit was bad for misjoinder of causes of action that the promissory notes were executed by Vythilingam in his proper senses for sums borrowed for family purpose, that as the suit No. 58 of 1887 was brought and decree obtained after Vythilingam was declared by the District Court to be sane, the Collector could not ask for the cancellation of that decree, that, at the time when his property was attached in execution of the decree, Vythilingam objected but his objection was not allowed, and that there was no reason to set aside the decree which was properly obtained, or the sale which was regularly conducted

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Second defendant, the auction purchaser, supported first defendant

Third defendant is the assignee from the first defendant of the latter's interest in the decree in suit No 58 of 1887 The assignment was made on 14th March 1891 and was accepted by the Court on 23rd September 1891

It appeared from the record that Vythilingam Pillai was found to be insane on 13th March 1885, but was subsequently certified by the District Surgeon to have recovered and was released from confinement

The Munsif found that (1) on 15th October 1886, Vythilingam was declared *sane* and his property, which was under the management of the Court of Wards, was ordered to be restored to him, (2) that when original suit No 58 of 1887 was brought, *viz*, on 12th February 1887 and when decree was passed on 24th June 1887 [**221**] Vythilingam was sane; (3) that on 25th July 1888, Vythilingam was again declared to be insane by the District Court, subsequent to which the attachment and sale took place, (4) that the execution proceedings were conducted without a guardian being appointed for him, but that this only amounted to an irregularity which did not vitiate the sale in execution He found that the second defendant purchased *bona fide* and that there was no evidence that the property was sold for less than the real value as alleged He therefore dismissed the suit with costs

On appeal the Subordinate Judge found that the promissory notes sued on in original suit No 58 of 1887 were binding, but reversed the decree and set aside the sale The material portion of his judgment is as follows —

" It is conceded that the first plaintiff was not represented on the " record at the time the execution of the decree was proceeded with He " was declared a lunatic and was in the eye of the law not capable of " acting for himself He was in the same position as a minor at that " time Under Sections 456, 459 and 460, Civil Procedure Code, he should " have been represented by a guardian The proceedings, therefore, were " null and void being *ultra vires* It is not, I think, a mere irregularity " as noticed by the District Munsif. I am inclined to hold that the Court " had no jurisdiction to sell the property in the absence of any body to " represent the defendant on record See *Ramasami* v *Bagirathi* (1) and " *Krishnayya* v *Unnissa Begam* (2) and especially the observation at page " 400 If, therefore, the Court had jurisdiction, then second defendant " is protected and his purchase will be unquestionable within the principle " laid down by the Privy Council in *Rewa Mahton* v *Ram Kishen Singh* " (3) The fact that second defendant is a *bona fide* purchaser, does not, " therefore, affect the present question I differ from the District Munsif

(1) 6 M. 180 (2) 15 M. 399. (3) 14 C 18.

1895 Aug. 28. "on the second question and hold that the execution sale was made "without jurisdiction, *i.e.*, without legal authority."

Defendant No. 2 preferred this second appeal.

APPEL-LATE CIVIL. *Rajagopala Ayyar* and *Tiruvenkata Chariar*, for appellant.

Sankaran Nayar, for respondent.

ORDER.

19 M. 219. BEST, J.—The question for decision in this appeal is whether the Subordinate Judge is right in setting aside the sale [222] held in execution of a decree (in original suit No. 58 of 1887) obtained by one Ramasami Sastri against the respondent's father Vythilingam Pillai. Appellant is the purchaser of the property at the said sale.

The Subordinate Judge's order proceeds on the ground that, at the time of attachment and sale of the property, Vythilingam Pillai was a person adjudged under Act XXXV of 1858 to be of unsound mind and therefore a person who should have been represented by a guardian *ad litem* as required by Sections 456 and 460 of the Code of Civil Procedure; and not having been so represented, the sale must be held to be null and void.

In *Ramasami* v. *Bagirathi* (1) and *Krishnayya* v. *Unnissa Begam* (2), it has been held that even where the judgment-debtor dies *after attachment* but before sale, and the sale takes place without making the representatives of the deceased parties to the proceedings, the sale is illgal and must be set aside. If so, a *fortiori* the absence of legal representatives throughout execution proceedings in a case where the judgment-debtor is dead or incapacitated at the date of the attachment must invalidate the sale The above Madras cases have, however, been dissented from by a Full Bench of the Allahabad High Court in *Sheo Prasad* v. *Hira Lal* (3). See also *Aba* v. *Dhondu Bai* (4). But appellant rests his case, not so much on the above decisions of the High Court at Allahabad and Bombay as on the ruling of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (5), to the effect that, when a Court having jurisdiction orders a sale in execution of a decree, a purchaser of the property sold is not bound to inquire into the correctness of such order any more than into the correctness of the judgment upon which the execution issues See also *Mothura Mohun Ghose Mondul* v. *Akhoy Kumar Mitter* (6) and *Rangasami Chetti* v. *Periasami Mudali* (7), where the law is stated to be that, where the defendant is a *bona fide* purchaser at a Court-sale, any irregularity in the proceedings, which led to the sale, cannot be relied on as a ground for setting aside the sale *after it has been confirmed and a certificate issued.*

Before it is confirmed objection can, of course, be taken under Section 311 of the Code of Civil Procedure.

[223] Before we can dispose of this appeal findings are required on the following issues:—

(1) Was the sale confirmed and certificate issued under Sections 314 and 316 of the Code prior to objection being taken to the same?

(2) Was the appellant a *bona fide* purchaser?

Additional evidence may be admitted on either side and the findings are to be submitted within a month from the date of the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

(1) 6 M. 180. (2) 15 M. 399. (3) 12 A. 440. (4) 19 B. 276.
(5) 14 C. 18. (6) 15 C. 557. (7) 17 M. 58.

JUDGMENT

Subramania Ayyar, J —The question raised before us is as to the validity of the sale of certain immoveable property held in execution of the decree in original suit No 58 of 1887, obtained by the first defendant against the first plaintiff, the alleged adoptive father of the second plaintiff (respondent), the second defendant (appellant) being the purchaser at such sale

The contention on behalf of the plaintiffs was that, from a time prior to that when the property was attached until long after the sale, the first plaintiff was a lunatic; that the first defendant though aware of the fact took no steps to bring on record a proper person to represent the first plaintiff in the execution proceedings, but proceeded with the execution as if the first plaintiff was of sound mind, that the property was sold for about one-tenth of its proper price and consequently the sale could not bind them That, as alleged, the first plaintiff was of unsound mind and was not represented in the execution proceedings which culminated in the sale are found by both the Lower Courts The District Munsif held, however, that the latter circumstance made the sale only irregular and, as it was not shown that the plaintiff sustained any injury by reason of the irregularity, the sale could not be cancelled The Subordinate Judge being of opinion that the absence of anybody to represent the first plaintiff in the execution proceedings rendered the sale one made without jurisdiction or legal authority, reversed the District Munsif's decree and set aside the sale

On behalf of the second defendant, the purchaser, great stress was laid in the Courts below, as well as here, upon the ruling of the Privy Council in *Rewa Mahton* v *Ram Kishen Singh* (1), where Sir B Peacock observed that "If the Court has jurisdiction, a purchaser [224] is no more "bound to enquire into the correctness of an order for execution than he "is as to the correctness of the judgment on which the execution issues" In laying down the rule in the wide terms just quoted, the judicial committee was, I think, only repeating the English Law, respecting sales by Court, as it stood before the passing of the Conveyancing and Law of Property Act of 1881, Section 70 of which provides that "an order of the "Court under any statutory or other jurisdiction shall not as against a "purchaser be invalidated on the ground of want of jurisdiction or want "of any concurrence, consent, notice or service whether the purchaser has "notice of any such want or not" The principle of the rule laid down by the Privy Council is that, so long as a Court is acting within its jurisdiction, *bona fide* purchasers at court sales sought not to be affected by errors or irregularities in the decree or order for sale or other proceedings connected therewith For, as observed by Sir Edward Sugden, L C, in *Bowen* v *Evans* "(2) It would be extremely dangerous to impress upon the minds of pur-"chasers under decrees that that which had escaped the vigilance of the "Court, its officers and of the Bar would form a sufficient ground to set "aside a sale" The following passage in the same judgment may also be usefully quoted as indicating the extent of protection accorded by law to a purchaser at such a sale. "A purchaser has a right to presume that the "Court has taken the steps necessary to investigate the rights of the par-"ties and that it has on that investigation properly decreed a sale, then he "is to see that this is a decree binding the parties claiming the estate "that is to see that all proper parties to be bound are before the Court "and he has further to see that taking the conveyance, he takes a title

(1) 14 C 18=13 I A 106

(2) 1 Jo and Lat. 178

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"that cannot be impeached aliunde. He has no right to call upon the "Court to protect him from a title not in issue in the cause and no way "affected by the decree: but, if he gets a proper conveyance of the estate "so that no person whom the decree affects can invalidate his title, al- "though the decree be erroneous and therefore to be reversed, I think the "title of the purchaser ought not to be invalidated If we go beyond this, "we shall introduce doubts on sales under the authority of the Court, "which would be highly mischievous." Looking to the reason of the rule, as explained in the above extracts, it appears to me that the language [225] of the judicial committee already quoted is to be understood, not as limited to the circumstances of the particular case then before it, but, as intended to lay down a broad rule applicable to judicial sales in this country.

Applying the rule, thus enunciated, to the present case, the first point is to see whether the sale was as held by the Subordinate Judge made without jurisdiction. That the Court which passed the decree in original suit No. 58 of 1887 had jurisdiction to pass it and that the decree was in force and capable of execution when the sale took place, are not questioned. The only fact said to vitiate the sale, as already stated, is that the first plaintiff, though insane, was not, after he became so afflicted, represented in the execution proceedings. It is difficult to understand how that fact could be said to have divested the Court of the jurisdiction, which it unquestionably had, to execute the decree before the first plaintiff lost his reason, whatever other effect such fact may have upon the validity of the execution proceedings conducted against him during the period of insanity. I am therefore unable to agree with the Subordinate Judge that the sale was made without jurisdiction.

The next point for consideration is how far, if at all, does the circumstance that the plaintiff was not represented in the execution proceedings which terminated in the sale, affect its validity. In dealing with this point, it may be observed that though the Code of Civil Procedure requires no special notice to be given to a judgment-debtor of an intended sale of his immoveable property, yet it does not appear to treat such a sale as a purely ex-parte proceeding. Most probably the legislature thought that, as every proclamation of sale has under Section 289 to be published at some place on or adjacent to the property to be sold and a copy thereof has to be fixed up in a conspicuous part of such property (*Kalytara Chowdhrain* v. *Ramcoomar Goopta* (1), the judgment debtor would thereby get sufficient notice of the proposed sale. However this may be, there can be no doubt as pointed by Ranade, J., in *Aba* v. *Dhondu Bai* (2) that the Code contemplates the necessity of a judgment-debtor being a party to the sale proceedings. See also the observations in *Sheo Prasad* v. *Hira Lal* (3). The provisions of the Code referred to by the learned Judge show that even after a [226] decree the law gives the debtor many reasonable facilities for saving his property from sale, and if a sale has become inevitable, the law further enables him under proper restrictions to complain of irregularities in connection with it if he could show they have proved prejudicial to his interest. Now how could the interest of a judgment-debtor, who has become insane after the decree was passed, be effectually protected in execution, if it is to go on without his being represented therein. And why should the judgment-creditor in a case like this stand on a

(1) 7 C. 466. (2) 19 B. 276. (3) 12 A. 440.

different footing from that occupied by a plaintiff or appellant, seeking relief against persons under such disability, neither of them being allowed by law to proceed without taking proper steps for the due representation of the defendant or respondent in the suit or appeal Though Section 463, Civil Procedure Code, is not expressly made applicable to execution proceedings, yet, I think, the procedure laid down therein ought, in reason, to be followed in cases like the present also, as otherwise serious harm might be done to judgment-debtor under such disability, whose helpless condition entitles them to peculiar protection at the hands of the Court directing the sale of their properties in execution I am of opinion, therefore, that first defendant was bound to see that the first plaintiff was duly represented in the sale proceedings And as he omitted to do so the sale must be held to have taken place without the due observance of the requirements of law on the point

Is such a sale void or is it only liable to be set aside at the instance of the party affected? We have not been referred to any direct authority on this point In England it is quite settled that a contract by a person of unsound mind is not void, but only voidable (See Pollock on Contracts, 6th edition, page 89, and the cases therein cited). When such is the case in respect of transactions into which private parties enter directly with insane persons, it is difficult to see how a different rule is to be laid down with reference to public sales held under the authority of a Court of Justice, it being of the greatest importance, as Sir Edward Sugden observes in the case already referred to that such sales should not be lightly set aside Against this view it may perhaps be urged that the Indian law as to contracts by persons of unsound mind is different from the English Law and that such contracts according to the proper construction of Section 12 of the Indian Contract Act are void and not merely voidable It is not, however, necessary in [227] this case to express any opinion on this point, for assuming for argument's sake that this construction of the section is correct, the ground on which it rests, *viz.*, incompetency to enter into a contract, is quite inapplicable to proceedings in execution where property of judgment-debtors, whether competent to contract or not, is equally liable to be seized and sold And considering that in such proceedings Courts could and would hold the scales evenly between judgment-debtors and purchasers on the one hand and judgment-debtors on the other, the proper course is not to treat sales like the present as entirely null, but to hold that they are liable to be set aside for good cause shown (compare *Jungee Lal* v *Sham Lal* (1)) My view is strongly confirmed by the general tenor of the observations of Muttusami Ayyar, J, in appeal against order No 128 of 1892 where he appears to consider that in cases concerning the validity of sales under the Civil Procedure Code, the real question is whether the defect in the sale to the confirmation of which objection is taken, resulted in substantial injury to the party affected by the same, it being, in the opinion of the learned Judge, immaterial whether the defect in question is an illegality or something less I arrive, therefore, at the conclusion that the sale in the present instance is not void but only irregular

The cases of *Ramasami* v *Bagirathi* (2) and *Krishnayya* v *Unnissa Begam* (3) relied upon on behalf of the plaintiffs, are not, in my opinion, in conflict with the above conclusion The question in both cases was whether a sale of the property of a deceased judgment-debtor without his

(1) 20 W.R. 120. (2) 6 M. 180 (3) 15 M 399

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representative being brought on the record was valid. This Court held it was not. After the death of the judgment-debtors in these cases there was no one that could be said to have been a party to the subsequent proceedings held therein, the representatives of the deceased parties not having been brought on the record; here, however, the judgment-debtor continued to be a party, though he came under a disability. Consequently these cases do not seem to me to be on all fours with the present. Apart from this, the language employed by the Judges who decided the later of the two cases, is hardly consistent with the view suggested by the words used by the Judges who decided the earlier case. In *Krishnayya* v. *Unnissa Begam* (1), Parker and [228] Wilkinson, JJ., say that "The sale without notice to him of property belonging to a person not a party to the suit "was a material irregularity and must necessarily cause him substantial injury." I do not think that I shall be warranted in supposing that in adding the words "must necessarily cause him substantial injury," the learned Judges intended to use the phrase "material irregularity" to denote something that rendered the sale absolutely null and void, a sense so different from the generally accepted interpretation of the term as used in Sections 311 and 312 of the Civil Procedure Code. I doubt whether the learned Judges intended to go further than to hold that the defect in the sale they had to deal with was from its nature such as to raise a strong presumption that it was calculated to cause loss to the party whose property was sold without his knowledge (compare *Gur Buksh Lall* v. *Jawahir Singh* (2). Moreover in *Aba* v. *Dhonda Bai* (3), already referred to, Jardine and Ranade, JJ., after considering the above two cases, treat the sale without the legal representative of a judgment-debtor being made a party as an irregular and not a void proceeding.

The third and last point to be noticed is that urged on behalf of the second defendant to the effect that, upon the view that the sale was not void, it is not open to the plaintiffs to impeach it on the ground of irregularity as he, second defendant, is a *bona fide* purchaser and the sale has been confirmed and sale certificate issued to him.

The facts necessary to determine this point are not before us. In concurring with my learned colleague in calling for the necessary findings I wish to draw attention to an aspect of the order confirming a sale that has in my view an important bearing upon the question of second defendant's *bona fide*. I refer to the circumstance that an order of confirmation is more than a mere ministerial act, and is a judicial determination, between the purchaser and the judgment-debtor, that none of the objections on which the latter could have sought to set aside the sale before confirmation, exist in the particular case (Sections 311 and 312, Civil Procedure Code). Now to hold that the order of confirmation in the present case is binding upon the first plaintiff, notwithstanding the fact that he was not represented at the time it was [229] passed as he ought to have been, would be to disregard the principle *andi alterum partem*. The disregard of even such a principle seems to be justifiable, provided it is necessary for the protection of *bona fide* purchasers at execution sales. But before the second defendant asks the Court to uphold an order obtained in violation of so fundamental a rule of judicial procedure as that stated above, it is incumbent upon him to satisfy the Court that, notwithstanding the exercise of the due diligence on his part, he was ignorant that the first plaintiff had become a lunatic; especially, as about the time

(1) 15 M. 399. (2) 20 C. 599. (3) 19 B. 276.

the sale in question took place, he had been declared to be such under Act XXXV of 1858, and the fact that there was an adjudication to that effect appears to have been communicated to the Court executing the decree by the Collector's petition, dated 22nd October 1888 For, when the second defendant's bid was accepted, he, as one of the persons interested in securing a valid confirmation, became responsible for the regularity of the subsequent proceedings and consequently was, in my opinion, bound to see that the first plaintiff was duly represented therein From this responsibility he could not escape except by showing that his ignorance of the condition and circumstances of the first plaintiff at the time of the sale and confirmation was not due to any omission on his part to examine the record in the execution proceedings and otherwise to make reasonable enquiries in the matter In the absence of such proof the second defendant would, I think, fail to establish that he exercised the care and attention necessary to make out he is a *bona fide* purchaser as alleged I agree in requiring the Subordinate Judge to submit findings on the matter specified in the judgment of my learned colleague Should the findings be against the second defendant, the Subordinate Judge should also record a finding upon the contention raised by the plaintiffs that they sustained substantial injury by the irregularity in the sale

[On return of findings the parties filed a razinama petition and the suit was compromised]

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19 M. 230=5 M L.J. 218

[230] APPELLATE CIVIL

Before Mr Justice Subramania Ayyar

RAMA AYYAN (*Counter-Petitioner*), *Appellant* v SREENIVASA PATTAR (*Petitioner*) *Respondent* *

[12th March and 18th April, 1895]

Civil Procedure Code, Sections 244, 258

On an application for execution of a decree being presented by a transferee decree-holder, the judgment-debtor opposed alleging in his petition that he had transferred certain immoveable property to the petitioner in consideration of his paying the judgment debt to the original decree-holder and that the petitioner had discharged the debt, but subsequently having got the decree transferred to himself instead of entering up satisfaction of the decree, fraudulently applied for execution Satisfaction had not been entered up under Section 258, Civil Procedure Code

Held that there must be an enquiry into the truth of the judgment debtor's allegations, and if proved the petition for execution must be dismissed, and further that Section 258, Civil Procedure Code, was inapplicable to the present case, since that section applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction

[**R.**, 35 M 659 (662)=12 Ind Cas 657=22 M L J 170 (173)=10 M L T 442=(1911) 2 M W N 568, **D.**, 21 M 409 (411)]

APPEAL against the order of R S Benson, District Judge of South Malabar, passed on civil miscellaneous appeal No 102 of 1893, reversing the order of V Rama Sastri, District Munsif of Temelprom, in civil miscellaneous petition No 1762 of 1893

The facts of this case necessary for the purposes of this report appear sufficiently from the judgment of the High Court

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* Appeal against Appellate Order No 6 of 1894

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19 M. 230=5 M.L.J. 218.

Sundara Ayyar, for appellant.

Respondent was not represented.

JUDGMENT.

In original suit No. 77 of 1883* on the file of the Temelprom District Munsif's Court, a decree was passed against the present respondent. The appellant applied to that Court to execute the decree as tranferee thereof. The respondent put in a petition wherein he stated that he had transferred certain immoveable property to the appellant in consideration of his paying the judg-[231]ment-debt to the original decree-holder, that the appellant accordingly had discharged the debt, that subsequently, however, he (the appellant) had got the decree transferred to himself, and that, having thus become the assignee, instead of entering up satisfaction, he has fraudulently applied for execution of the decree against the respondent. He therefore prayed that the application for execution be rejected. The District Munsif, without taking evidence, dismissed the petition on grounds which I think it unnecessary to notice. The District Judge on appeal came to the conclusion that, if the allegations contained in the respondent's petition be true, the appellant should be taken to have become a trustee for the discharge of the judgment debt in 77 of 1883,* and the appellant's application to execute the decree is an abuse of the trust. Consequently he reversed the order of the District Munsif whom he directed to record, after admitting evidence, a finding on the question of trust raised and to pass a fresh order.

It was urged before me that the District Judge's view, that a trust was undertaken by the appellant when the property was transferred to him, is erroneous, and therefore his order should be set aside and that of the District Munsif, rejecting the respondent's petition, restored. I think, however, that the District Judge's order should not be disturbed, as I hold that it is right in so far as it considers that an enquiry into the allegations of the respondent is necessary.

Now assuming these allegations to be well founded, whether, when the appellant became the transferee of the property in consideration of his paying off the debt due by the respondent, the former became trustee, as suggested in the order of the District Judge, may be open to doubt. But there can be no doubt that the appellant thereby undertook an obligation to discharge the debt. Having undertaken that duty, it follows he has certainly now no right to execute the decree. This would be still clearer if, as alleged by the respondent, the appellant did in fact pay the original judgment-creditor the amount due to him. In such circumstances the application made by the appellant, praying for the execution of the decree, must be held to be a fraud against which the respondent is entitled to redress. And now that the appellant has been allowed to appear on the record as the assignee of the decree, the question whether the application to execute it is fraudulent or not is one relating to execution arising between the decree-[232]holder and the judgment-debtor, and consequently it can and ought to be investingated under Section 244, Civil Procedure Code (*Paranjpe* v. *Kanade* (1), *Subbaji Rau* v. *Srinivasa Rau* (2), *Viraraghava Ayyangar* v. *Venkatacharyar* (3)).

As, however, the agreement between the appellant and the respondent about the former paying the decree amount to the original judgment-creditor

* Found as 77 of 1893 in 5 M.L.J. 218 (219), Ed.

(1) 6 B. 148. (2) 2 M. 264. (3) 5 M. 217.

is said to have taken place so far back as 1883-84, it might perhaps be suggested that the transaction in question cannot, under the last paragraph of Section 258, Civil Procedure Code, be recognized by the Court in execution proceedings, inasmuch as it was not certified by the appellant and inasmuch as the respondent's application was, with reference to the date of the agreement, made after ninety days, the period prescribed for an application by a judgment-debtor under that section I consider, however, that the said paragraph of the section has no application to this case, because at the date of the transaction, which, if proved, would prevent the appellant from executing the decree, he was not himself the decree-holder As I understand the said provision of the law, it is only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand at the date of such transaction in the relation of judgment-creditor and judgment-debtor to each other that a Court executing the decree is prohibited from recognizing such transaction unless duly certified That this must be so is clear when the object of Section 258 is considered—compare *Ramji Pandu* v *Mahomed Walli* (1) following *Yella* v *Munisami* (2) The first paragraph of the section imposes on judgment-creditors the duty of certifying to the Court any payment out of Court on account of any satisfaction or adjustment in respect of the decree The second paragraph enables judgment-debtors to apply to Courts to compel judgment-creditors to certify if they had failed to do so and empowers Courts to hold an enquiry into the matter The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly therefore the enquiry under the said second paragraph can take place only between persons standing in the relation of judgment-debtor and judgment-creditor

[233] If the former has entered into a contract, not with the latter, but with a third party, with reference to the satisfaction or adjustment of a decree, the judgment-creditor cannot make any application against such third party under Section 258, and consequently the latter cannot on principle be permitted to take advantage of the prohibition imposed by the concluding paragraph of that section as a penalty for the judgment-debtor's omission to apply to the Court under the previous paragraph, or for his failure to prove his case if he did apply The circumstance that the third party, subsequently to the contract, becomes the transferee of the decree which he contracted to satisfy, can have no retrospective effect, so as to deprive the judgment-debtor of his right to establish that the transferee is, by the anterior contract, precluded from realizing the judgment-debt

It is hardly necessary to observe that it is not the case of the respondent that, subsequent to the appellant being recognized by the Court as transferee of the decree, anything transpired which the respondent is entitled to rely upon as a satisfaction or an adjustment of the decree As regards the appellant's getting himself recognized as transferee of the decree, there is nothing on the record before me to show whether, at the time when, he applied for it, the respondent had notice of the application, and whether the latter then raised any objection to its being granted and with what result Consequently it is not now possible to pronounce any opinion upon the question how far the order of the Court permitting the name

(1) 13 B. 671 (2) 6 M. 101.

1895 APRIL 18. — APPELLATE CIVIL — 19 M. 230=5 M. L. J. 218.

of the appellant to be put on the record as that of the transferee affects the right of the respondent to object to the appellants being allowed to execute the decree. This and any other question that might be raised against the sustainability of the respondent's present petition will have to be determined at the enquiry which has been ordered, and which I think was rightly ordered.

The appeal fails and is dismissed.

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19 M. 234.

[234] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

KUNHAN MAYAN AND OTHERS (*Plaintiffs*), *Appellants v.* THE BANK OF MADRAS (*Defendant*), *Respondent.**
[15th and 25th October, 1895.]

Indian Contract Act—Act IX of 1872, Section 171—Banker's lien.

The plaintiff deposited certain jewels with the defendant Bank to secure certain debts. Afterwards, he paid the secured debts and demanded the return of the jewels being then otherwise indebted to the Bank:

Held, that the plaintiff was not entitled to recover the jewels without discharging the other debts unless he proved that the defendant had agreed to give up its general lien.

APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of North Malabar, in original suit No. 58 of 1893.

Suit for the return of certain jewels pledged by the first plaintiff on different dates with the defendant as security for loans made to him or their value. The first plaintiff alleged that at the date of the said pledges and loans the defendant was informed that the jewels pledged did not belong to the first plaintiff, but belonged to plaintiffs Nos. 2 and 3, and further that it was agreed that whenever first plaintiff tendered the principal and interest due on the respective loans the jewels pledged therewith were to be returned to him. The plaintiffs alleged that the first plaintiff, on 30th June 1893, tendered the amount due on the loans and demanded the return of the jewels pledged, but that defendant refused to return the jewels alleging that the jewels will not be delivered until the first plaintiff discharges his other liabilities to the Bank. The defendant by its agent admitted the loans and pledges of the jewels in question, but denied that at the time the pledges were made, the defendant was informed that the jewels did not belong to the first plaintiff, and the defendant denied that it was agreed that whenever plaintiffs tendered the principal and interest due on the said loans the jewels were to be returned. The defendant further denied the tender and the defendant further set up that in addition to the amounts for which the jewels were pledged to the defendant the first plaintiff was indebted to the said defendant in a large sum of money and that the [235] defendant has the right to retain any property belonging to the first plaintiff and in defendant's possession, in exercise of his general right of lien on such property for the amount due. The Subordinate Judge by his decree directed that, on payment of the loans by the plaintiffs with interest thereon within one month together with defendant's costs, the defendant should return the jewels pledged.

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* Appeal No. 206 of 1894.

The plaintiffs appealed and the defendant filed a memorandum of objections on the ground that the Lower Court erred in law in finding that the defendant was not entitled to a general lien on the jewels, the subject of the suit for all money due to it, and that it should have found that the defendant was entitled to hold the said jewels until all moneys due to it from the plaintiffs on any account whatever were paid.

1895 OCT. 25 — APPELLATE CIVIL. — 19 M. 224

Mr. C. Krishnan, for appellants.

Mr J. H. M Ryan, for respondent

JUDGMENT.

SHEPHARD, J —The real question to be decided in this appeal is whether, under the circumstances, the defendant had a general lien on the jewels and was at liberty to retain them until the other debt owing by the plaintiff Kunhan Mayan was paid off. I see no reason to differ from the Subordinate Judge in his opinion on the evidence given with reference to the second issue, but the alleged fact of notice having been given to the agent that the jewels belonged to other persons, is not, in my opinion, material, for it is not said that Kunhan Mayan was acting otherwise than with their consent in pledging the jewels. Indeed the evidence in the case of one pledgee is to the effect that the real owner was actually present and took part in the transaction; in another case, the husband of the alleged owner is said to have been present Under these circumstances and seeing that the Bank agent was, as the discharged cashkeeper admits, careful to deal with the plaintiff Kunhan Mayan only, I do not think the right of the Bank in respect of the pledge would be in any way prejudiced by the agent's knowledge, if it had existed The question as to the Bank's general lien is important, because, by his letter of the 22nd August 1893, the agent declined to give up the jewels until the other liabilities of the plaintiff were discharged In this letter, referring to the plaintiff's letter of the previous day, the agent in effect told the plaintiff that he would not take the money offered [236] on the terms indicated in the plaintiff's letter If, therefore, the plaintiff was right in insisting on those terms, he was entitled to say that there was, on the part of the Bank, a waiver of his actual tender of the money The rule of law with regard to general liens is clearly laid down in the 171st section of the Contract Act Bankers have such a lien on things bailed with them unless there is a contract to the contrary It was for the plaintiff in this case to prove the existence of such a contract It was argued that the plaintiff had discharged that burden of proof by showing that a fresh deposit of jewels was made as each loan was advanced. Each loan, with the pledge of jewels accompanying it, must, it was said, be taken as a separate transaction so that the Bank could not retain the jewels pledged to secure one of the loans as security for any other of the three loans The evidence before us as to the relations between the plaintiff and the Bank is meagre All we know is that besides these three loans there were other loans by the Bank to the plaintiff, a list of which with interest was made up to the 31st May 1893 On the 28th June, a deed of hypothecation was given as security The Bank books were not produced, but perhaps it may be inferred that the loans on jewels and the other loans were not entered in one account This circumstance, however, is not inconsistent with the Bank's claim to a general lien The evidence of the cashkeeper, which is extremely brief, shows that he at least thought there was nothing special about the plaintiff's loans and that therefore the jewels might be retained untill all debts

1895 OCT. 25. — APPELLATE CIVIL. — 19 M. 234.

were paid off. It being incumbent on the plaintiff to show that the Bank had agreed to give up the general lien to which by law a Bank is *prima facie* entitled, I must say that in my opinion the plaintiff has failed in his proof. There was, it may be observed, no proper issue on the question, and no attempt made to prove a special contract except by the evidence of the witnesses which was discredited by the Judge. Holding that the Bank was entitled to retain the jewels until the other debts owed by the plaintiff were paid off, I think the suit ought to have been dismissed. I would accordingly reverse the decree and dismiss the suit with all costs.

BEST, J.—Plaintiffs appeal against so much of the decree as directs payment of (1) interest subsequent to 21st August 1893, (date of the letter D) and (2) defendant's costs of the suit, while defendant has taken objection under Section 561 of the Code of [237] Civil Procedure to the disallowance of his claim to a general lien on the jewels pledged.

Plaintiffs' case is that the amount due on the pledge of the plaint jewels was first tendered on 30th June 1893 and again the tender was repeated in writing on 21st August following, by letter D, to which was received the reply E from the defendant Bank's agent, saying that the jewels could not be given up " until full value for same has been received unless you first discharge your other liabilities to the Bank."

The question, therefore, is. had the defendant a lien on the jewels for debts of the first plaintiff other than those for which they were pledged?

The law on the point is contained in Section 171 of the Contract Act, which says that Bankers may " in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them." The burden of proving " a contract to the contrary " is, in the present case, clearly on the plaintiffs, who allege that at the times of deposit of the jewels the then agent was informed that the jewels belonged to second and third plaintiffs and should be returned to them on their paying the moneys due on the particular pledge The Subordinate Judge's finding as to this special agreement, which is against the plaintiffs, is in accordance with the evidence. Mr. Black, the then agent, denies that there was any such agreement, or that he was informed that the jewels belonged to the second and third plaintiffs. The only witnesses who give evidence to the contrary are the first plaintiff and his first witness Achuden, a dismissed cashkeeper of the Bank, who, however, admits that it was " against the rules of the Bank " to advance money on the pledge of jewels known not to belong to the pledger.

Agreeing with the Subordinate Judge in his findings as to the facts, I would dismiss the appeal. But on these same findings the conditional decree in favour of plaintiffs cannot be supported. The suit should have been dismissed in its entirety.

The respondent's objection must, therefore, be allowed and the suit dismissed with costs throughout.

Messrs. *Barclay, Morgan & Orr*, attorneys for respondents.

19 M. 238=2 Weir 461.

[238] APPELLATE CRIMINAL

1896 March 13.

APPELLATE CRIMINAL.

19 M. 238=2 Weir 461.

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Benson

QUEEN-EMPRESS v LAKSHMI NAYAKAN* [13th March, 1896]

Cattle Trespass Act—Act I of 1871, Sections 22, 25—No appeal—Criminal Procedure Code, Section 404

There being no appeal from a conviction under Cattle Trespass Act, the High Court refused to revise the proceedings of the lower Court under Sections 435, 438, Criminal Procedure Code, since there being evidence to support the conviction to adopt such a course would be to substantially allow an appeal

Imprisonment cannot be inflicted in default of payment of the compensation awarded under the Cattle Trespass Act

[R., 31 M 133=7 Cr L J 267=18 M L J 57 (58)=3 M L T 230, 11 C P L R 10 (11) Cr]

CASE referred for the orders of the High Court by A W B Higgens, District Magistrate of Tinnevelly, under Section 438, Criminal Procedure Code

The case was stated as follows —

" In Calendar Case No. 169 of 1895 on the file of the Sub-Magistrate " of Vilatikulam, the complainant charged the accused with having seized " his master's cattle and impounded them, and also with having beaten " him owing to some enmity between the accused and his (complainant's) " master The complaint was under Section 22 of the Cattle Trespass " Act I of 1871 and Section 323 of the Indian Penal Code The Sub-" Magistrate entertained the complaint and tried both the offences to-" gether The complainant examined two witnesses to prove his allegation " The accused pleaded that the cattle grazed on his field and that, for this " reason, he impounded them, and that this complaint was got up against " him because he impounded the cattle He pleaded also that the com-" plainant was beaten by his own men for having allowed the cattle to " stray on another man's land The accused cited four witnesses to prove " his defence The Sub-Magistrate believed the prosecution and dis-" believed the defence and sentenced the accused to pay Rs 12 as com-" pensation under [239] Section 22 of the Cattle Trespass Act and a fine " of Rs 5 under Section 323, Indian Penal Code, or, in default, to undergo " rigorous imprisonment for ten days and five days respectively

" An appeal was preferred by the complainant and the Joint Magis-" trate found that there was not sufficient evidence as to the illegal " impounding, and, as regards the assault, he held that there was no " reason to believe the prosecution rather than the defence He there-" fore quashed the sentence under Section 323, Indian Penal Code, but as " no appeal is provided against the award of compensation under Section " 22 of Act I of 1871, he has made a reference under Section 435, Crimi-" nal Procedure Code.

" The Cattle Trespass Act I of 1871 does not provide for any appeal, " and, under Section 404, Criminal Procedure Code, there was no appeal " against the order of compensation As observed by the Joint Magistrate, " the evidence about the illegal seizure of the cattle is apparently in-" sufficient I consider, therefore, that the award of compensation is

*Criminal Revision Case No 633 of 1895

1896 MARCH 13. — APPELLATE CRIMINAL — 19 M. 238=2 Weir 461.

"unjust, and request that the High Court will be pleased, in exercise of its "powers of revision, to order the refund of the amount of compensation "levied. I have also to remark that the order of the Sub-Magistrate "awarding imprisonment in default of payment of compensation is illegal."

Parties were not represented.

JUDGMENT.

[The District Magistrate is right in stating that no appeal lies against an order under Section 22 of the Cattle Trespass Act (I of 1871), *Queen-Empress* v *Raya Lakshma* (1) and *Dhiku* v. *Deno Nath Deb* (2).

There is evidence that the seizure was illegal and the Sub-Magistrate believed it. The Joint Magistrate however considered it ' insufficient. The High Court, as a Court of Revision, will not, in such a case, weigh the evidence, for to do so would, in effect, be to admit an appeal where the law does not allow it.] So much, however, of the Sub-Magistrate's order as directs that imprisonment be awarded in default of payment of compensation is illegal, and is set aside.

N.B.—The portion in rectangular brackets may be omitted. Since *now an appeal will lie*, ED

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19 M. 240=1 Weir 537.

[240] APPELLATE CRIMINAL.

Before Mr Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS *v.* RAYAPADAYACHI.* [9th January, 1896.]

Penal Code, Section 448—Criminal Trespass—Intent

Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent.

[**F.**, 16 C.P L R. 182 (183); 1 L B.R 355 (356); **R.**, 35 M 186 (187)=12 Cr. L.J. 30 =9 Ind Cas 152=21 M.L J 161=9 M L T 283: 2 Cr L.J 83=13 P.R. 1905, Cr =81 P L R 1905; 4 Cr. L. J. 293=12 P R. 1906 (**F.B.**) Cr.=54 P.L.R. 1907; 12 Cr L.J 148 (149)=9 Ind Cas 895=5 S.L.R 29 (30); U.B R. (1897—1901) 352 Cr., **Com.**, 12 Cr L J. 453 (454)=11 Ind. Cas 797=21 M.L.J. 781 (782)= 10 M L T 118=(1911) 2 M W.N 71, **Expl.**, 26 B. 558 (561).]

CASE referred for the orders of the High Court by R. D. Broadfoot, Acting Sessions Judge of Trichinopoly, under section 438, Criminal Procedure Code.

The facts of this case appear from the letter of reference which is as follows:—

"The Stationary Second-class Magistrate of Udaiyarpalaiyam con-"victed one Rayapadayachi accused in calendar case No. 677 of 1895 on "his file under Sections 451 and 75, Indian Penal Code, and sentenced "him to four months ' rigorous imprisonment.

"The accused appealed against this conviction to the Deputy "Magistrate of Aryalur, who altered the conviction to one under Section "448 and upheld the conviction.

"In this case, there is a distinct finding by the Stationary Sub-"Magistrate that the intention of the accused in entering the house was "to have sexual intercourse with the complainant's unmarried sister.

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*Criminal Revision Case No. 602 of 1895.

(1) 10 B. 230. (2) 15 C. 712.

[Reporter's Note: See *In re* Khadar Khan, 11 M. 359].

"The Deputy Magistrate agrees with the said Sub-Magistrate and with "the said finding; while admitting that it is no offence to have intercourse with an unmarried woman, he adds that in this case the accused "should be presumed to have acted with a criminal intent as 'nothing can "be more annoying and insulting to complainant than such an entry' "I think this is not a correct and proper interpretation of the law "Criminal revision case No 544 of 1885 quoted in page 329, *Weir's* "*Criminal Rulings*, third edition, is in point This ruling is a clear "authority for holding that, in the circumstances stated and found, the "accused has committed no offence, for his *primary* intent, and to that "alone we should look, was not to insult or annoy the brother but to "meet the sister

1896 JAN. 9. — APPELLATE CRIMINAL. — 19 M. 240=1 Weir 537.

"[241] Again on the facts found, it is no more than likely that, as "alleged by the accused, he was enticed into the house in order to be "beaten and falsely charged with theft Under these circumstances I "have the honour to request their Lordships to quash the conviction and "to order that the accused who has been this day ordered to be released "on bail be set at liberty"

Counsel were not instructed

JUDGMENT

We agree with the opinion of the Sessions Judge based on a decision of this Court *in re Sivaratri Guruvaiya* (1) which, however, is not in accordance with a previous decision *in re Vera Gurukkal* (2) In our opinion the accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, cannot be said to have intended either actually or constructively to cause such annoyance It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result The section (441) defining criminal trespass is so worded as to show that the act must be done with intent and does not, as other sections do (*e g* , Section 425), embrace the case of an act done with knowledge of the likelihood of a given consequence

The conviction must be set aside and the prisoner who is on bail released from his bond

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19 M. 241=1 Weir 732.

APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt , Chief Justice and Mr. Justice Davies.

QUEEN-EMPRESS *v*. SUBBANNA.* [14th February, 1896.]

Madras District Municipalities Act—Act IV of 1884, Section 179—Criminal Procedure Code, Section 433

By Section 179, Madras District Municipalities Act IV of 1884, it is provided "the external roofs, verandahs, pandals, and walls of buildings erected or "renewed [242] after the coming into operation of this Act shall not be made of "grass, leaves, mats or other such inflammable materials except with the "written permission of the Municipal Council"

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* Criminal Revision Case No. 532 of 1895

(1) Criminal Revision Case No. 544 of 1895, *Weir's Criminal Rulings, Third Edition*, 329

(2) Criminal Revision Case No 249 of 1882, *Weir's Criminal Rulings, Third Edition*, 328.

1896 FEB. 14. — APPELLATE CRIMINAL. — 19 M. 241 = 1 Weir 532.

Held, that the word "renewed" includes repairing.

[D., U.B R. 1904, 3rd quarter, Upper Burma Municipal Regulation, p 1.]

CASE referred for the orders of the High Court by J. N. Atkinson, District Magistrate of Kistna, under Section 438, Criminal Procedure Code.

The case was stated as follows:—

"One Kowludu Subbanna of Bezwada repaired a portion of his thatched roof without the permission of the Municipal Chairman. The Sanitary Inspector of the Bezwada Municipality prosecued him under Section 179 of the Madras District Municipalities Act, 1884. But the Bench acquitted the accused under Section 245, Criminal Procedure Code, on the following grounds:—

"'This is neither erection, nor renewal contemplated by the Act. Only a portion of the roof was repaired. This is not within the purview of the Act.'

"The Bench is clearly wrong. Section 179 of the Municipal Act covers all 'external roofs of buildings renewed.' My Head Assistant Magistrate comments on the case as follows:—

"'Repair' is renewal and further the contention is not technical. The section places in the hands of the Municipal Council a means of preventing fire through thatched roofs, since the substitution of tiles can, at its discretion, be made a condition of the grant of the license. By decisions such as this, that discretion is taken away, since so long as a vestige of the old roofs remains the plea of repairs will be successful."

Parties were not represented.

JUDGMENT.

We have no doubt that the interpretation put by the Bench of Magistrates upon the meaning of the word 'renewed' is wrong. It includes repairing. The acquittal is set aside and the accused must be retried.

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19 M. 243=6 M.L.J. 39.

[243] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt, Chief Justice and Mr. Justice Parker.

VELU PANDARAM (*Plaintiff*), *Appellant in Appeal No.* 115 *of* 1894 *v.* GNANASAMBANDA PANDARA SANNADHI AND ANOTHER (*Defendants*), *Respondents.*

GNANASAMBANDA PANDARA SANNADHI (*Defendant No.* 1), *Appellant in Appeal No.* 120 *of* 1894 *v.* VELU PANDARAM AND ANOTHER (*Plaintiff, and Defendant No.* 2), *Respondents.** [17th, 23rd September and 22nd October, 1895.]

Religious endowment—Hereditary trustee—Invalid alienation—Limitation.

In a suit brought by a hereditary trustee to set aside certain alienations of the trust property made by his predecessors-in-title and to have it declared that he was entitled to the sole management of the trust property, it appeared that the property was held jointly by plaintiff's father and by the mother of the first defendant On 17th September 1868 first defendant's mother alienated her right to the joint management to the first defendant, who however never

* Appeals Nos. 115 and 120 of 1894.

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got possession until 13th February 1869, on which date plaintiff's father alienated his right to joint management to first defendant; the plaintiff was born in 1875

Held, that the hereditary right of plaintiff was a personal right accuring on the death of his predecessor, *viz*, his father, and that as limitation ran from that date, the suit was not barred

[**Rev.**, 23 M 271 (**P.C.**)=2 Bom L R 597=4 C W.N 329=27 I A 69=10 M L J. 29 =7 Sar. P C J 671, **R.** 23 M 439 (441)]

APPEALS against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 42 of 1892

This suit was brought by the plaintiff as hereditary trustee of the Nakshatramalai Kattalai charity against the first defendant, the adhinamdar of the Dharmapuram mutt, for a declaration to establish plaintiff's right to the sole management of the said charity of Sri Amerthaghateswaraswami temple at Thirukadaiyur and to direct the first defendant to surrender up to the plaintiff the plaint properties. It was further prayed that should the Court [**244**] hold that the first defendant had acquired the second defendant's right in respect of his half share in the management of the said charity, a decree might be passed declaring plaintiff to have the right to hold the plaint properties jointly with the first defendant and to have jointly with him the right to the management of the said charity

The charity in question was alleged to have been founded by the ancestors of the plaintiff and second defendant and the lands described in the plaint schedule attached to it were granted by them for the use of the charity in order that the income thereof might be appropriated and employed for the worship and the celebration of certain festivals It was further alleged that it had been arranged that the management of this charity and the property so granted should vest in the members of their own family from generation to generation While this charity was thus under the management of the family of the founders, the Government took charge of it and the properties thereto attached, but Government disconnected itself from all direct management of this institution and delivered it to plaintiff's grandfather Velu Pandaram in 1850-57 Since then the charity was managed by the said Velu Pandaram and his divided co-parcener Kuppa Pandaram (the father of defendant No 2) until their death, and they were succeeded in the management by the plaintiff's father. In the years 1868 and 1869 the plaintiff's father and one Visalakshi, mother of defendant No 2 and widow of Kuppa Pandaram, accepted each Rs 2,000 from the Pandara Sannadhi of Dharmapuram (first defendant's predecessor-in-title) and transferred to him all their rights to the management and to the lands pertaining to the kattalai, and since that date the Dharmapuram mutt agents have been managing the lands and affairs of the charity The plaintiff's father died in August 1884 The plaint set forth that the plaintiff and defendant No 2 have the right of management according to the family arrangement and custom, but alleged that defendant No 2, having left the management in the hands of the first defendant, and being even after having attained majority unwilling to assume it, the plaintiff has succeeded to the sole management of the entire charity Plaintiff attained his majority on 26th February 1891, and has since frequently requested the first defendant to surrender the office of trustee and the lands pertaining to it but without success

[**245**] The first defendant traversed the allegations in the plaint and pleaded that the suit was barred by limitation He further stated that this

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trust and charity had been attached to the Dharmapuram Adhinam and were handed over to his predecessors in office in 1842 by the Government, that the plaintiff's father having put forward a claim of right in 1867, his claim was purchased for Rs. 2000. The first defendant further raised some other pleas, which are not now material.

The second defendant filed a written statement supporting the plaintiff's case, but seeking to have joint management with him.

The Court of first instance found that, though the origin of the institution was involved in obscurity, there was no doubt that the management of this kattalai was vested in the plaintiff's family, and that its affairs were managed subsequent to the Government management by the plaintiff's grandfather Velu Pandaram and his nephew Kuppa Pandaram, and after the death of Velu Pandaram by his adopted son Nataraja (plaintiff's father) and nephew till the death of the latter. It was also proved that, in August 1868 and February 1869, it passed to the Dharmapuram mutt under two registered conveyances, the one (Exhibit A) executed by the second defendant's mother as guardian of defendant No. 2 and the other (Exhibit H) executed by the plaintiff's father.

In the result the lower Court held that the alienations were illegal, that the suit was not barred by limitation, and that the plaintiff was entitled to joint management of the office and the lands forming its endowment along with defendant No. 1. The lower Court further held that the plaintiff's claim to the half share of second defendant's father was barred by limitation.

The plaintiff appealed in appeal No. 115 of 1894 on the ground that he is entitled to the whole property and management.

Defendant No. 1 appealed in appeal No. 120 of 1894 contending that plaintiff's claim is barred in respect of his father's half share.

Bhashyam Ayyangar and *Sundara Ayyar*, for appellant in appeal No. 115 of 1894.

Krishnasami Ayyar, for respondents in the above.

Krishnasami Ayyar, for appellant in appeal No. 120 of 1894

Bhashyam Ayyangar and *Sundara Ayyar*, for respondents in the above.

JUDGMENT.

[**246**] The ancestors of plaintiff and of second defendant were hereditary trustees of the charity called Nakshathramalai Kattalai attached to a temple of Thirukadaiyur, and were jointly entitled to its management. It was at one time taken under the control of Government, but was redelivered in 1850-57 to Velu Pandaram, plaintiff's grandfather, as hereditary adinakarta, since which time Velu Pandaram and his divided coparcener Kuppa Pandaram continued in joint management. In 1868 Velu Pandaram had been succeeded by his son (plaintiff's father), and Kuppu Pandaram had also died, leaving a minor son (second defendant) and a widow, Visalakshi. On 17th September 1868 Visalakshi, on behalf of her minor son, executed a registered deed of conveyance of his share in the joint management to first defendant's predecessor, the then Pandara Sannadhi of Dharmapuram mutt (Exhibit A), and in the following year (February 13, 1869) plaintiff's father executed a similar deed in respect to his half share in the management (Exhibit H). Since that time the Pandara Sannadhi for the time being (now first defendant) has managed the charity. Plaintiff's father died in August 1884 and plaintiff brought this suit on 17th August 1892 as the successor of his father in the hereditary trusteeship to

recover the properties of the charity and for a declaration of his right to sole management.

Various issues were framed in the Court, below, almost all the allegations made in the plaint having been disputed In the result the Subordinate Judge found that plaintiff was entitled to recover his father's half share in the management, but that his claim to the half share which had belonged to second defendant's father, was barred. A decree was, therefore, passed, giving plaintiff joint possession of the management and property with the first defendant

Against this decree both sides have appealed, the plaintiff in appeal No 115 of 1894 contending that he is entitled to the whole property and management, while the first defendant in appeal No 120 of 1894 contents that plaintiff's claim is barred in respect to his father's half share as well as to the half share of second defendant's father.

Before us the original hereditary right of plaintiff's family has not been contested, nor is it denied that the alienations of the [247] trust property in 1868 and 1869 were illegal The sole points argued have been the questions of limitation

Taking first defendant's appeal (No 120), first, it is argued time began to run against plaintiff's father in 1869 before plaintiff was born (in 1875) and hence that the right was barred long before plaintiff had any claim, which could only have accrued on the death of his father in 1884 The first defendant's pleader complains that the Subordinate Judge has treated the case as if it resembled one of an alienation made by a widow, which would be valid for the life-time of the alienor, and in which the successor's right would only be infringed when the succession opened In support of this contention he referred to *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube* (1) and other cases in which that Privy Council decision has been followed—*Kannan* v *Nilkandan* (2), *Karimshah* v *Nattan* (3), *Giyana Sambandha Pandara Sannadhi* v *Kandasami Tambiran* (4), *Nilakandan* v *Padmanabha* (5), and *Sankaran* v *Krishna* (6).

No doubt the right of plaintiff's father to set aside his own alienation or that of his kinswoman Visalakshi would have been barred long before his death in 1884, but the question is, when did the right to sue as hereditary trustee accrue to plaintiff It seems to us clear that it did not accrue till his father's death in 1884, and he has brought his suit within eight years of that date. Against plaintiff there could be no adverse possession till his right accrued, the act of his father was a fraud on the trust, but plaintiff was not in a position to question it till 1884; the time will therefore run from the date of his predecessor's death See *Mahomed* v *Ganapati* (7), *Jamal Saheb* v *Murgaya Swami* (8), and *Modho Koocry* v *Tekait Ram Chunder Singh* (9)

Another argument put forward was, that since second defendant had permitted his right to sue to become barred by limitation, the plaintiff is also barred, since plaintiff and second defendant were jointly entitled to sue, and we were referred to the cases reported in *Seshan* v *Rajagopala* (10), *Narayanan Nambudri* v *Damodaran Nambudri* (11), and *Moidin Kutti* v *Beevi Kutti Ummah* (12). We [248] do not think these cases apply The personal right of trusteeship is not joint, though the rights of trustees against strangers are joint Any one of the joint trustees as against a

(1) 10 I A. 90 (2) 7 M 337 (3) 7 M 417 (4) 10 M 375 (477). (5) 14 M. 153 (6) 16 M 456 (7) 13 M 277 (8) 10 B 34 (9) 9 C. 411. (10) 13 M 236 (11) 17 M 189. (12) 18 M. 38.

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stranger has a right to claim the whole property, and as plaintiff has brought his suit to recover the properties within twelve years of the accrual of his right, he is not barred by the fact that his co-trustee may have suffered his right to become extinct.

On these grounds the appeal by first defendant (appeal No. 120) must be dismissed with costs.

Passing to the appeal preferred by plaintiff (appeal No. 115) the Subordinate Judge held that plaintiff's father had a right of suit in August 1868, as soon as Visalakshi alienated her son's share in the management, that that right of suit became barred in six years, and hence was barred before plaintiff was born, and that, whether the limitation was six years or twelve, time ran against plaintiff's father, and thus the bar against him was equally a bar against his successor.

In this view of the case we are not able to agree. It appears to us doubtful, in the first place, whether the widow Visalakshi was able to give possession to the purchaser, though, no doubt, the then Pandara Sannadhi sent his men to reap the crops and set up a claim under colour of the document executed by the widow. The Pandara Sannadhi was a far more influential man than plaintiff's father, and he was consequently able to bring pressure upon the latter and induce him to execute the deed H, which was a fraud upon the trust. But we do not think the evidence establishes that between September 1868 and February 1869 the two were in joint possession. The possession seems to have been with plaintiff's father, though efforts were made forcibly to oust him. Exhibit H states that possession was given under that document.

There is then no question of the Pandara Sannadhi having acquired as against plaintiff a right by adverse possession to a joint share in the management, and the cases referred to *Kannan* v. *Nilakandan* (1), *Madhava* v. *Narayana* (2) and *Radhabai* v. *Anantrav Bhagvant Deshpande* (3) do not apply. As no limitation with respect to joint management ran against plaintiff's [**249**] father none ran against plaintiff: and as has been pointed out above, his right to follow the property is not barred, since the suit is brought within twelve years of the accrual of the right.

The appeal must therefore be allowed and the plaintiff be declared entitled to the sole right of management and the possession of the properties attached to the kattalai must be delivered to him.

The first defendant must pay plaintiff's costs in this appeal.

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(1) 7 M. 337. (2) 9 M. 244. (3) 9 B. 198 (231).

19 M 249 (PC)=23 I.A. 32=6 M.L.J. 53=7 Sar. P.C.J. 10

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PRIVY COUNCIL.

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PRIVY COUNCIL

PRESENT

Lords Watson, Hobhouse, Shand and Davey and Sir R Couch
[*On appeal from the High Court at Madras*]

SRI RAJA PAPAMMA RAO (*Defendant*), *Appellant* v SRI VIRA PRATAPA H V RAMACHANDRA RAZU AND ANOTHER (*Plaintiffs*), *Respondents* [12th, and 22nd February, 1896.]

Simple mortgage—Remedy of mortgagee upon default made—Act IV of 1882, Section 58—Construction of decree

On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, Section 58)

In this suit, brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits

Held, that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having only been as mortgagee, and having involved liability to account to the mortgagor

[**Rel.**, 10 Ind Cas 975 (977)=4 S L R 244, 11 Ind Cas 629 (631)=21 M L J 562, **R**, 35 B 204=13 Bom L R 30 (37)=9 Ind Cas 351 (353), 30 C 463 (466), 25 M 244 (260), 30 M 393 (396)=17 M L J 220=2 M L T 351; 7 Ind Cas 36 (37), 6 O C 367 (369), **Expl.**, 29 C 1 (**F B.**)=5 C W N 821 (829), **D**, 16 Ind Cas 694 (696)=23 M L J 360 (362)=12 M L T 330 (332)=(1912) M W N 995, 8 O C 33 (35)]

APPEAL from a decree (21st February 1893) of the High Court, reversing a decree (5th September 1891) of the Subordinate Judge at Ellore

This appeal arose out of a suit filed on the 10th March 1891 by the representatives of mortgagors against the representatives of the mortgagee, claiming re-delivery by them of possession of a [250]talukhdari village, the mortgaged property, on an account being taken of the rents and profits realized by the mortgagees, from the year 1880

No facts were in dispute, and the only question was as to the effect to be given to a decree of the District Court of Godavari of the 16th July 1876, under which the mortgagees had taken possession, and as to whether that decree had effect to deprive the mortgagors of their title to redeem

The mortgage was executed on the 15th June 1870 by the father and elder brother of the plaintiff in this suit to the ancestor of the first and second defendants, of whom one now appealed

The mortgagors undertook in the deed, which was specially registered, to repay a sum of Rs 2,011 with interest by four annual instalments, mortgaging, as security, the talukdari village of Khandrika Sitaranavaram, their ancestral estate

The condition of the mortgage was this :—

" If the debt is not discharged according to the instalments, you " should recover the same by means of the mortgaged property, the crops " of our cultivation, and our other property and from our person according to your wish "

The mortgagee sued the mortgagors upon this bond in 1876, and prayed for a decree directing the defendants to pay the amount then due

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with subsequent interest, "by means of the undermentioned property "and other property." The District Judge of Godavari decreed on the 16th September 1876 in favour of the plaintiff, stating in his judgment: "In accordance with the custom prevailing in the Courts in this Presi- "dency three months' time will be allowed to the defendants within which "to pay up the whole sum now decreed, principal and interest and costs; "failing which, the plaintiff shall be put in possession of the immoveable "and moveable property specified in the bond sued upon, and in the plaint "and schedule, as provided in the terms of the bond." The decree followed in the same words.

On the 26th August 1879 notice was given to the mortgagors to show cause why this decree should not be executed. On the 16th September following, stay of execution was applied for, on the ground that the decree was neither according to the terms of the mortgage deed, nor was according to what had been asked; and that the mortgagors were about to apply for a review. This [251] application, founded on the Judges having wrongly treated the mortgage as one of conditional sale, was rejected on the 10th November 1879 as being out of time; and in 1880 the mortgagees obtained possession. In 1883 the village was sold to a person who again sold it to the present appellant in 1884.

On the 10th March 1891 the representatives of the mortgagors brought this suit for an account alleging that the whole mortgage debt had been discharged by the rents and profits received by the mortgagees down to 1885; and that they were entitled to restitution of the property. The defendants representing the mortgagee by their written statement insisted that the village had become absolutely their property in virtue of the decree of 1876, behind which no Court could go.

On the 5th September, 1891 the Subordinate Judge at Ellore dismissed the suit.

In his judgment he said:—

"I understand from the provision of three months' grace allowed "in the decree for discharging the debt the District Judge of Godavari "meant that the mortgage would be foreclosed on the default made, and "that afterwards the land could be delivered to the decree-holders uncon- "ditionally as was subsequently done."

On the plaintiff's appeal the High Court, (MUTTUSAMI AYYAR and HANDLEY, JJ.) on the 21st February 1893, reversed this decree of dismissal, remanding the suit for decision on the merits. The reason assigned for this result was that the true construction of the decree of 1876 was that the District Judge of Godavari intended to put the mortgagee into possession, only that he should recoup himself the mortgage debt and interest out of the usufruct of the mortgaged property as provided for in the deed, and remain in possession until the debt and interest should have been thereby liquidated; and not that he should retain possession as if on foreclosure.

On an appeal preferred by the representative of the original mortgagee Mr. *J. D. Mayne* appeared for the appellant.

The respondent did not appear.

The argument for the appellant, in brief, was that the decree of 1876 had not received due effect. The effect intended, although that was not the right decree upon a simple mortgage on which default had been made, was that the mortgage after the three months of grace had expired should, on the further default, be [252] foreclosed. Further default occurred; and that the decree in itself was wrong was no ground at the

present day for its not receiving effect The mortgagors, who might have had the decree reversed or amended by taking proceedings in due time, had, after the expiration of the three months' grace, lost all title to the land mortgaged, of which by the necessary effect of the decree of 1876 the lawful possession had passed to the mortgagee The respondents should have sought their remedy, if they had any, by petition when the execution proceedings were pending in the suit decreed in 1876 No separate suit would lie for the construction, and virtually for the setting aside, of that former decree.

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Their Lordships' judgment was, on the 22nd February 1896, delivered by Lord HOBHOUSE :—

JUDGMENT.

The plaintiffs in this suit, who are respondents in the appeal, represent the mortgagors of the property in dispute; and the defendants, who are appellants, represented the mortgagees The present question is, what was the effect of a decree of the District Judge which was passed on 16th September 1876, and which directed that the mortgagees should be put into possession of the property

The mortgage was effected by deed dated 15th July 1870 for securing Rs. 2,011 and interest The debt was to be paid by four instalments On failure to pay " you should recover the same by means of the mortgaged "property, the crops of our cultivation, and our other property, and from " our person " Though it is not here expressed that the mortgagee's remedy is to be by sale under decree, the mortgage falls within the class of simple mortgages, as classified in Sir A Macpherson's work on Mortgages, page 12, and in the Transfer of Property Act, 1882 In such a mortgage there is no transfer of ownership, and the mortgagee must enforce his charge by judicial sale

In the year 1876 the mortgagee, being unpaid, filed a plaint, and prayed for a decree directing the mortgagors to pay debt and costs and interest until realization of the money by means of the mortgaged property and other property. That is precisely the relief to which a simple mortgagee is entitled, whether before the Act of 1882 or since

The difficulty has arisen from the decree which the Court thought fit to make on this plaint After affirming the mortgagee's right to a decree for the money, the District Judge said [253] that " In accordance with the custom prevailing in the Courts in this Presidency, " three months' time will be allowed to the defendants within which to pay " up the whole sum now decreed, principal and interest and costs, failing " which the plaintiff shall be put in possession of the immoveable and " moveable property specified in the bond sued upon and in the plaint and " schedule as provided in the terms of the bond " And he made a decree accordingly.

That decree was not according to law. In default of payment, a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution proceedings. In referring to a Madras custom, the District Judge probably meant only a practice of the Courts to give three months for payment. If he meant a custom to give possession on simple mortgage as the High Court think he did, there is no such custom And Mr. Mayne frankly admitted that the mortgagee was not entitled to the relief given, and that there is no ground for thinking that the decree was agreed on in Court, or consented to by the mortgagor.

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The mortgagor however did not appeal and did not seek relief by way of review until it was too late. The decree therefore stands and is binding on the parties; and the mortgagee took possession under it. He has since sold the property, but that does not affect the rights of the mortgagor. The question is in what character was the possession taken. If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by time when this suit began.

Mr. Mayne contends that the decree was intended as a foreclosure, and is so in effect. The only other kind of possession which can be suggested is usufructuary possession, lasting until the debt is discharged by the profits of the estate; and Mr. Mayne urges that there is nothing in the judgment to suggest such a possession, and that " the terms of the bond " do not warrant possession of any kind. All that is true; but it does not compel the inference that the decree amounts to a foreclosure. There is nothing in the judgment to suggest a foreclosure any more than usufructuary possession; nothing indeed to throw light on the terms of the decree. All we know is that possession was given, and given under some error.

[254] If it were necessary to speculate nicely on the meaning of the Judge, their Lordships would be disposed to agree with the High Court, who consider that when the Judge used the expression " as provided in the terms of the bond " he was thinking that the right given by the mortgage to recover by means of the mortgaged property and the crops meant a right to enter and take the profits. That is certainly more in accordance with " the terms of the bond " than is a foreclosure, which is not a recovery of the debt by means of the property, but a substitution of the property for the debt. If indeed the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary possession, but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale.

It is however hardly necessary to follow the High Court into this speculation. It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession " as provided in the terms of the bond." That was impossible, for there were no such terms; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee, thereupon, became mortgagee in possession; and as such he must submit to be redeemed.

Their Lordships will humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellants:—*Messrs. Burton, Yeates & Hart.*

19 M. 255.

1895 Oct. 14.

APPELLATE CIVIL.

19 M. 255

[255] APPELLATE CIVIL

Before Mr. Justice Shephard and Mr Justice Best.

SURYANARAYANA (*Plaintiff*), *Appellant v* NARENDRA THATRAZ (*Defendant*), *Respondents.** [8th and 14th October, 1895]

Regulation V of 1804, Section 17—Powers of Agents to Court of Wards—Contract Act, Section 25, Clause 3—Promise to pay a time-barred debt

A Collector, as Agent to the Court of Wards, has no authority to bind a ward of the Court of Wards by a promise under Contract Act, Section 25, Clause 3, to pay a debt which is barred by limitation

[R., 6 Ind Cas 760=20 M.L J 567 (568)=7 M L T 383=(1910) M W N 194, D, 34 M 221 (225)=6 Ind Cas 407=20 M L J 808 (813)=8 M L T 105]

APPEAL against the decree of E C Rawson, Acting District Judge of Vizagapatam, in original suit No 1 of 1893.

The plaintiff sued to recover a sum of money advanced in 1879 by his father to the deceased father of the defendant, who was a minor under the Court of Wards and was represented in the suit by the agent to the Court of Wards

The District Judge dismissed the suit as barred by limitation

The plaintiff preferred this appeal

Sankaran Nayar and *Sundara Ayyar*, for appellant

Mr *E B Powell*, for respondent

JUDGMENT

The suit is to recover a sum of Rs 6,583-13-6 as balance due under the document A, alleged to have been executed by the defendant's father to plaintiff's father on the 29th September 1879, for Rs 7,000 repayable on 21st July 1880 with interest at 6 annas per cent per mensem The Judge has dismissed the suit, finding (1) that the genuineness of A is not proved, and (2) that the claim is barred by the law of limitation

A number of letters were produced before the Judge as containing acknowledgments of the debt, and therefore saving the suit from the time bar The Judge rejected these letters as inadmissible by reason of their not bearing a one-anna stamp under Article 1 of Schedule I of the Stamp Act It is contended for appellant that, in thus holding, the Judge was in error—a contention that must be allowed to be good, see *Bishambar Nath* v *Nand Kishore* (1), [256] *Fatechand Harchand* v *Kisan* (2) It is, however, also found by the Judge that even if admitted, the letters would not help the plaintiff, as "there is no evidence worthy of the name" that the defendant's father authorized the writing of the letters. To be of use for saving from the bar of limitation, under Section 19 of the Act (XV of 1877) the acknowledgment must be signed "either personally or by an agent duly authorized on this behalf it is admitted that none of the letters produced are signed by defendant's father, and we agree with the Judge that the evidence is altogether insufficient to support a finding, that those who signed the letters were in fact authorized to do so

Stress is laid on behalf of appellant on Exhibits B to H, in which the debt in question is acknowledged by the Governor's Agent on the death

* Appeal No 181 of 1894

(1) 15 A 56.

(2) 18 B. 614

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of defendant's father. When the estate was taken charge of by the Court of Wards, and, as appears from Exhibits C and G, a sum of Rs. 2,135 was actually paid to the Jeypore Estate "on account of debts due by Srinivasa Bakshi Patro (plaintiff) from Rs. 8,000," which the Bisamkatak Estate (*i.e.*, defendant's estate) owes to him (plaintiff.)

But neither can this payment nor the acknowledgments contained in these letters be of use to plaintiff under Section 19 or Section 20 of the Limitation Act, as they were not made till after the claim had become barred. It remains to consider whether they are sufficient to revive the plaintiff's claim (supposing it ever to have existed) under Section 25 of the Contract Act (Clause 3), which makes enforceable a "promise made in writing and signed by the person to be charged therewith, *or by his agent generally or specially authorized in that behalf*, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits." The question here is, can the Governor's Agent be held to have been the agent of the defendant "generally or specially authorized" to make promises to pay barred debts? Section 17 of Regulation V of 1804, no doubt, authorizes Collectors to liquidate debts due to private creditors from the estates of disqualified proprietors; but the same section contains a proviso "that the permission of the Court of Wards in writing shall have been had and obtained in every instance previously to the payment of any private debt." In the present case the Court [257] of Wards declined to admit the debt and told plaintiff to ish his claim by suit (see Exhibit I). It is clear, therefore, that the nor's Agent, the officer in the Vizagapatam Agency, corresponding lector in the regulation districts had not authority to bind the minor lant by promise under Clause 3 of Section 25 of the Contract Act y the plaint debt.

he above findings make it unnecessary to consider whether A is ie or not. Had it been necessary, we should agree with the Judge ding that the evidence is altogether in sufficient to justify a finding, our of the plaintiff.

he appeal, therefore, fails and is dismissed with costs.

[Reporter's Note.—The defendant's estate, Bisamkatak, is situated in the Jeypore lari, which is a scheduled district—*Vide* Act XIV of 1874, Schedule I. By V of 1874, Section 4 and the second schedule, it is enacted that Regulation V is not applicable to the scheduled districts. See also the revised rules framed guidance of the Governor's Agents in Ganjam and Vizagapatam under the ty of Madras Act XXIV of 1839.]

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19 M. 257.

APPELLATE CIVIL.

efore Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

Palani Chetti (*Defendant No.* 2), *Appellant v.* Subramanyan tti and another (*Plaintiff and Defendant No.* 1), *Respondents.**

[25th March, 1896.]

ge—Effect of foreclosure decree passed by a foreign Court—"Lis pendens"—ansfer of Property Act—Act IV of 1882, Section 52:

In 1887 K., who resided at Singapore, mortgaged certain lands in the Madura listrict to S., who sued and obtained a conditional foreclosure decree on 13th une 1892 in the Supreme Court of Singapore. This decree became absolute on

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* Appeal No. 154 of 1895.

the 3rd October 1892 On 12th August 1892, K hypothecated the said land to P In a suit brought by S· 1896 MARCH 25.

Held, that the decree of a foreign Court cannot directly affect land situated in British India; that at the date of the mortgage there was no decree purporting to operate upon the land, that the doctrine of *lis pendens* was inapplicable APPELLATE CIVIL.

[258] *Quære*. Whether P, would have been bound if he had had notice of the existence of the conditional decree at the date of his mortgage

APPEAL against the decree of C Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No 11 of 1894 19 M. 257.

The facts set forth in the plaint were briefly as follows —

The first defendant, who was residing and carrying on business at Singapore, executed to the plaintiff there on the 2nd April 1887 an indenture whereby, in consideration of a sum of 3,000 dollars received, the former mortgaged to the latter certain property situated in the Trippatur Taluk of Sivaganga Zamindari in the Madura District with a covenant, among other things, to repay the amount with 12 per cent interest per annum on the 2nd May next, and that, if the said sum should not be so paid, then to pay by equal payments on the 2nd day of each and every month with interest at the above-mentioned rate of 12 per cent per annum during the first 12 months from the date of the document, and thereafter at the rate of 13½ per cent per annum on the said 3,000 dollars or on so much thereof as should, for the time being, remain owing until the same should be wholly paid up The mortgage was in the English form and evidenced by Exhibit A, but it was not registered, and an application for registration made to the Sub-Registrar of Trippatur in the Madura District on the 4th December 1891, was rejected by that officer on the ground that the document was not presented for that purpose within four months after it was received in British India (Exhibit I) The first defendant had paid interest on the amount up to the 2nd March 1890 and also by a document (Exhibit M) of the 8th April 1891 agreed to pay the balance of interest and principal, but, not having done so, plaintiff brought suit No 44 of 1892 on the file of the Supreme Court of the Straits Settlements at Singapore and obtained a decree (Exhibit B) on the 13th June 1892 by which it was ordered that the plaintiff do recover against the defendant the sum of dollars 3,793 12, and it was further ordered that it be referred to the Registrar to take an account of principal and interest due on the mortgage and of the costs, and it was further ordered that on payment of such amount found due and costs within one month that the plaintiffs do reconvey the property mortgaged clear of all incumbrances, but in default that defendants should be foreclosed from all equity of redemption in the mortgaged premises

[259] In pursuance of the aforesaid decree, the amount ascertained by the Registrar as due to the plaintiff was dollars 4,159 72 and the same made payable on the 19th September 1892 (Registrar's certificate, Exhibit D), and by a subsequent order of the Court (Exhibit E) the time for payment was extended to 26th idem Defendant not complying with the above orders, the Court passed the final foreclosure decree (Exhibit C) on the 3rd October 1892, whereby it was "ordered that the defendant do from henceforth stand absolutely debarred and foreclosed of, and from all equity of redemption of, and in, the mortgaged premises in the statement of claim mentioned."

The second defendant is made a party to the present suit on the ground that the first defendant has, for no consideration and with a view, of defrauding plaintiff, executed to that defendant a hypothecation deed

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APPELLATE CIVIL.

19 M. 257

of the property on the 12th August 1892, and the plaintiff also alleges that the defendants who had notice of the pendency of the aforesaid suit, are bound by the proceedings therein.

The plaint, therefore, prayed that, in the above circumstances, the Court be pleased to decree that—

(i) plaintiff do get possession of the aforesaid property;

(ii) if the Court holds that the plaintiff is not entitled to possession, then to direct the first defendant to pay plaintiff the sum of dollars 4,159.72 (a dollar being priced at Rs. 2-4-0) with interest thereon at 12 per cent. per annum from 26th September 1892;

(iii) if the Court holds that both the aforesaid reliefs cannot be granted, then to direct the first defendant to pay to the plaintiff the sum of 3,000 dollars and interest or Rs. 10,455-12-0 as particularized in the plaint; and

(iv) the hypothecation-deed aforesaid executed by the first to the second defendant is not binding upon plaintiff

First defendant admitted his execution of the bond of the 2nd April 1887, but denied that of the agreement of the 8th April 1891 and contended that the debt due under the former bond had been wholly discharged. He further stated that he had received no summons in, nor notice of, the suit or of the proceedings in suit No. 44 of 1892 on the file of the Supreme Court of the Straits Settlements at Singapore; that the plaintiff fraudulently recovered judgment in that case by affecting a false service and false return; [260] that he was a subject of British India and not of Singapore; that the *ex parte* judgment passed against him by that Court was not valid nor binding on him; that he had moved the said Court to set aside the decree passed in the case, that the Court had no jurisdiction to pass any decree affecting immoveable property situated in British India; that the plaint has not been properly framed and was opposed to the provisions of the Code of Civil Procedure, and that the same was further bad for misjoinder of parties and of causes of action. It was also pleaded that the plaintiff was not entitled to the alternative reliefs claimed in the plaint; that the suit was barred by limitation; that the plaintiff never became entitled, and could have never become entitled, to the plaint properties; that the mortgage relied on by plaintiff was not valid in law, not having been registered in accordance with the Indian Registration Act and that the hypothecation-deed to second defendant was *bona fide* executed for full consideration.

Second defendant supported the above defence.

On the 4th September 1894, the issues were framed of which the following only are now material, *viz.*, 6th, 9th, 10th and 12th.

The sixth issue— whether the Singapore Court had jurisdiction to pass a foreclosure decree in respect of the plaint property situated in British India?

The ninth issue—whether the hypothecation-bond of the 12th August 1892 by the first to the second defendant was *bona fide* executed for consideration as alleged by the defendants? And even if it was so, is not the said deed binding on the plaintiff on account of pendency at the time of the suit before the Singapore Court?

The tenth issue—is the mortgage relied upon by plaintiff not valid in law and binding on the plaint property by reason of the deed not being registered according to the Indian Registration Act?

On the 3rd July 1894, first defendant applied to the Supreme Court of the Straits Settlements to set aside its judgment, dated 13th June 1892, on the grounds that he had no notice of the suit and that the debt had been fully discharged, and that Court, after recording evidence, found for the plaintiff with costs and passed an order (H) on the 27th November 1894 declaring "that there was money due from the defendant to the plaintiff on the 13th day of June 1892 upon the mortgage in the statement of claim mentioned and that no part of what was so due had been [261] paid or discharged" and directing that the application of the defendant to set aside the judgment and the proceedings thereunder stand dismissed with costs On plaintiff's application No 9 of 1895 stating these further proceedings of the Supreme Court, the Subordinate Judge framed the following additional issue —The twelfth issue—"Whether the defendants are entitled to question the foreign judgment at all, after the passing of the order, dated the 27th November 1894 by the Supreme Court of Singapore?"

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On the sixth issue the Lower Court found that the Singapore Court had jurisdiction to pass the foreclosure decree and that the defendants are now estopped from denying its jurisdiction

On the ninth issue the Lower Court found as follows —

Suit No 44 was filed before the Singapore Court on the 31st May 1892 and the preliminary decree (B) directing foreclosure of the equity of redemption, if the amount were not paid by a certain day was passed on the 13th June 1892, while the hypothecation bond to the second defendant was only executed on the 12th August following or some two months afterwards The second defendant pleads ignorance of the proceedings before the Supreme Court at Singapore, but the doctrine as to *lis pendens* affecting a purchaser or mortgagee is not founded upon any doctrine of actual or constructive notice, but upon the fact that the law does not allow litigant parties to grant, pending the litigation, rights in the property in dispute, so as to prejudice the opposing party A purchaser *pendente lite* cannot, of course, be in a better position than his vendor, and the second defendant is bound by the suit, proceedings and decree of the Supreme Court against the first defendant, as if he (second defendant) was himself a party thereto *Sam v Ippundi Ibrahim Sahib* (1), *Sami Aiyan v Amman Ammal* (2) and *Mannal Eruval v Sanagapalli Latchmidevamma* (3)

With regard to the tenth issue the Court found that the foreclosure decree had the legal effect of absolutely passing the plaint properties to the plaintiff as the defendants are debarred from redeeming and that the plaintiff is entitled to possession, and on the twelfth issue he found that the defendants are not now entitled to question the judgment of the Supreme Court of the Straits Settlements in original suit No 44 of 1892 The Lower Court gave a [262] decree, "that defendants make over to plaintiff the plaint-properties with mesne profits, from date of plaint till restoration at such rate as may be found due in course of execution and costs of suit payable by first defendant, and in case of the Appellate Court holding that the plaintiff has derived no valid title to such property, then the decree of this Court will be that first defendant do pay plaintiff dollars 4,159 72 or Rs 9,359-5-0 with 12 per cent interest thereon from 26th September 1892 (Exhibits C and E) up to date of decree costs of suit and

(1) 6 M.H.C.R 75 (2) 6 M.H.C.R 234 (3) 7 M.H.C.R 104

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further interest on the aggregate amount at 6 per cent. per annum from decree till payment."

Defendant No. 2 appealed.

Sankaran Nayar, for appellant.

Ramasubba Ayyar and *Sundara Ayyar*, for respondents.

JUDGMENT.

On the 12th August 1892 there was executed in the appellant's favour by the other defendant a mortgage of certain property in the Madura district which, at the time, was the subject of proceedings in a suit brought by the plaintiff in Singapore. This latter suit was founded upon an hypothecation of the property, which, as it was not registered, would not in itself create any charge. The Subordinate Judge has decreed in favour of the plaintiff on the ground that the mortgage taken by the appellant was taken subject to the result of the suit in the Singapore Court. He considers that the doctrine of *lis pendens* applies.

We are unable to agree with him. The 52nd section of the Transfer of Property Act expressly limits the operation of the doctrine to suits in British India. Moreover, on general principles it is clear that a purchaser cannot be affected immediately by proceedings in a foreign Court. The decree of a foreign Court cannot directly affect land situated in British India. It can only create an obligation notice of which might possibly affect third parties. In the present case at the date of the appellant's mortgage there was no decree purporting to operate upon the land and it is not alleged that the appellant had had notice of such decree as had been passed.

The Subordinate Judge has not decided the ninth issue which raises the question whether there was really a mortgage. We must reverse the decree so far as the appellant is concerned and remand the case for trial. Costs to abide and follow the result.

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19 M. 263=6 M.L.J. 143=2 Weir 725.

[**263**] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Davies.

QUEEN-EMPRESS *v.* MANIKAM AND OTHERS.*

[23rd February and 3rd March, 1896.]

Criminal Procedure Code, Section 555—Magistrate personally interested—Magistrate giving evidence before himself.

Where a Magistrate, in whose Court a complaint of rioting and mischief had been filed, made a personal inspection of the *locus in quo*: *Held,* that by so doing he had made himself a witness in the case and had thereby rendered himself incompetent to try it: *Held,* further that where a Judge is the sole Judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.

[**Diss.**, 11 Cr. L.J. 171=5 Ind. Cas. 602 (607)=1 P.W.R. 1910 (Cr.); **R.**, 19 A. 302 (303) 27 A. 33 (35)=A.W.N. (1904) 157; 37 C. 340=11 C.L.J. 335 (342)=14 C.W.N. 422=5 Ind Cas. 365=11 Cr. L.J. 121; 5 L.B.R. 52 (53; **D.**, 13 P.R. 1901=89 P.L.R. 1901; 2 Weir 727 (728); 2 Weir 758.]

PETITION under Sections 435 and 439, Criminal Procedure Code, against the conviction and sentence passed under Section 147, Indian

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* Criminal Revision Case No. 596 of 1895.

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Penal Code, by the Second-class Magistrate of Musiri and confirmed on appeal by the Head Assistant Magistrate of Trichinopoly.

The accused were charged with rioting and committing mischief to the paddy sprouts of complainant It appeared from the record that the said Second-class Magistrate on the day subsequent to the filing of the complaint made a personal inspection of the *locus in quo*

Mr. *Bakewell*, for petitioners.

The Magistrate was personally interested in the case within the meaning of Section 555 of the Code of Criminal Procedure and was therefore not competent to try it. *Girish Chunder Ghose* v *Queen-Empress* (1), *Hari Kishore Mitra* v. *Abdul Baki Miah* (2), *Queen* v *Meyer* (3), *Serjeant* v. *Dale* (4). A Magistrate has power to inspect before receiving complaint, Sections 159 and 202, but not after. There is a special provision for inspection by jurymen and assessors, Section 293 The Magistrate had a legal interest in the decision of the case and therefore was in competent to try it [264] *Serjeant* v *Dale* (4). The Magistrate being the sole Judge of law and fact could not be a witness before himself (*Queen-Empress* v *Donelly* (5)), as the accused had no power to cross-examine him. In civil cases the evidence seems to be admissible *Joy Coomar* v *Bundhoo Lall* (6)

Mr. *Wedderburn* and *Rangachariar*, for counter-petitioner

It is open to the Magistrate to inspect the scene of offence and this course is frequently adopted There is no special provision giving the Magistrate power to do so There is no provision for inspecting instruments which have caused wounds Inspection of a place comes under what is called real or material evidence, which appeals directly to the senses of the Judges The Evidence Act does not contemplate such inspection but the definition of the word ' proved,' Evidence Act, Section 3, seems clearly to contemplate more than what is included in the word ' Evidence.' *Joy Coomar* v *Bundhoo Lall* (6) Criminal Procedure Code, Section 526, lays down the desirability of inspecting the *locus in quo* as a ground for granting a transfer The conviction has been upheld on other evidence and the irregularity must be taken to have been cured

ORDER

In this case certain persons—five and more in number—were convicted of rioting under Section 147 of the Indian Penal Code, in that they forcibly entered upon the land of one Kandikkaruppan and there committed mischief by destroying some of his young paddy plants It appears that on the day after the complaint in the case was filed, the Second-class Magistrate who tried the case went to make a local inspection of the scene of the alleged offence, not because he distrusted the truth of the complaint, for he had issued process against the accused, but apparently for the purpose of seeing what damage was done The following is the account given by the Magistrate of the result of his inspection " As alleged " in the complaint the said two fields were in a very disorderly and " pitiable state The young paddy plants and sprouts in the said fields " were lying troden down. There were innumerable pits in the field " caused by the feet of the people A greater part of the said fields was " dug up with spades and several heaps of earth were lying promiscuously " all over the said fields. The spectacle was truly pitiable " The Magistrate then proceeds in his judgment to say " under the above circumstances

(1) 20 C. 857.　(2) 21 C. 920　(3) L R, 1 Q.B D 173.
(4) L. R., 2 Q B D. 558　(5) 2 C 405.　(6) 9 C 363

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19 M. 263 = 1 M. L. J. 143 = 2 Weir 725.

[265] "the thoughtless attempt made by the defence to prove that no mischief was committed to the plants and sprouts of paddy in the fields in "question is utterly futile. Nothing has been adduced by the accused "or their witnesses to show how the said seedlings and sprouts in the said "fields were damaged. The whole defence therefore falls to the ground." In the appeal against the conviction to the Court of the Head Assistant Magistrate, Trichinopoly, objection was taken to this inspection by the Magistrate, on the ground that the Magistrate was making himself a witness in the case and that his evidence should therefore have been open to cross-examination and also that the Magistrate, after conducting such a local enquiry, should not have tried the case. The objections were overruled by the Head Assistant Magistrate, because he found that the Magistrate's evidence was not the only evidence on the point and because he considered that the Magistrate was perfectly right in satisfying himself that the complaint was well founded. It is clear from the facts stated, that the Magistrate's view of the *locus in quo* was what influenced him in finding that the complaint of actual damage being caused was true and that the defence, that no damage was caused, was false The question now before us is whether the Magistrate, having made himself a witness in the case, rendered himself incompetent to try the case The Privy Council has observed in *Harpurshad* v. *Sheo Dyal* (1). "It ought to "be known, and their Lordships wish it to be distinctly understood, "that a Judge cannot, without giving evidence as a witness, import "into a case his own knowledge of particular facts" There is no provision in the Code of Criminal Procedure, which authorizes a Magistrate to make a local inspection in a case which is being tried by himself, and therefore there is no provision as to what is to be done in regard to his examination, in case he should make such local inspection by which he becomes personally acquainted with relevant facts in the case, such as is made in Section 294 of the Code, in the case of a juror or assessor who is personally acquainted with any relevant fact, that is for his being sworn, examined, cross-examined and re-examined in the same manner as any other witness. As it is not possible, therefore, for the Magistrate to be so examined in a trial held before himself, it follows that he cannot comply with the rule of the Privy Council [266] requiring that he should give evidence as a witness. That being so, we agree with the Calcutta High Court in holding that when a Judge is the sole Judge both of law and fact, he cannot give evidence before himself and that the accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they have no opportunity of testing by cross-examination and of rebutting. (See *Girish Chunder Ghose* v. *Queen-Empress* (2) and *Hari Kishore Mitra* v. *Abdul Baki Miah* (3)). A Magistrate by making himself a witness has a legal interest in the decision of the case which disqualifies him from trying it, no matter how small that interest may be (see *Serjeant* v. *Dale* (4)). The learned Judges Mellor and Lush, JJ., therein observed that "the law in laying down this strict "rule has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. "One important object, at all events, is to clear away every thing which "might engender suspicion and distrust of the tribunal and so to promote "the feeling of confidence in the administration of justice which is so "essential to social order and security." Although the law makes no

(1) 3 I. A. 259. (2) 20 C. 857. (3) 21 C. 920. (4) 2 Q. B. D. 558.

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provision for a local inspection by a Magistrate of the *locus in quo* in a case being tried by himself, we do not go the length of saying that under no circumstances may local inspection be made. But we are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that This is the view taken by the learned Chief Justice (Petheram, C J) of the Calcutta High Court in the case already quoted (*Hari Kishore Mitra* v *Abdul Baki Miah* (1)) To this we would add that when any inspection is made with the object stated, the Magistrate should invariably be accompanied by both parties or their representatives

Holding as we do for the reasons above given that the Second-class Magistrate rendered himself incompetent to try this case, we must set aside the conviction and sentences of fine and direct that a new trial be held by another Magistrate in the case of those of the accused whose conviction was confirmed by the Appellate Court

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[267] APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Subramania Ayyar

SUBRAMANYA CHETTYAR (*Plaintiff*), *Appellant* v PADMANABHA CHETTYAR AND OTHERS (*Defendants*), *Respondents* *
[19th March, 1896]

Hindu law—Alienation of part of family property by one brother—Suit by another brother for partition of his share of the property alienated

The plaintiff sued for partition and delivery to him of his share of a plot of land sold by defendant No 1 his undivided brother to defendant No. 3 The land in question formed only part of the property of the family of the plaintiff and defendant No 1

Held, that the plaintiff was entitled to maintain the suit

[F, 28 A 50 (51)=(1905) A W N 174, 5 Ind Cas 921 (922)=7 M L T 164, **R**, 34 M 269 (272)=7 Ind Cas 559=20 M L J 743=8 M L T 269=(1910) M W N 380, 33 P R 1908=75 P W R 1908=151 P L R 1908, 1 S L R 133 (138), 1 S L R 142 (144), 2 S L R 43 (48)]

APPEAL against the decree and judgment of D Broadfoot, Acting District Judge of Trichinopoly, in original suit No 4 of 1894

The plaintiff sued his two brothers, defendants Nos 1 and 2 and defendant No 3, representing the Society of Jesus for the partition of certain property admittedly only a portion of the ancestral property in which he was entitled to share

The father of plaintiff and defendants 1 and 2 died in 1860, leaving a large estate consisting of moveable and immoveable property, which was managed by the plaintiff's mother during the minority of her three sons until the eldest of the sons, *viz*, defendant No 1, attained his majority

On the 28th June 1882, the first defendant sold the property, the subject-matter of the present suit, and the third defendant purchased it on behalf of the Society of Jesus, such property being alleged to be portion only of the ancestral estate The third defendant set up a defence that

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* Appeal No 145 of 1895

(1) 21 C. 920.

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the suit was not maintainable, as it was brought to enforce partition of a particular parcel of family property.

The remainder of the pleadings are not now material.

The District Judge relying on *Koer Hasmat Rai* v. *Sunder Das* (1), dismissed the suit holding that a suit for partial partition is not maintainable.

[268]Plaintiff preferred this appeal.

Sankaran Nayar, for appellant.

Mr. *H. G. Wedderburn*, Mr. *K. Brown* and *Pattabhirama Ayyar*, for respondents.

JUDGMENT.

The District Judge ought to have followed the ruling in *Venkatachella Pillay* v. *Chinnaiya Mudaliar* (2), which is clearly in point.

At first sight it may seem strange that a purchaser may not bring a suit for partition in circumstances in which a member of the family other than the vendor may bring such a suit. There are reasons, however, why the one suit for partial partition should be allowed and the other not.

To allow the purchaser from one member of a family to bring a suit for the partition of the particular property purchased might facilitate members of an undivided family in dealing with the property in fraud of the rights of the family. It is not unreasonable that the purchaser should have no greater powers against the family than his vendor. On the other hand, it is to the advantage of the family to be able to ascertain by partition the particular property which the purchaser may retain and to be freed from all relations with a stranger to the family. Nor is the ability to sue for a partition of the particular property altogether disadvantageous to the purchaser, for if all the family property were brought into the suit it might turn out that the purchaser took nothing. The decision in *Venkatachella Pillay* v. *Chinnaiya Mudaliar* (2) is not, in our opinion, shaken by the observations in the case in *Venkayya* v. *Lakshmayya* (3).

We must reverse the decree and remand the case for disposal according to law.

Costs to be provided for in the revised decree.

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19 M. 269=6 M.L.J. 134=2 Weir 433.

[269] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* GOPAL GOUNDAN.*
[23rd March, 1896.]

Criminal Procedure Code—Act X of 1882—Sections 260 (d) 355, 537—Record in summons case

A Native Sub-Magistrate, who had not been authorized to take down evidence in English, recorded the memorandum of the substance of the evidence taken under Section 355 in that language;

Held, that there was no provision in the Code prohibiting this procedure and that at any rate it was merely an irregularity which would not vitiate the trial.

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* Criminal Revision Cases Nos. 658 and 659 of 1895.

(1) 11 C. 396. (2) 5 M.H.C.R. 166. (3) 16 M. 98.

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APPELLATE CRIMINAL.

19 M. 269=6 M. L. J. 134=2 Weir 433.

CASES reported for the orders of the High Court under Section 438 of the Criminal Procedure Code by J Twigg, Acting District Magistrate of Madura

The case was stated as follows —

"In calendar case No 450 of 1895 on his file, the Second-class "Stationary Magistrate of Periyakulam convicted the accused of the "offence of theft under Section 379, Indian Penal Code, and sentenced "him to a fine of Rs 20, in default to one month's rigorous imprisonment

"The accused appealed to the Joint Magistrate of Madura who set "aside the finding of the Lower Court and ordered a retrial on the ground "that the only record in the case is a memorandum of the evidence made "in English by the Magistrate

"The Sub-Magistrate recorded the memorandum under the provi-"sions of Section 355, Criminal Procedure Code, read with Section 260, "Clause (*d*), but the Joint Magistrate following a decision of the Sessions "Court has found that there is no legal record of evidence, as the "memorandum has been written in English, while the Sub-Magistrate "has not been authorized to take down evidence in the English language "I venture to think [270] that it is not illegal for a native Magistrate "to make the memorandum in English as nothing is said in the Code "about the language in which the memorandum is to be made"

The Public Prosecutor (Mr *Powell*), for the Crown

Vencata Subbayyar, for the accused

ORDER

In all these cases, the Joint Magistrate has set aside the findings and sentences of a Second-class Sub-Magistrate and has ordered a retrial on the ground that, as the Sub-Magistrate made a memorandum of the evidence in English instead of in the vernacular, there is no legal record of the evidence, and the trial was therefore wholly irregular and illegal He refers to a judgment of the Sessions Court of Madura, in which the same view was taken

We are of opinion that the decisions of the Joint Magistrate are erroneous

The Sub-Magistrate was trying cases of the classes mentioned in Section 355, Criminal Procedure Code That section does not require him to record the *evidence* of the witnesses, but only to make a *memorandum* of the *substance* of the evidence of each witness as it proceeds Section 357, Criminal Procedure Code, carefully prescribes the language in which the *evidence* of witnesses in the trials and inquiries referred to in Section 356 shall be taken down, but the Code is silent as to the language in which a *memorandum* of the *substance* of the *evidence* in the less important cases enumerated in Section 355 is to be recorded

We are not aware of any provision of law which renders it illegal for a native Second-class Magistrate to record the memorandum referred to in Section 355 in English, any more than it is illegal for an English Magistrate to do so.

Even if the procedure were irregular, there is nothing to show that the accused were in any way prejudiced by the Magistrate's procedure, or that any failure of justice was thereby occasioned, and that being so, the

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irregularity would not justify the reversal of the convictions (Section 537, Criminal Procedure Code).

We must set aside the order of the Joint Magistrate in all these cases and direct that the appeals be restored to his file and decided in accordance with law.

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19 M. 271 = 6 M.L.J. 134 = 2 Weir 433.

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[271] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

MANIKA GRAMANI (*Defendant, No. 3*) *Appellant v.* ELLAPPA CHETTI (*Plaintiff*), *Respondent.** [17th March, 1896.]

Hindu Law—Mortgage—Pendency of maintenance suit—"Lis pendens"—Transfer of Property Act—Act IV of 1882, *Section* 52.

Where a member of a Hindu family during the pendency of a suit for maintenance which resulted in a decree charging the plaint house together with other property with the maintenance claimed, mortgaged the plaint house to the plaintiff:

Held, that he was entitled so to do and that the validity of the mortgage was not affected by the doctrine of *lis pendens*

[**R.**. 15 C L J 391 (393)=2 Ind. Cas 85]

APPEAL against the decree of P. Sreenivasa Rau, City Civil Judge, in original suit, No. 346 of 1894.

The facts of the case were as follows:—

The plaintiff sued for Rs. 390 as principal and interest on a mortgage-bond said to have been executed to him by the first defendant on the 2nd July 1888 for Rs. 250, and for the sale of the mortgaged house for the satisfaction of the said debt.

The second defendant was made a party to the suit by reason of her having brought the said house to sale in execution of the decree obtained by her for maintenance against her step-son, the first defendant, in original suit, No. 34 of 1888 in the High Court and became herself the purchaser.

And the third defendant was made a party to this suit upon the representation made by the second defendant that she had since sold the house to the third defendant.

The first defendant admitted the plaintiff's claim.

The second defendant pleaded that the plaintiff's mortgage was not a *bona fide* one, it having been made by the first defendant in order to deprive her (second defendant) of the means of recovering her maintenance; that further the said mortgage having been made after the institution of the second defendant's suit No. 34 of 1888 [**272**] in the High Court for her maintenance, was not valid; and that she (second defendants) having purchased the house at the Court-sale in execution of the decree obtained in the said suit, sold it to the third defendant.

The third defendant reiterated the assertions contained in second defendant's statement; and added a plea of limitation not now material.

The Lower Court framed issues of which the two following are material:—

(i) Whether the plaint mortgage was *bona fide* or otherwise?

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* Appeal No. 22 of 1895.

(ii) Whether the mortgage is invalid by reason of the pendency of suit No 34 of 1888 on the file of the High Court on the date of the said mortgage?

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As to the first issue, the Judge found the mortgage was *bona fide* and as to the second issue that suit No 34 of 1888 was a suit brought by the second defendant against the first defendant in the High Court for maintenance and was actually pending at the date of the suit mortgage bond, but he held that the title to the mortgaged house was not directly and specifically in question in the said suit, and that consequently the doctrine of *lis pendens* (Transfer of Property Act, Section 52) had no application Further that though the decree passed in that suit created a charge for maintenance against the plaint house, still as such decree was subsequent to the plaintiff's mortgage, it would not affect it and he decreed for the plaintiff, that first defendant do pay the principal and interest and costs within six months of decree and in default the mortgaged property be sold

The third defendant appealed

Krishnasami Ayyangar, for appellant

Ethiraja and *Sivagnanam*, for respondent

JUDGMENT

The only point urged in appeal is that the decision of the Lower Court on the first and second issues is incorrect

The Lower Court has dealt fully with the evidence in regard to the first issue, and we concur in the finding

As regards the second issue, we are also of opinion that the finding is correct There is nothing in the plaint in original suit No 34 of 1888 to show that the then plaintiff desired to charge the present plaint property with her maintenance She merely enumerated it and the other property of the then defendant in order to enable the Court to determine what amount of maintenance might [273] fairly be given There was not then any right to immoveable property directly and specifically in question, and consequently the doctrine of *lis pendens* has no application

It would obviously be most inconvenient, if a man, no matter what his wealth might be, should be debarred from dealing with any of his immoveable property, merely because a suit for a petty sum as maintenance, not sought to be charged on any specific part of his property were pending at the time

We concur in the findings of the Lower Court and dismiss this appeal with costs

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19 M 273=1 Weir 814.

APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr Justice Benson

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REV. FATHER CAUSSAVEL v REV SAUREZ*

[20th March, and 16th April, 1896]

Indian Christian Marriage Act—Act XV of 1872, *Sections* 5, 10, 12, 13, 38, 68, 70 *and* 73

S, an Episcopally—ordained Priest of the Syrian Church, under the jurisdiction of the Patriarch of Antioch, solemnized two marriages according to

* Criminal Revision Petition No 62 of 1896

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Roman ritual without publishing or causing to be affixed the notices of such marriages required by Part III of the Act. It was proved that S. used the Roman ritual with the sanction of his Bishop who was appointed by the Patriarch.

Held that S. having received Episcopal ordination was authorized to solemnize the marriages according to the rules, rites, ceremonies and customs of his church and that it was not shown that a marriage solemnized with the Roman ritual under the sanction of the Bishop of the Syrian Church was not soleminized according to the rules, rites, ceremonies and customs of the Syrian Church:

Held, further that Part III of the Act only applies to ministers of religion licensed under the Act and not to Episcopally-ordained persons.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. W. B. Higgens, District Magistrate of Tinnevelly, discharging the accused under Section 253 in calendar case No. 6 of 1895.

[274] The material Sections of the Act XV of 1872 are printed in the foot-note.

The order of the District Magistrate discharging the accused was as follows:—

"The complaint in this case was lodged on the 4th March 1895 by the Rev. A. Caussavel, S. J., Superior of the Roman Catholic Church, Palamcotta, against the Rev. L. M. Saurez, charging the latter with having performed two marriages between Roman Catholic Christians at a chapel at Vellapati not being authorized to solmenize such marriages, and with having in consequence committed offences under several Sections of the Christian Marriage Act XV of 1872. The complainant was examined, and he confirmed his complaint. As the complaint was laid upon information received by the complainant and not on facts known to him personally, I referred it to the Superintendant of Police for investigation

"The chief point raised in the complaint was that Father Saurez had not received Episcopal ordination as required by Section 5 (1) of the Act and could not claim the right to perform marriages [275] under any

(1) Section 5—Marriages may be solemnized in India—

(i) by any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister;

(ii) by any clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland;

(iii) by any minister of religion licensed under this Act to solemnize marriages;

(iv) by, or in the presence of, a Marriage Registrar appointed under this Act;

(v) by any person licensed under this Act to grant certificates of marriage between Native Christians.

Section 10.—Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening; provided that nothing in this section shall apply to—

(i) a clergyman of the Church of England solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening under the hand and seal of the Anglican Bishop of the Diocese or his Commissary; or

(ii) a clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special license in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such license.

[275] Section 12.—Whenever a marriage is intended to be solemnized by a minister of religion licensed to solemnize marriages under this Act, one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the minister of religion whom he or she desires to solemnize the marriage, and shall state therein—

other clause of that section and had therefore committed and offence under Section 68 of the Act The Superintendent of Police accordingly directed his attention to the question whether Father Saurez had received Episcopal ordination He received information by means of the following letters A, dated 13th April 1895 from the Most Rev Mar Dionysius, Syrian Metropolitan of Malabar, Travancore and Cochin B, dated 27th May 1895, from the Right Rev Mar George Gregorius, Syrian Metropolitan of Niranam and C, dated 13th June 1895 from the author of A This information showed that the writer of A was in 1875 made Metropolitan over six Bishoprics in the Jacobite Syrian Church in Malabar by the Patriarch of Antioch, and that the writer of B was one of the Bishops under him and that in May 1889 the writer of B ordained Father L M Saurez first as Deacon and then as Priest under the orders of the writer of A The Superintendent accordingly reported that Father Saurez had received Episcopal ordination and was consequently entitled to solemnize marriages in India under Section 5 (1) of the Act I agreed with him and considered that it would not be right to issue process for the appearance of Father Saurez to answer a charge under Section 68 of the Act.

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[276] " In regard to the ritual employed by Father Saurez in the marriages in question, he admitted that it was the Roman ritual, but

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(i) the name and surname, and the profession or condition of each of the persons intending marriage,
(ii) the dwelling place of each of them,
(iii) the time during which each has dwelt there, and
(iv) the church or private dwelling in which the marriage is to be solemnized

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards

Section 13—If the persons intending marriage desire it to be solemnized in a particular church, and if the minister of religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church

But if he is not entitled to officiate as a minister in such church, he shall, at his option, either return the notice to the person who delivered it to him or deliver it to some other minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid

Section 38—When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing, in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the district within which the parties have dwelt or, if the parties dwell in different districts shall give the like [276] notice to a Marriage Registrar of each district, and shall state therein the name and surname, and the profession or condition, of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein, that he or she has dwelt there one month and upwards

Section 68—Whoever, not being authorized under this Act to solemnize a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnized, knowingly solemnizes a marriage between persons, one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards, with transportation for a term of not less than seven years, and not exceeding ten years, or, if the offender be a European or American, with penal servitude according to the provisions of Act No XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts*), and shall also be liable to fine.

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pleaded that he was authorized by the Patriarch of Antioch to use such ritual. There is nothing to show that this is not the case. In regard to his position in India he produced a commission extending from Trichinopoly to Cape Comorin granted to him by Dom Antonio Francisco Xavier Alavres Julio I, Archbishop under the See of Antioch. The Jesuit Mission very naturally repudiates any such commission, but it has apparently no ground for the objection which can be recognised by the law other than the ecclesiastical law of the Roman Church to which Father Saurez is not amenable.

"Though on the principal point urged against Father Saurez his admitted conduct in marrying two couples at Vellapatti did not appear to render him liable to punishment under Section 68 of the Act, yet it appeared to me on what was apparently a too hasty reading of Section 73 coupled with Part III of the Act, that under those sections he might have rendered himself liable to prosecution, if he had not, before performing the marriages, posted up a notice on the church at Vellapatti as required by Section 13 of the Act. I accordingly directed enquiries to be made on this point, and it [277] was ascertained by the Superintendent that no such notice was posted up on the Vellapatti chapel in reference to the marriages in question. The fact of the marriages and the failure to post up a notice or publish banns was not denied by Father Saurez. I then summoned Father Saurez, in view to enquire into his conduct in this particular. He had in the meanwhile gone away to Ceylon and it was not until the 28th January 1896 that I was able to procure his attendance.

"On his appearance a preliminary question was raised as to whether admitting that no notice was posted up on the chapel as required by Section 13 of the Act, which is the portion of Part III, which had been assumed to govern his conduct, he could as a fact be charged on that account with an offence under Section 73.

Section 70.—Any minister of religion licensed to solemnize marriages under this Act, who, without a notice in writing, or, when one of the parties to the marriage is a minor and the required consent of the parents or guardians to such marriage has not been obtained within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

[277] Section 73.—Whoever, being authorized under this Act to solemnize a marriage, and not being a clergyman of the Church of England solemnizing a marriage after due publication of banns or under a license from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf, or, not being a clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church, or, not being a clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that church, knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him;

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the senior Marriage Registrar of the district;

or knowingly and wilfully issues any certificate, the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue;

or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same;

shall be punished with imprisonment for a term which may extend to four years and shall also be liable to fine.

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"Now Father Saurez is, as has been found, 'a person authorized under this Act to solemnize a marriage,' in that he has the qualification of Episcopal ordination required by Section 5 (1), and he is not a clergyman of the Church of England, Scotland or Rome and it would, therefore, appear that he should, before solemnizing a marriage publish or affix the notice as directed in Part III. But, when Part III of the Act is more closely examined, it appears, both from the heading of the part and from the opening sentence of Section 12, that it applies exclusively to ministers of religion [278] licensed under the Act, and I take it that the minister of religion mentioned in Section 13 is also a minister of religion licensed under this Act, because the notice which should be delivered to him and which he should cause to be affixed on the church is evidently the notice delivered to the minister of religion mentioned in Section 12, who is a minister of religion licensed under this Act. Father Saurez is not a minister of religion licensed under this Act, but has obtained his authority to marry from the fact of his ordination It follows that Part III (and its constituent Section 12, 13 and others) does not apply to him He is accordingly not liable to punishment under Section 73 for a breach of the directions given in Part III regarding the affixing of the notice.

"According to the commission under which he worked in India Father Saurez was empowered to dispense with all ecclesiastical impediments to matrimony and to dispense with the banns, and if he pleads this in view to excuse the apparent informality of his action in regard to these two marriages, whether from an ecclesiastical point of view he is justified in this plea I cannot say, but the informality, i e, the want of publication of banns does not appear to make him liable to punishment under the Indian Christian Marriage Act any more than the failure to affix a notice on the church

"I am not in a position to say whether the conclusion now arrived at was that intended by the legislature The very general terms of the opening portion of Section 73 appear to indicate the contrary and the existence of these general terms is strongly urged on behalf of Father Caussavel as an argument for proceeding with the case On mature consideration however, I hold that the terms of Part III limiting the directions therein given to ministers of religion licensed under the Act, must be read in their literal and exclusive sense, and cannot be taken to include directions to a minister of religion who is not licensed but is episcopally ordained It is therefore of no avail to examine witnesses

"No case has been made out against Father L M Saurez, and he is discharged under Section 258, Criminal Procedure Code"

Mr. *Wedderburn* and *Rangachariar*, for complainant

Mr *K Brown*, for accused

JUDGMENT

COLLINS, C J —This is a revision petition presented by the Rev. Father A Caussavel, S J, against the decision of the District Magistrate of Tinnevelly, discharging an accused person, the Rev L M Saurez, under Section 253, Criminal Procedure Code

[279] The accused was charged under the Indian Christian Marriage Act with solemnizing marriages without authority and without publishing or causing to be affixed notices of such marriage, and thereby committing offences under the said Act

It appears to be admitted that the accused did solemnize two marriages between Roman Catholic Christians according to the Roman Catho-

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lic ritual at a chapel at Vellapatti, and did not comply with the provisions of Part III of the Indian Christian Marriage Act. The District Magistrate has found that the accused has received Episcopal ordination, and that he is a Priest of the Syrian Church under the jurisdiction of the Patriaret of Antioch, and he is also satisfied that the accused is authorized by the Patriarch of Antioch to use the ritual of the Roman Catholic Church. The District Magistrate, therefore, held that the accused was not guilty of an offence under Section 78 of the Act, although he had not given the notices as directed by Part III of the Act.

The only question that has to be decided in revision is—was the accused bound to publish the notices provided for in Part III of the Act?

The Indian Christian Marriage Act of 1872 modified by Act XII of 1891* enacts (Section 5) that marriages may be solemnized in India—

(i) by any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister;

(ii) by any clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of Scotland;

(iii) by any minister of religion licensed under this Act to solemnize marriages;

(iv) by, or in presence of, a Marriage Registrar appointed under the Act;

(v) by any person licensed under this Act to grant certificates of marriage between Native Christians.

Part II of the Act enacts the time and place at which marriages may be solemnized, with special provisoes relating to clergymen of the Church of England, Rome, and Scotland.

Part III relates to marriages solemnized by ministers of religion licensed under this Act, and, as I read the sections, does not apply to marriages solemnized by persons who have received [280] Episcopal ordination. It enacts, *inter alia* that one of the persons intending marriage shall give notice in writing according to a certain form to the minister, and that such minister shall cause the notice to be affixed in some conspicuous part of the church, if the marriage is intended to be solemnized in a church, or if the marriage is intended to be solemnized in a private dwelling, the notice shall be forwarded to the Marriage Registrar of the district.

Part IV directs registration of marriages solemnized by ministers of religion, and points out how such registration shall be carried out by clergymen of the Church of England, Rome, and Scotland, respectively and in Section 32 refers to the case of a marriage solemnized by a person who has received Episcopal ordination, but who is not a clergyman of the Church of England, Rome, or Scotland.

Parts V and VI do not relate to the matter in question.

Part VII is headed ' Penalties ' and Section 70 provides a penalty, if any minister of religion licensed to solemnize marriages under the Act wilfully solemnizes a marriage under Part III of the Act without a notice in writing * * * and Section 73 enacts that " whoever being authorized under this Act to solemnize a marriage,

" and not being a clergyman of the Church of England solemnizing a marriage after due publication of banns, or under a license from

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*XII of 1891 seems to be a misprint; II of 1891 seems to be more appropriate, Ed

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the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

"or, not being a clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

"or, not being a clergyman of the Church of Rome solemnizing a marriage according to the rites, rules, ceremonies and customs of that church,

"knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him

"or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the [281] persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district:

"or knowingly and wilfully issues any certificate, the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue.

"or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same, shall be punished with imprisonment for a term which may extend to four years and shall also be liable to fine"

It is contended by the counsel for the petitioner, that the accused has brought himself under, this section, by neglecting to publish and causing to be affixed *the* notice of such marriage as directed by Part III of the Act, and consequently is liable to imprisonment for four years and also fine

I cannot assent to this contention The Act authorizes a person episcopally ordained to solmnize a marriage according to the rules, rites, ceremonies and customs of the church of which he is a minister It directs (Section 10) with certain provisions, within what hours such marriages shall be solemnized. It directs (Section 32) that if such person, although episcopally ordained, is not a clergyman of the Church of England, Rome or Scotland, how he shall register such marriage The Act is silent as to notices of marriage being given or published by such a person, and it would be contrary to the ordinary rules of construing a statute to hold, that although no obligation is imposed to publish notices of marriage, yet a penalty is incurred if such notices are not published—the penal section uses the words "*the* notice" and not a "notice" of such marriage as directed in Part III, and holding, as I do, that Part III only applies to ministers of religion licensed under the Act, and not to Episcopally-ordained persons, I think the District Magistrate was right in discharging the accused and I would dismiss this revision petition.

BENSON, J.—I think that the order of the District Magistrate was right, and that it was so for the reasons stated by him

The learned counsel for the petitioner does not, as I understand, now press the contention that the Rev. Father Saurez is guilty of an offence punishable under Section 68 of the Indian [282] Christian Marriage Act, 1872, (as amended by Act II of 1891) The question, as I understand it, that we have to decide is this:—Assuming that Father Saurez has received Episcopal ordination in the Græco-Syrian Church

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of Malabar, is he liable to a penalty under Section 73 of the Act because he solemnized a marriage between Christians without having published a notice as directed in Part III of the Act? I think the answer to this question must be in the negative. Part I of the Act relates to the persons by whom marriages may be performed and Section 5 enumerates them by classes. In some the right is recognized independently of appointment under the Act; in others the right is recognized as a consequence of license, or appointment, under the Act. Under the former head are the first two classes in Section 5, *viz.*—

"(i) Any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister—" under this class would fall ordained clergymen of the English, Irish, Roman or Syrian Churches;

"(ii) Any clergyman of the Church of Scotland, provided &c.," as before;

under the second head fall the remaining three classes, *viz.*,

"(iii) Any minister of religion licensed under this Act, to solemnize marriages;

"(iv) A Marriage Registrar appointed under this Act," or any person in his presence (Section 38);

"(v) any person licensed under this Act to grant certificates of marriage between Native Christians."

Sections then follow authorizing Government to license or appoint persons of these last three classes.

Parts III to VI then deal with the three classes licensed or appointed under the Act.

Part III deals with class 3, *viz*, ministers of religion licensed under the Act.

Parts IV and V deal with marriages by, or in the presence of, Registrars, and Part VI deals with the marriages of Native Christians.

The Act prescribes (Sections 12 and 38) that when a marriage is intended to be solemnized by a minister of religion licensed [283] under the Act, or by a Marriage Registrar appointed under the Act, due notice must be given and must be published in a formal manner, but there is no similar obligation imposed, when the marriage is intended to be solemnized by a person who has received Episcopal ordination, or by a minister of the Church of Scotland. Section 5 merely says that such person must solemnize the marriage "according to the rules, rites, ceremonies and customs" of the church to which he belongs. Part VII prescribes penalties in connection with the Act. Penalties are prescribed for solemnizing a marriage without being authorized to do so by the Act, and for solemnizing marriages at other than the hours prescribed, or in the absence of witnesses. Penalties are also prescribed if a minister of religion, licensed under the Act, solemnizes a marriage without having received a notice, and if a Marriage Registrar commits certain offences against the Act; and then follows Section 73 which enacts that "whoever being authorized under "this Act to solemnize a marriage, and not being a clergyman of the "Church of England * * * or of Scotland * * * or of "Rome * * * solemnizes any marriage * * * *without publishing or causing to be affixed, the notice of such marriage as directed in Part III of this Act*" * * * shall be liable, &c. It is urged for the prosecution that Father Saurez is liable under this section, inasmuch as he has solemnized a marriage without notice, and is

not one of the persons excepted. I do not think that this is so. As already observed, the Act nowhere imposes on a person who has received Episcopal ordination the duty of receiving, or of publishing a notice of an intended marriage, though this duty is expressly imposed on ministers of religion licensed under the Act, and on Marriage Registrars appointed under the Act. The imposition of a penalty is correlative to the imposition of a duty, and if no obligation exists there can be no penalty for its breach. But it is argued that the section itself, by prescribing the penalty, impliedly imposes the obligation In order that the section should be so construed its terms should be such as to convey the intention in a clear and unambiguous manner, but it cannot be said that this is so in the present case. The words " as directed in Part III " refer, on their face, to Part III, but that part deals only with the procedure to be adopted by " ministers of religion licensed under the Act " There is no ground whatever for supposing that Section 13 refers to a larger class than Section 12, for it expressly [284] refers back to that section by the employment of the word " *such* notice," *i e.*, the notices which under Section 12 must be given by the candidate for marriage to the minister of religion licensed under the Act If the words in Section 73 had been " a notice of such marriage as directed in Part III " there might be some ground for contending that the words " as directed in Part III," merely mean " in accordance with a procedure similar to that directed in Part III," but the use of the word ' *the* ' before ' notice ' precludes this construction, and refers us back to the notice prescribed in Section 12, that is, the notice which the candidate for marriage presents to the minister of religion licensed under the Act It was suggested that the words of Section 73 could not refer to the latter class of minister, because a penalty was previously imposed by Section 70 on such a minister solemnizing a marriage without notice. I observe, however, that Section 70 provides a penalty for solemnizing marriage " without notice " that is, without having *received* a notice, as required by Section 12, whereas Section 73 provides a penalty for solemnizing a marriage without *publishing* the notice Thus Section 73 finds an appropriate subject and application in the minister of religion licensed under the Act, and is, in fact, necessary as a supplement to Section 70 in order to provide a complete sanction for the obligations imposed by Part III on such ministers.

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It may be also observed that the words " *See Sections* 12 *and* 38 " after the heading in Schedule I, which contains the form of notice under Part III, point to the fact that it was intended to apply to those sections only Had it been intended to apply to Section 73 also, I would have expected a reference to be made to that section, as well as to Sections 12 and 38 In my opinion, then, Section 73 does not require that a person who has received Episcopal ordination (and who is not one of the classes specially excepted by that section) should publish a notice of any marriage which he intends to solemnize. Section 73 is a highly penal section, and must be construed strictly, and in favour of the liberty of the subject. If it is asked why an exception is made in favour of such persons, it may, perhaps, be suggested that the legislature regarded the control which is exercised, or which is supposed to be exercised, by the Bishops in such churches, as a sufficient safe-guard Under Section 5 such a person is allowed to solemnize a marriage only provided he does so " according to the rules, rites, ceremonies and customs of the church of which he is a minister." Under Section [285] 10 he can solemnize a marriage only during certain hours,

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and under Section 32 he is bound to register the marriage in a prescribed manner. In the present case Father Saurez alleges that he has registered the marriage. It is admitted that he used the Roman ritual, but he says that he had the permission of his Bishop to do so. There is nothing to show that a marriage solemnized with this ritual under sanction of a Bishop of the Syrian Church is not solemnized according to the "rules, rites, ceremonies and customs" of the Syrian Church of which Father Saurez, is an ordained minister. Father Saurez apparently had the approval of his own ecclesiastical superiors. The prosecution was instituted by a Priest of a rival church. In my opinion the District Magistrate was justified in refusing to proceed wtih the prosecution.

I would dismiss the petition.

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19 M. 285=6 M.L.J. 92.

APPELLATE CIVIL

Before Sir Arthur J. H Collins, Kt., Chief Justice and Mr. Justice Benson.

Somasundara Mudaliar, *Petitioner* v Vythilinga Mudaliar and another, *Respondents*.* [9th March, 1896]

Religious Endowments Act—Act XX of 1863, *Section* 5.

Where a hereditary trustee of a temple died and application was made by the Collector as Agent of the Court of Wards, in whom the management of deceased's estates, during the minority of the sons of the deceased, had vested, to be appointed trustee on behalf of the said sons:

Held, that the case fell within Section 5 of Act XX of 1863, and that the Court had jurisdiction to make the appointment.

[R., 26 M. 85 (88), 10 Ind Cas 300 (301)=9 M L.T. 495=(1911) 1 M.W.N 303]

Petition under Section 622 of the Code of Civil Procedure praying the High Court to revise the order of T. M. Horsfall, District Judge of Tanjore, passed on civil miscellaneous petition No. 639 of 1895.

[286] The facts of this case are as follows:—

The three petitioners represented by the Acting Collector of Tanjore as Agent to the Court of Wards presented a petition under Section 5† of Act XX of 1863 (the Religious Endowments Act) setting forth that one Bava Chokkappa Mudaliar together with Bava Krishnasami Mudaliar and

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* Civil Revision Petition No. 34 of 1896.

† Whenever from any cause a vacancy shall occur in the office of any trustee, manager, or superintendent, to whom any property shall have been transferred under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple, or religious establishment to which such property shall belong, or in the performance of worship, or of the service thereof, or the trusts relating thereto, to apply to the Civil Court to appoint a manager of such mosque, temple, or other religious establishment; and thereupon such Court may appoint such manager to act until some other person shall by suit have established his right of succession to such office.

The manager so appointed by the Civil Court shall have and shall exercise all the powers which, under this or any other Act, the former trustee, manager, or superintendent in whose place such manager is appointed by the Court had or could exercise, in relation to such mosque, temple, or religious establishment or the property belonging thereto.

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Somasundara Mudaliar were trustees of the Sri Tyagarajaswami temple at Tiruvalur, that Bava Chokkappa Mudaliar was a hereditary trustee until his death in April 1894, leaving three minor sons, the petitioners, that the Collector and Agent to the Court of Wards, who is now in charge of the estate of the petitioners, is entitled to the management of the temple as hereditary trustee on behalf of the said minors and is willing to accept the management on their behalf and praying that the Collector may be appointed trustee of the temple on behalf of the minor sons of deceased This petition was opposed by Somasundara Mudaliar, one of the trustees, stating that the Court had no jurisdiction under Section 5 of Act XX of 1863 to pass the order prayed for and alleging that the deceased was not a hereditary trustee and that his appointment was only personal The District Judge granted the petition as prayed

Somasundara Mudaliar filed the present petition

Ramasubba Ayyar for respondents took the preliminary objection that an appeal lay from the order of the District Judge and therefore this petition must be dismissed, citing *Sultan Ackeni Saheb* v *Shaik Bava Malimiyar* (1), but the Court overruled the objection

Bhashyam Ayyangar, *Krishnasami Ayyar* and *Desikachariar*, for petitioner

Ramasubba Ayyar, for respondents

JUDGMENT

[287] Mr. Ramasubba Ayyar for the counter-petitioners in this Court raises the preliminary objection that an order under Section 5, Act XX 1863, is appealable, and that an application for revision under Section 622, Civil Procedure Code, is therefore inadmissible He relies on *Sultan Ackeni Sahib* v *Shaik Bava Malimiyar* (1), but we are of opinion that this case is, in effect, overruled by the decision of the Privy Council in *Minakshi* v *Subramanya* (2) That decision was, no doubt, given with reference to an order made under Section 10 of Act XX of 1863 But we think that the principle on which that decision was based, is also applicable to an order like the present made under Section 5 of Act XX of 1863

We are therefore of opinion that no appeal lies

We have now to consider whether we should interfere under Section 622, Civil Procedure Code

The petitioner in this Court contends that the District Judge had no jurisdiction to pass an order under Section 5, Act XX of 1863, on the ground that no dispute respecting the right of succession to the trusteeship had arisen, and that the office was not hereditary and that there could, therefore, be no "right of succession" The record does not show clearly what is the constitution of the trust, but the counter-petitioner, in his petition to the Lower Court, claimed the office as hereditary trustee, and his claim was opposed by the petitioner. We think that this constituted a dispute respecting the right of succession to the office, and it is admitted that the institution is one falling under Section 4 of the Act. The District Judge, therefore, had jurisdiction to make the appointment. It has also been suggested that, as two trustees still remain, there is not such a vacancy as is contemplated by Section 5 We, however, are of opinion that as there were three trustees for many years prior to the

(1) 4 M 295 (2) 11 M. 26.

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death of the counter-petitioner's father in 1894, a vacancy such as is contemplated by the section arose when that death occurred.

It is also argued that the Judge acted with material irregularity in not having held an enquiry as to whether the office was of an hereditary character or not. Looking at the fact that the counter-petitioner's father and grandfather before him held the office of trustee, and that the Judge's proceeding was of a summary [288] character, intended merely to provide for the vacancy, pending the decision by regular suit of the right of succession, we are unable to hold that the enquiry was defective or that our interference under Section 622, Civil Procedure Code, is necessary.

The petition fails and is dismissed with costs.

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19 M. 288.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

UPPALAKANDI KUNHI KUTTI ALI HAJI (*Defendant*), *Appellant v.*

KUNNAM MITHAL KOTTAPRATH ABDUL RAHIMAN (*Plaintiff*), *Respondent.** [10th April, 1896.]

Suit on a Kanom—Registration Act III of 1877, *Section* 17, *Clause* (*n*).

Although under the Registration Act III of 1877, Section 17, Clause (*n*) a receipt given by a mortgagee purporting to extinguish the mortgage debt does require registration:

Held, that the language of the receipt in the present case did not indicate any intention to extinguish or limit the mortgagor's interest and that therefore registration was unnecessary.

[F., 9 Bom. L R 254 (257); 11 C L.J 551 (554)=6 Ind. Cas. 159 (161).]

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 259 of 1894, modifying the decree of B. Cammaran Nayar, District Munsif of Tellicherry, in original suit No. 381 of 1893.

Suit to redeem a kanom granted by plaintiff's assignor to the defendant's Karanavan in September 1877 for Rs. 600. The principal point in dispute was whether a sum of Rs. 500 had been paid in July, August 1890 by the plaintiff to the defendant. The Munsif found that this sum had not been paid and that a receipt for Rs. 500 (Exhibit A) was a forgery and he decreed that the kanom be extinguished on payment by plaintiff of Rs. 600 together with costs of suit. The District Judge *reversed* the decree of the Munsif finding that the sum of Rs. 500 had been paid, that the receipt (Exhibit A) was genuine, and ordered that the kanom be redeemed [289] on payment of Rs. 100. Defendant to pay plaintiff's costs in both Courts.

The receipt (Exhibit A) was as follows:—

" Receipt granted by Uppalakandy Kunhi Kutti Ali to Kottapurathu " Pokkar, Karanavan, on behalf of Kottupurathu Antharuman.

" Out of the amount due to me by Antharuman, under the decree in " original suit No. 354 of 1887 in the Court of the District Munsif of " Tellicherry, you have already paid me Rs. 400 through my paternal " uncle Puthenpurayil Kunhi Kutti Ali, and have returned to me two " subsidiary deeds on Kunnamnenthal paramba. Deducting this sum " of Rs. 400, the remaining sum due to me according to the decision of

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* Second Appeal No. 298 of 1895.

" arbitrators is Rs. 200, of which you Pokkar, have paid to me this day " Rs 100, and you shall pay me the remaining sum of Rs. 100 within " one month from this date and shall obtain back the said two documents " On receipt of this sum of Rs 100, I shall submit a petition to the " Court, stating that the matter of the decree has been adjusted I affix " my signature to this in presence of witnesses "

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Mr. *K Brown* and Mr *C. Krishnan*, for appellant

Exhibit A acknowledges receipt of consideration in partial extinction or limitation of the mortgage interest on immoveable property of over Rs. 100 in value It should have been registered and not being so it is inadmissible in evidence (Sections 17 and 49, Registration Act) There is no other evidence to prove payment of Rs 500 of the mortgage money. Exhibit A is not a mere acknowledgment of payment of a debt But it acknowledges receipt of a consideration as the person who gives it has to return two documents and put in a petition, see *Vennayar* v *Subbayyar* (1) and *Venkatarama Naik* v *Chinnathambu Reddi* (2) Clause (*n*), Section 17, added by Act VII of 1886 shows Exhibit A required to be registered as it extinguishes the mortgage *pro tanto* It evidences part-payment of the *mortgage money* and releases the claim on the property secured by the mortgage to that extent, see *Basawa* v *Kalkapa Sharbana* (3) and *Jiwan Ali Beg* v *Basamal* (4) Exhibit A specially refers to the mortgage debt which formed the subject of original suit No 34 of 1887

[**290**] *Sankaran Nayar* and *Ryru Nambiar*, for respondent

JUDGMENT

The only question is whether the receipt required registration under Clause (*n*) of Section 17 of the Registration Act

It may be doubted whether in view of the decision of this Court in *Venkatarama Naik* v *Chinnathambu Reddi* (2) and *Venkayyar* v *Subbayyar* (1) the money received in discharge of a mortgage can be deemed to be a consideration with the meaning of the clause Since those decisions, however, the law has been amended, a clause is now added (clause *n*) which, as it might be argued, indicates that receipts given by a mortgagee purporting to extinguish the mortgage do require registration. In the present case, assuming that this is the effect of the amendment, we do not think that the language of the receipt indicates any intention to extinguish or limit the mortgagor's interest The instrument, therefore, did not require registration We must dismiss the appeal with costs

The memorandum of objection is also dismissed with costs

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APPELLATE CIVIL

Before Mr Justice Shephard and Mr. Justice Subramania Ayyar.

KRISHNA PANDA AND ANOTHER (*Plaintiffs*), *Appellants* v BALARAM PANDA (*Defendant*), *Respondent* * [7th March, 1896]

Suit for partition—Prior arbitration and award, effect of.

Disputes having arisen in a joint Hindu family, the parties submitted the question of partition to arbitrators, who passed an award thereon Both parties objected to the award, and it was never carried into effect On a suit for partition being filed

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* Appeal No 123 of 1895.

(1) 3 M 53 (2) 7 M.H.C R 1 (3) 2 B 489 (4) 9 A. 108.

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Held, that such an award is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agreed that the former state of things should be restored and that therefore the present suit for partition could not be maintained.

[F., 33 C. 881 (885)=4 C.L.J. 162; 20 M. 490 (491); 11 Bom. L.R. 20 (25)=5 M.L.T. 220; 1 S.L.R 236 (237); R., 33 M. 246 (248)=4 Ind. Cas. 392=20 M.L.J. 79 (82)=7 M.L.T. 67; 15 Bom. L.R. 223 (224); 15 Ind. Cas. 819=5 S.L.R. 240 (242); U B R. (1906),—1st quart., Specific Relief. 30]

APPEAL against the decree of J. P. Fiddian, District Judge of Ganjam, in original suit No. 2 of 1894.

[291] *Suit for partition.*—The facts were as follows:—

The grandfathers and fathers of the parties were members of a joint Hindu family until the year 1875, when disputes arose and a separation was effected. In the year 1882, plaintiffs' father and the defendant appointed three persons as arbitrators to divide the property and the arbitrators passed an award to which neither party agreed, and it was never enforced. The property consisted of moveables and immoveables, portions of which were in the possession of both parties. The plaint raised various other questions not now material. The cause of action was alleged to have arisen in 1892, when the plaintiffs demanded partition. The defendant pleaded, *inter alia,* that the suit is barred by the submission to arbitration in 1882 and the award passed thereunder. The District Judge finding that the dispute was submitted to arbitration in 1882 and that an award was passed thereon, but that the plaintiffs objected to the award, and that no action has been taken under it, held with reference to Specific Relief Act, Sections 21 and 30, and on the authority of *Palaniappa Chetti* v. *Rayappa Chetti* (1), *Rani Bhagoti* v. *Rani Chandan* (2) and *Muhammad Newaz Khan* v. *Alam Khan* (3) that the present suit for partition was barred by the submission to arbitration and dismissed it with costs.

Pattabhirama Ayyar, for appellant, cited *Tahal* v. *Bisheshar* (4).

Mr. *Parthasaradhi Ayyangar,* for respondent.

JUDGMENT.

The effect of an award has been entirely misunderstood. An award duly passed in accordance with a submission of the parties is equivalent to a final judgment. To give effect to it, the subsequent consent or approval of neither party is required. After an award made for a partition of joint property neither party can sue for partition any more than he could if a decree in a suit for partition had been passed. In order that the parties should be remitted to their previous rights, it is not enough that the award was not enforced or that even both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. There is no such evidence in this case. The appeal must, therefore, be dismissed with costs.

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(1) 4 M.H.C.R. 119. (2) 11 C. 386 (3) 18 C. 414 (4) 8 A. 57.

19 M. 292.

[292] APPELLATE CIVIL

Before Sir Arthur J H. Collins, Kt, Chief Justice and Mr Justice Benson.

[IN APPEAL No 10 OF 1895.]
FISCHER (*Plaintiff*), *Appellant v*
SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*), *Respondent* *

[IN SECOND APPEAL No 1245 OF 1895.]
ORR AND ANOTHER (*Plaintiffs*), *Appellants v*
FISCHER (*Defendant*), *Respondent* * [13th, 14th and 30th April, 1896]

Suit for declaration—Specific Relief Act—Act I of 1877, *Section* 42—*Act I of* 1876 *(Madras), Section* 2—"*Concur in applying*"

A suit was brought by F against the Secretary of State for India in Council for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of a village in the Sivaganga Zamindari in his name was *ultra vires* and illegal The plaintiff's claim to be separately registered as the holder of the said village depended upon the proper construction to be put on a grant of the village contained in two documents, the one dated 13th December 1872 and the other being a document, dated 14th May 1877, executed by the Rani and her children Subsequent to the grant referred to, an application was preferred by the Rani and addressed to the Collector requesting him to separately assess the village and register it in the name of F This application was never presented owing to the death of the Rani, who was succeeded by the father of the present Zamindar who executed on 22nd February 1883 a deed of release in favour of F ratifying the grant above mentioned in the following terms:—

"Whereas the village of Kondagai of my Zamindari . has been "granted to you in perpetuity by the late Rani Kattama Nachiyar and others "and has been in your possession according to the terms of the documents exe- "cuted by them to you therefor on the 13th December 1872 and on the 14th "May 1877, and whereas I have received from you Rs 2,000 as the consideration "for my ratifying your rights in accordance with the terms of the said docu- "ments and for relinquishing whatever rights I possess therein, I hereby ratify "your rights of every description in the said village and relinquish all my "rights therein in your favour Wherefore as per the terms of the said "documents, dated 13th December 1872 and 14th May 1877, you and your "heirs and assigns shall hold and enjoy the said Kondagai village in "perpetuity with full powers of alienation by sale, gift or otherwise "You shall pay to my [293] Zamindari the sum of Rs 3,500 the puruppu fixed "on the said village as well as road-cess, *magamai, &c*, according to custom," and he applied to the Collector for separate assessment and registration of the village in the name of F on 25th March 1883

On 29th March 1883 F also made a similar application but pending disposal the present Zamindar's father died, and was succeeded by his son the present Zamindar who raised objections and the application was not granted On 23rd May 1887 the present Zamindar granted a lease of the Zamindari to O S and R who executed a release guaranteeing F undisturbed possession and enjoyment of the village and accepted his position such as it may have been at or prior to the date of the execution of the lease On 23rd January 1890 the Zamindar executed in favour of F a deed of release which after reciting the grant from the Rani, the deed executed by the Zamindar's deceased father, dated 22nd February 1883 and a further payment of Rs 3,500 by F contained the following covenant:—

"Therefore I forfeit and relinquish the right I profess to have in me to "question the said permanent lease or the terms of the said lease deeds, and I

* Appeal No 10 of 1895 and Second Appeal No 1245 of 1895.

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"hereby ratify your right. You and your heirs shall hold and enjoy the said "villages absolutely according to the terms of the aforesaid permanent lease "deeds." F then applied by petition, dated 13th March, 1890, to the Collector for separate registration and assessment of the said village, but on notices being sent to the Zamindar and the lessees, they filed objections which after due enquiry were overruled by the Collector who ordered separate registration and fixed the assessment. On appeal, the Board of Revenue supported the action of the Collector. Whereupon the lessees appealed to the Government of Madras on 21st September 1891 and the Government of Madras on 14th November 1891 cancelled both the separate registration and the separate assessment. Under the circumstances F claiming to be the duly registered holder of the said village sued the Secretary of State for a declaration that the order of the Madras Government dated 14th November 1891 directing the Collector to cancel the separate registration and assessment of the said village was *ultra vires* and illegal—and the lessees sued F for the balance of *poruppu*, *magamai* and road-cess with interest alleged to be due on the said village for fasli 1300:

Held, that F was bound to pay the lessees Rs. 3,500 poruppu with magamai and road-cess whether his village was separately registered and assessed or not;

Held, that the suit by F for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of the village previously made by him was illegal and *ultra vires* could not be maintained with reference to Section 42, Specific Relief Act, inasmuch as the order had been already carried out:

Held, also that if the general words of the prayer "for such other relief as the circumstances of the case may require" were to be taken as including a prayer for consequential relief, then the suit was bad for misjoinder, inasmuch as the Zamindar and the lessees who were interested parties were not joined·

Held, also that not only the person applying under Act I of 1876, Section 2 for separate assessment and registration must be entitled thereto, but also that the parties to the alienation must concur in the application.

[**Rev.**, 22 M 270 (**P.C.**)=3 C.W.N. 161=26 I.A. 16=7 Sar. P.C.J. 459.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East) in original suit No. 14 of 1892, and

[**294**] Second appeal against the decree of W. Dumergue, District Judge of Madura reversing the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East) in original suit No. 20 of 1893.

From the judgment of the High Court reported below in which the facts of these two cases are set out at length, it appears that the parties interested agreed that the evidence taken in original suit No. 14 of 1892, on the file of the Court of the Subordinate Judge of Madura (East) should be also treated as evidence in original suit No. 20 of 1893, on the file of the same Court and the present appeal from the judgment in original suit No. 14 of 1892 and the present second appeal from the judgment of the District Court of Madura reversing the decree of the Subordinate Judge in original suit No. 20 of 1893, were accordingly argued together.

[In appeal Ni. 10 of 1895.]

Mr. *Wedderburn*, *Sankaran Nayar*, *T. Rangachariar* and *V. Rangachariar*, for appellant.

The Government Pleader (Mr. *Powell*), for respondent.

[In appeal No. 10 of 1895.]

Mr. *Norton*, for appellant.

Mr. *Wedderburn*, Mr. *K. Brown*, Mr. *Parthasarathi Ayyangar*, *T. Rangachariar* and *V. Rangachariar*, for respondent.

JUDGMENT.

In original suit No. 14 of 1892 on the file of the Subordinate Court of Madura (East), Mr. R. Fischer, claiming to be the duly registered

holder of the village of Kondagai in the Sivaganga zamindari, sued the Secreatry of State for India in Council, for a declaration that the order of the Madras Government No. 1088, dated 14th November 1891, directing the Collector to cancel his separate registration and assessment of the village, was *ultra vires* and illegal

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The Subordinate Judge dismissed the suit with costs, and the plaintiff now appeals (appeal suit No. 10 of 1895) to this Court against that decree.

In the original suit No 20 of 1893, on the file of the same Subordinate Court, the plaintiffs, who are the present lessees of the Sivaganga Zamindari, sued Mr R Fischer for the balance of *poruppu magamai* and road-cess, with interest, alleged to be due on the said village of Kondagai for fasli 1300 The Subordinate Judge gave a decree for the sum which he found to be due, but in appeal the District Judge of Madura found that nothing was due and [295] dismissed the suit with costs Against this decree the plaintiffs now bring this second appeal No 1245 of 1895.

The evidence in original suit No 14 was, by consent, taken as evidence in original suit No 20 also, and both appeals were argued together

In order to understand the matters in issue, it is necessary to set forth the transactions which proceeded the present litigation These may be stated as follows, adopting, with but slight variations, the words of the District Judge .—

" For some years prior to 1872, Rani Kattama Nachiyar was Zemindarni of Sivaganga and in 1869 one Dhorasinga Tevar instituted a suit in the District Court of Madura (original suit No 2 of 1869) against the Rani, her son and three daughters, in order to establish his right of succession to the Zamindari. A decree was passed in his favour and the Rani and her children, after appealing unsuccessfully to the Madras High Court, preferred an appeal to the Privy Council Mr Fischer proceeded to England in order to assist in the prosecution of this appeal and on the 13th December 1872, the Rani, her son and three daughters executed in favour of Mr Fischer an indenture (Exhibit A) of which the following are the terms material to the suit ' In consideration of the sums the said Robert Fischer is to spend on the appeal and in consideration of the services he has rendered and is to render in future, we hereby convey and sell to the said Robert Fischer, his heirs and assigns the village of Kondagai attached to the Tiruppuvanam Taluk, Sivaganga Zamindari, Madura District, Sub-District of Madura. to be enjoyed by him from generation to generation as long as the sun and moon endure without any obstruction and with full powers of alienation by way of gift, sale or otherwise, subject to a payment to the circar of Rs 3,500 every year as peishcush We hereby bind ourselves jointly and severally to deliver possession of the said village to the said Robert Fischer, his heirs and assigns and to inform the Collector of the said District and get the said village sub-divided under Regulation XXV of 1802 and registered in the name of the said Robert Fischer, his heirs and assigns, and to arrange for receiving every year the amount of peishcush above fixed from the said Robert Fischer, his heirs or assigns as soon as judgment is obtained in the appeal above mentioned or as soon as the said litigation comes to a close in any other manner. . [296] We do hereby empower the said Robert Fischer jointly and severally to conduct the said appeal . . . . . . and to do all that is necessary in the said appeal

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and to pay the necessary sums from his own funds towards the fees and all other expenses of the said appeal and agree to accept and consider all sums to be paid on account of the said appeal by the said Robert Fischer as the consideration money for this agreement as mentioned above as payments directly made to each and all of us'."

On Mr. Fischer's return from England after the successful prosecution of the appeal in the Privy Council, the Rani put him in possession of the village in 1874 and on the 14th May 1877 she, her son and her three daughters executed in favour of Mr. Fischer another instrument which is called a Deed of Release (Exhibit B). This document after reciting, *inter alia*, that by the agreement, dated the 18th December 1872 (Exhibit A)* as well as by another agreement, dated the 12th April 1872 the right to the village of Kondagai and all its lands and samlets had been given to Mr. Fischer, that Mr. Fischer had paid the Rani and her children according to the terms of the said agreements the sum of Rs. 20,000 for the expenses of the appeal to the Privy Council, that the decree of the District Court of Madura and of the Madras High Court had been set aside by the Privy Council and that the executants had obtained, for the life-time of the Rani, all the benefits that could be derived according to law in the matter of the said suit, proceeds in the following terms:—

"Whereas you have agreed to pay the Zamindari peishcush that may be fixed according to law upon the said Kondagai village . . . .and whereas we have agreed to get the said village of Kondagai inclusive of its hamlets, registered in your name in the Collector's office under Regulation XXV of 1802; now in consideration of all the considerations detailed above, we hereby agree to you, your son and grandson from generation to generation, holding and enjoying village of Kondagai together with the eight kinds of products of an estate and with full powers of alienation by sale, gift or otherwise; and we hereby agree to relinquish to you all the rights and connections which Kattama Nachiyar, one of us, now possesses in the village and all the rights and connections which any of us may acquire after her lifetime."

[297] In pursuance of these instruments and admittedly on or about the 14th May 1877, an application (Exhibit C) addressed to the Collector of Madura was prepared by Rani Kattama Nachiyar and was expressly stated to be an application under Section 1 of Act I of 1876 and Section 8 of the Instimirar Sannad and Section 9 of Regulation XXV of 1802. This application runs as follows:—

"The village of Kondagai attached to the Tiruppuvanam Taluk of my Zamindari was given to Mr. R. Fischer and has been in his enjoyment. As it has been arranged to pay through me the amount that might be assessed separately on the village with reference to the accompanying statement showing the beriz of the Zemindari and the said village, I pray you will separately assess the said village and register the village in the name of the said Mr. R. Fischer." This application, however, was never presented to the Collector, because Rani Kattama Nachiyar died a few days after signing it and was succeeded by Dhorasinga Tevar as Zemindar of Sivaganga.

There is no record of any transaction relating to the village of Kondagai during the next five years, but on the 22nd February 1883, Dhorasinga Tevar, the present Zamindar's father, executed in favour of

* All the Exhibits referred to were filed in O. S., No. 14 of 1892, in the Subordinate Judge's Court, Madura (East).

Mr. Fischer, a deed of release and agreement of ratification (Exhibit D) in these terms.—" Whereas the village of Kondagai . . . of my Zamindari . . . has been granted to you in perpetuity by the late Rani Kattama Nachiyar and others and has been in your possession according to the terms of the documents executed by them to you therefore on the 13th December 1872 and on the 14th May 1877; and whereas I have received from you Rs. 2,000 as the consideration for my ratifying your rights in accordance with the terms of the said documents and for relinquishing whatever rights I possess therein, I hereby ratify your rights of every description in the said village and relinquish all my rights therein in your favour. Wherefore, as per the terms of the said documents, dated 13th December 1872 and 14th May 1877, you and your heirs and assigns shall hold and enjoy the said Kondagai village . in perpetuity . . . with full powers of alienation by sale, gift or otherwise. You shall pay to my Zamindari the sum of Rs. 3,500, the *poruppu* fixed on the said village, as well as road-cess, *magamai*, etc , according to custom "

This instrument was followed by an application (Exhibit E) presented to the Collector of Madura by Dhorasinga Tevar on the [298] 25th March 1883 under Act I of 1876. In that application Dhorasinga Tevar, after stating that the village of Kondagai had been granted in perpetuity to Mr. Fischer by the late Rani, said " I have also ratified the same by means of a document, dated 22nd February 1883, and therefore, request you will get the separate assessment fixed thereon according to the Act I herein enclose a statement showing the 10 years' beriz of the Zamindari for the purpose "

Mr. Fischer himself presented a similar application (Exhibit I) for the separate assessment and registration of the village on the 29th March 1883, but these applications were not disposed of until the 22nd September 1883 By that time Dhorasinga Tevar was dead and had been succeeded by the present Zamindar, who objected, by a petition, dated 27th August 1883, to the sub-division. On this the Collector held, in his proceedings Exhibit I (*a*), dated 22nd September 1883, that Mr Fischer's application must fail " because it is opposed by the *ipso facto* Zamindar who was the eldest son of the Zamindar lately deceased "

The next event connected with this suit in chronological order is the acquisition of a lease of the Sivaganga Zamindari by the present lessees on the 23rd May 1887 Within three months of that date, that is to say, on the 12th August 1887, the lessees executed a deed of release (Exhibit F) guaranteeing Mr. Fischer, in consideration of services rendered to them by him, undisturbed possession and enjoyment of the village of Kondagai, so far as they are concerned, during the term of their lease and 'accepted his position such as it may have been at or prior to the date of the execution of the lease and were prepared in any formal way which it may be agreed necessary and expedient to confirm this guarantee.'

Then on the 23rd January 1890 the present Zemindar executed in Mr. Fischer's favour a deed of release (Exhibit G) and after expressly mentioning therein the deeds executed by Rani Kattama Nachiyar on the 13th December 1872 and the 14th May 1877 (Exhibits A and B) and the deed executed by his father Dhorasinga Tevar on the 22nd February 1883 (Exhibit D) and reciting that he himself had received Rs. 3,500 in cash from Mr. Fischer as the consideration for ratifying Mr. Fischer's " permanent lease, without questioning it " made the following covenant —Therefore I forfeit and relinquish the right I profess to have in me to [299] question the said permanent lease or the terms of the said

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lease deeds, and I hereby ratify your right. You and your heirs shall hold and enjoy the said villages absolutely according to the terms of the aforesaid permanent lease deeds."

Mr. Fischer then applied by a petition (Exhibit III) framed under Regulation XXV of 1802 and Act I of 1876 to the Collector of Madura for the separate registration and assessment of the village of Kondagai.

On this the Collector, acting in conformity with the provisions of Act I of 1876, sent notices [Exhibits O and O (i)] to the Zamindar of Sivaganga and to his lessees. The Zamindar and the lessees both filed objections (Exhibits IV and V) to the grant of Mr. Fischer's application. After due enquiry the Collector, in accordance with Section 2 of Act I of 1876, ordered the separate registration of the village of Kondagai in Mr. Fischer's name, fixed the assessment on the portion thus sub-divided at Rs. 2,757-4-1 per annum and reported his proceedings to the Board of Revenue in his letter (Exhibit VI), dated 13th November 1890 for sanction as to the apportionment of assessment.

In its proceedings (Exhibits VI, dated 5th December 1890 the Board of Revenue sanctioned the separate assessment of the peishcush as proposed by the Collector, and the lessees thereupon appealed [Exhibits VII VII (*a*)] to the Board against the Collector's order directing the separate registration and assessment. On this the Board of Revenue, in its resolution (Exhibit VIII), dated 21st April 1891, held that it had "no power to interfere with the Collector's orders as to the separate registration of the village, which can only be set aside by a suit in Civil Court, *vide* Section 5 of Madras Act I of 1876," but called for a further report as to the apportionment of assessment, and, on receiving it, proceeded on the 17th August 1891, under Section 7 of Act I of 1876, to revise its original order on this point and fixed the assessment at Rs. 3,027-2-8 instead of at Rs. 2,757-4-1.

Dissatisfied with this result, the lessees appealed (Exhibit IX) on the 21st September 1891 to the Government of Madras against the resolution of the Board of Revenue and, by its order (Exhibit X), dated the 14th November 1891, the Madras Government, without giving any notice to Mr. Fischer, cancelled both the separate registration and the separate assessment of the Kondagai village and its hamlets.

[300] These being the facts of the case, the suits out of which the present appeals arise were instituted with the results already stated in the first two paragraphs of this judgment.

We do not think it necessary to decide, or to discuss, the many difficult questions dealt with by the Courts below. It seems to us that the rights of the parties, so far as they are properly raised in the suits before us, may be decided on comparatively simple grounds. The claim of the lessees for balance of *poruppu*, *magamai* and road-cess due by Mr. Fischer forms the subject of second appeal No. 1245 and its vaidity evidently depends upon the terms under which Mr. Fischer holds the village of Kondagai from the Zamindar. Those terms are contained in Exhibits A, B and D, and the first question for our consideration is as to what was the real agreement evidenced by these documents. The Subordinate Judge held that they evidenced merely the grant of a permanent lease of the village subject to a payment of Rs. 3,500 as quit-rent (his translation of the word "*poruppu*" in Exhibit D) together with *magamai* (contributions to the landlord for maintenance of temples and charities) and road-cess. The District Judge however, held that the transaction was an absolute sale of the village, with an agreement that the village should be separately registered

and assessed by the Collector in Mr. Fischer's name, after which he would be liable to pay the assessment so determined whether more or less than Rs. 3,500, but that until such separate assessment should be made, Mr. Fischer should pay Rs. 3,500, to the Zamindar that being the proportionate assessment which the parties estimated would be payable by the village when separately assessed. The Subordinate Judge observed that even if Exhibits A and B evidenced a contract of sale, they were ineffectual to bind the Rani's successor as she had only a life-interest (like that of a Hindu widow) in the estate, while her children had no interest at all, and he held that Exhibit D was intended to materially limit the extent of the estate contemplated to be given by Exhibits A and B. In support of this view he referred to the substitution of the word "*poruppu*" in Exhibit D for "*peishcush*" in Exhibits A and B, and to the absence in exhibit D of any reference to separate registration and assessment. The District Judge appears to regard the use of the word "*Poruppu*" as unimportant and as meaning no more than "*peishcush*" when the sum was paid not direct to the revenue authorities but to the Zamindar We agree with the Dis-[301]trict Judge in concluding that the omission of all reference to separate registration and assessment in Exhibit D is of no special import, since such registrations and assessment was expressly agreed to in Exhibits A and B whcih were confirmed by Exhibit D, and the latter was immediately followed by an application (Exhibit E) from the Zamindar to the Collector reciting the deeds and adding "I, *therefore*, request that you will get the separate assessment fixed thereon according to the Act"

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We do not think that either the Subordinate Judge or the District Judge has correctly understood the full force of Exhibit D We do not think that it was intended by that document to limit the quality of the estate conveyed by Exhibits A and B, or to disown the agreements therein that application should be made to the Collector for the separate assessment and registration of the village, but in Exhibits A and B there was manifestly an uncertainty as to whether Mr Fischer was to pay the sum of Rs. 3,500 (Exhibit A) or was to pay the *peishcush* which might be fixed by the Collector (Exhibit B) and there was no provision at all in Exhibits A and B for payment of *magamai* and road-cess It was, we think, mainly to define and provide for these matters that Exhibit D was written In it the Zamindar accordingly accepts all that is in Exhibits A and B, and relinquishes all his own rights in the village, but adds at the end, as if to clear up the uncertainty of Exhibits A and B as to the payments, "you shall, as usual, pay into my Zamindari Rs 3,500, being the *poruppu* fixed for the said village, as also road-cess, *magamai*, &c" It is to be observed that even in Exhibits A and B, the agreement is that the *peishcush* is to be paid "*to the Zamindari*," and the same condition occurs in Exhibit C where the Rani says "It has been arranged to pay *through me* the amount that might be separately assessed, &c." Thus though the village was to be separately registered and assessed, the assessment, even after such separate registratoin, was to be paid not direct to the Collector, but to the Zamindar The separate registration and assessment was of importance to the parties, and especially to Mr Fischer, since it would save each party from liability except in respect of his own portions, but the fact that the sum due by Mr. Fischer is all through stipulated to be payable to the Zamindar supports the view that the parties intended the sum to be fixed permanently at Rs. 3,500, and not to be liable to alteration according to the apportionment which the Collector might make We [302] think it is impossible

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to hold that the express sum named in Exhibit D as payable by Mr. Fischer can be held to be controlled by the indefinite terms of Exhibit B. It seems to us clear that, instead of accepting those indefinite terms, Exhibit D fell back on the definite terms of Exhibit A, and re-affirmed them, with an addition regarding *magamai* and road-cess, regarding which there is now no dispute. Exhibit D with the subsidiary instruments Exhibits A and B are the tittle-deeds by which Mr. Fischer is bound. Exhibits F and G by which the lessees and the present Zamindar confirmed Mr. Fischer's title do not introduce new terms.

On the true construction, then, of Exhibits A, B and D, we are of opinion that Mr. Fischer is bound to pay the lessees Rs. 3,500, with *magamai* and road-cess, whether his village is separately registered and assessed or not. On this finding the decree of the Subordinate Judge in original suit No. 20 was right, and the decree of the Lower Appellate Court was wrong.

In second appeal No. 1245, we reverse the decree of the District Judge with costs, and restore that of the Subordinate Judge.

Turning now to appeal suit No. 10, we do not think that it is necessary for us to say anything further on the disputed question as to the character of the estate conveyed by Exhibits A, B, D, F and G. Looking to the special agreements in Exhibits A and B, which are confirmed in the subsequent instruments, and which specially provided for separate registration and assessment, and looking to the importance to Mr. Fischer of these agreements, it may well be that, in a suit properly framed for the purpose, under Section 6, Act I of 1876, Civil Court would grant him a "declaration that separate registration ought to be made" if the Collector refused such registration on application being made to him. But this is not what Mr. Fischer has sued for. His suit is for a declaration that the order of the Madras Government (Exhibit X), directing the Collector to cancel the separate registration and assessment of the village previously made by him is invalid and *ultra vires*. No consequential relief is sought, unless, indeed, it be in the general words of prayer "and for such other relief as the circumstances of the case may require." If these words contain a prayer for a declaration that the registration and assessment of the Collector ought to be restored, the suit is clearly bad for non-joinder of parties. It is, as now framed, against the Secretary of State for India only; but if the Collector's order is to be restored, it is clear that the lessees [303] and the Zamindar should have been made parties and given an opportunity of contesting a claim which they regard as injurious to them.

If, however the above words are mere surplusage, and the suit is really for a bare declaration that the order of the Madras Government is *ultra vires* and illgeal, it is clear that the suit is not sustainable with regard to the provisions of Section 42 of Specific Relief Act, for long before the date on which the suit was filed (7th March 1892), the order had been communicated to the Collector and had been carried out by that officer on the 13th January 1892 (Exhibit X). Mr. Fischer, therefore, when he filed the suit ought to have asked for substantial relief and not for a mere declaration. It is suggested that he would not ask for this relief lest he should be met by a plea of limitation founded on the Collector's refusal in 1883 (Exhibit I) to grant separate registration and assessment. Whatever the reason for the omission, we are of opinion that, under the circumstances, the suit for a mere declaration was not sustainable. These considerations are sufficient to justify the Subordinate Judge's

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dismissal of the suit and our dismissal of this appeal We do not think it necessary to go at length into the questions which were debated in both the Lower Courts as to the powers of the Collector and of Government under Act I of 1876 and under the old Regulations XXV of 1802 and III of 1803. We think it is clear, for the reasons stated in paragraph 20 of the Subordinate Judge's judgment in original suit No 14, that when the Collector ordered the separate registration and assessment (Exhibit VI), all the parties to the alienation had not concurred in applying therefore It is beside the mark to say that the Zamindar's father had applied in 1883. That application was refused. It is also idle to say that under Exhibits A and B the Zamindar was bound to joint in the application. Section 2 of Act I of 1876 does not require that the party should be merely entitled to registration, but that the parties to the alienation should "concur in applying" for it It is equally idle to say that the objection was not so much to separate registration as to the amount of assessment to be fixed Whatever the cause was, it is clear that the Zamindar and the lessees not only did not concur in the application but opposed it That being so, we are of opinion that the Collector ought to have refused registration and left the party aggrieved to his remedy by suit under Section 6 of the Act [304] The Collector, however, granted separate registration and assessment, but afterwards, under the orders of Government, cancelled the registration This cancellation must be regarded as a final refusal by the Collector to grant the separate registration applied for by Mr. Fischer If the latter was aggrieved by this refusal, his remedy was by a suit under Section 6 of the Act against the Secretary of State as the authority in whose name the Collector acted, and against the Zamindar and lessees, as persons whose interests would be affected by the declaration to be asked for He has not thought fit to adopt the remedy prescribed by the Act, and for the reasons already stated we are of opinion that he cannot be granted the relief for which he has asked in the present suit.

We, therefore, confirm the decree of the Subordinate Judge and dismiss this appeal with costs

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19 M. 304.

APPELLATE CIVIL.

Before Sir Arthur J H Collins, Kt , Chief Justice and Mr Justice Benson.

VOLKART AND OTHERS (*Plaintiffs*) v. SABJU SAHEB AND OTHERS (*Defendants*) * [29th April, 1896.]

Presidency Small Cause Courts Act, Section 69—Jurisdiction—Divisible contract.

Where a contract provided for delivery of goods in two monthly shipments by the plaintiffs and the defendants refused to take delivery or pay for either of the shipments of the goods in accordance therewith, it appeared that the total amount of the damages sustained by reason of the two breaches, if added together, exceeded Rs 2,000, whereas if taken separately they were respectively less than that amount The contract provided that each shipment was to be treated as a separate contract·

Held, that the plaintiff was entitled to bring separate suits for the damages sustained in respect of each shipment and that therefore the Presidency Small Cause Court had jurisdiction

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* Referred case No. 17 of 1895.

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APPEL-
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CIVIL.

19 M. 304.

Case stated for the opinion of the High Court under Section 69 of the Presidency Small Cause Courts Act, and Section 617 of the Code of Civil Procedure by R. B. Michell, Chief Judge of the Presidency Court of Small Causes, in small cause suit No. 11487 of 1895.

[305] The case was stated as follows:—

"This is a suit for damages for loss sustained by plaintiffs through "defendants' alleged breach of contract in not taking delivery and paying "for 24 cases of nainsooks in accordance with the contract between the "parties made on 25th October 1894. The contract referred to is the "indent (Exhibit A) bearing that date, and admittedly signed by first "defendants in the name of the defendants' firm and bearing the word "'accepted, written on it, which the plaintiffs' second witness, their "manager, Mr. Scholl, has sworn was written by him, and means that the "indent is accepted by plaintiffs. By this indent the defendants agree to "purchase 50 cases of white cambrics; shipment to be in two monthly "lots. The 50 cases were brought out by plaintiffs from England by "two shipments—one of 24 cases, the other of 26 cases. Exhibit A "contains, amongst others, a stipulation that 'each shipment $\frac{\text{or}}{\text{and}}$ item "'under this contract is to be treated as a separate contract.' Acting "upon this, the plaintiffs have instituted two suits—one in respect of "the shipment of 24 cases, being the suit in which this reference is made, "the other in respect of the shipment of 26 cases being suit No. 12179 "of 1895. On the application of defendants' attorney the two suits were "heard together, the witnesses to be examined and most of the documen-"tary evidence to be adduced in both suits being the same. The defend-"ants' attorney pleaded in both suits (i) that this Court had no jurisdic-"tion, as there was only one contract in respect of which the two suits "were brought and the amount of the two claims together exceeded the "pecuniary limits of the jurisdiction of this Court; (ii) defendants put "plaintiffs to proof of the contract; (iii) goods were not according to "contract; (iv) no notice of re-sale was given to defendants; (v) damages "claimed are excessive. After the evidence on both sides had been "taken the defendants' attorney applied under Section 69 of the Presi-"dency Small Cause Courts Act for a reference being made to the High "Court for its opinion upon the question whether, with reference to the "provision in the contract (Exhibit A) 'that each' shipment $\frac{\text{or}}{\text{and}}$ item "'under this contract is to be treated as a separate contract,' the plaintiffs "are entitled to bring two separate suits, as they have done in respect "of the subject matter of Exhibit A or are bound to bring one single "suit in respect thereof. This question, therefore, I refer, under Sec-"tion 617, [306] Civil Procedure Code, and Section 69, Presidency Small "Cause Courts Act, for the opinion of the High Court, and reserve "judgment until the disposal by the High Court of this reference.

"Upon the question referred, I had, after the pleas were put in and "before the examination of witnesses began, ruled in plaintiffs' favour, "being of opinion that the stipulation in question on which they relied "in Exhibit A entitled them, and indeed bound them, to treat each ship-"ment as a separate contract, and that therefore they were entitled to "institute separate suits in respect of such separate contracts."

Mr. *K. Brown*, for plaintiffs.
Mr. *R. F. Grant*, for defendants.

JUDGMENT.

1896 APRIL 29. — APPEL-LATE CIVIL. — 19 M. 306

Our answer to the question referred to us is that the terms of the contract in Exhibit A are clear, and under it the plaintiffs are in our opinion, entitled to bring two separate suits as they have done one in respect of each shipment.

Attorneys for plaintiff —*Wilson & King*

Attorney for defendants —*James Short*

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19 M. 306=6 M.L.J. 172.

APPELLATE CIVIL.

Before Mr Justice Subramania Ayyar

MUTHUNARAYANA REDDI (*Defendant No* 1), *Appellant v* BALAKRISHNA REDDI AND OTHERS (*Petitioner, and Plaintiffs Nos* 1 *and* 2), *Respondents* * [13th April, 1896]

Assignment of decree by one of two-decree-holders valid—Civil Procedure Code, Section 232

There is no prohibition in law against one of several decree-holders assigning his interest under the decree

Held, that the assignee is entitled to execute under Section 232, unless the judgment-debtor can show that such a proceeding is prejudicial to his interest

[R. 33 M 80 (81)=6 M L T 294; 6 M.L T 242]

APPEAL against the order of H H O'Farrell, Acting District Judge of South Arcot, passed in civil miscellaneous petition No 168 of 1895

[307] Petition presented under Section 232 of the Civil Procedure Code by Balakrishna Reddi, son of Andi Reddy, of Vikravandi in Villupuram taluk, being the assignee of plaintiff No 1, Lakshminarayana Reddi, in respect of his rights under the decree in this suit

Plaintiff No 1 is entitled to half of the rights due under this decree The said plaintiff No 1 transferred to this petitioner the rights due to him under the decree, on the 14th May 1895, by a registered deed upon receiving, in consideration therefor, Rs 3,500 including interest due up to 14th May 1895

The assignee claimed to be entitled to execute the decree for recovery of the amount in lieu of the first plaintiff Defendant No 1 objected that the assignment was by one plaintiff only while there were two plaintiffs on the record

The Acting District Judge overruled the objection.

Defendant No. 1 appealed

Pattabhirama Ayyar, for appellant

Krishnasami Ayyar, for respondents

JUDGMENT

The objection taken is that, unless all the decree-holders join in assigning the whole of the interest possessed by them under the decree, no order should be passed under Section 232, Civil Procedure Code The decision in *Kishore Chand Bhalkat* v *Gisborne and Company* (1) is an authority against this contention Following that case, I hold that there is no prohibition in law against one of several decree-holders assigning his interest under the decree Whether such an assignment ought to be

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* Appeal against order No. 10 of 1896

(1) 17 C 341

1896 April 13. — Appellate Civil. — 19 M. 308= M. L. J. 172.

recognised under the section of the code referred to above and the assignee permitted to take out execution must depend upon the circumstances of each case. Here, however, I see no objection to the first respondent being permitted to execute the decree according to law. The appellant was not able to show how he would have been prejudiced by the respondent being allowed to execute the decree. The order of the District Judge was right. The appeal is rejected with costs of the first respondent.

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19 M. 308=6 M.L.J. 179.

[308] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

KAMALAMMAL (*Defendant No.* 1), *Appellant v.* RAJU NAICKER AND OTHERS (*Plaintiffs and Defendant No.* 2), *Respondents.**
[30th March and 1st April, 1896.]

Suit for declaration—Regulation XXV of 1802, *Section* 8 *and Madras Act I of* 1876, *Sections* 2, 6.

An alienee of a portion of a zamindari is entitled to separate registration and assessment under Madras Act I of 1876. A Court has power to order separate registration and assessment under Section 6, although all the parties concerned do not concur in applying within the meaning of Section 2.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West) in original suit No. 89 of 1894.

The facts of the case are as follows:—

One Kamaraja Pandiya Naicker was the zemindar of Bodinayakanur. He died in December 1888 and was succeeded by his widow the first defendant. After his death one Kanthasami Naicker, whose father and the zamindar's father were brothers, brought a suit for recovery of the zamindari in original suit No. 16 of 1889 on the file of this Court against the present defendants plaintiff's father, Sundara Pandiya Naicker, who was then the eldest paternal uncle of the said Kanthasami and the late Kamaraja Pandiya Naicker, asserted some claim in the zamin. The claims of all the parties were settled in that suit by a compromise, which is Exhibit D in this suit. A deed of gift, dated 6th May 1890, (Exhibit 1) was executed by first defendant to the said Sundra Pandia Naicker, father of these plaintiffs. Under that document the plaint village was absolutely given to plaintiffs' father by first defendant. In original suit No. 33 of 1890 the plaintiffs' father brought a suit against first defendant for recovery of this village and other properties comprised in Exhibit I, got a decree and was put in possession of the village. But he could not exercise his right as landlord without separate registry being entered in his name in the Collector's register as shown by [309] Exhibits B and C. Plaintiffs' father then applied to the Collector for separate registry under Madras Act 1 of 1876, and the Collector passed an order in his favour as per Exhibit E. But the Revenue Board cancelled that order as is seen from F. Hence this suit for separate registry under Section 6 of the said Act. As ruled by the Madras High Court in *Mangamma* v. *Timmapaiya* (1) and *Virasami* v. *Rama Doss* (2)

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* Appeal No. 100 of 1895.

(1) 3 M.H.C.R. 134.

(2) 15 M. 350.

the Collector representing the Secretary of State as second defendant is a necessary party to a suit of this nature The cause of action arose under Section 6 of Act I of 1876 only after refusal to separately register and assess.

1896 APRIL 1. APPELLATE CIVIL. 19 M. 308 = 6 M. L. J. 179.

Sankaran Nayar, for appellant.

The Government Pleader (Mr. *Powell*), for respondent No 5.

Krishnasami Ayyar, for respondents Nos 1 to 4.

JUDGMENT

Plaintiffs as the alienees of two villages of the first defendant's Zamindari under Exhibit I, applied to the Collector under Act I of 1876 to have the two villages registered in their names Owing to the first defendant's objection the Revenue authorities refused to make the transfer of registry Plaintiffs, as persons aggrieved by this order, sued first defendant and the Secretary of State for India (second defendant) under Section 6, Act I of 1876, for a declaration that such separate registry ought to be made. The Lower Court decreed that it ought, and, first defendant now appeals against that decree. The Government Pleader, on behalf of the second defendant, states that Government is indifferent to the result of the suit It is urged by appellant that under the terms of Exhibit I the first defendant (appellant) alone and not the plaintiff's (respondents 1 to 4) are liable, notwithstanding the alienation, to pay the land revenue to Government, and that there is, therefore, no occasion for separate registry, and that Act I of 1876 is inapplicable to the case, as its purpose is to make better provision for the separate *assessment* of revenue on alienated portions of estates We cannot admit that this is so Section 8 of Regulation XXV of 1802 allows the proprietors of zamindaries to transfer their proprietary rights in the whole or in part of their zamindaries and Regulation XXVI of 1802 and Act I of 1876 provide for the separate registry and assessment of the alienated portions Without such separate registry the alienee cannot collect rents as a landlord under Act VIII of 1865, [310] *Valamaramayyan* v *Virappa* (1) and *Ayyappa* v *Venkatakrishnamarazu* (2), and without separate assessment he is liable to have his property sold at any time for arrears accruing on the other parts of the zamindary It is, therefore, essential that he should get separate registry at least in order that he may enjoy the fruits of the alienation Government, in order to maintain the security for the public revenue due from the estate, apportions the revenue separately as a natural result of the alienation and this Government will do notwithstanding any arrangement between the parties as to which of them is to be responsible for the revenue It is argued that under Section 2 of Act I of 1876 the Collector cannot transfer the registry unless all the parties concur. That section relates to transfer of registry by agreement of parties on application to the Collector It does not control or affect the power of the Civil Court under Section 6 of the Act to direct separate registration. The right to registry follows the title, and under Exhibit I the title is in the respondents 1 to 4 The decree of the Lower Court was, therefore, right This appeal fails and is dismissed with costs

Two sets of costs will be allowed—one to the respondents 1 to 4, and one to respondent 5.

(1) 5 M. 145. (2) 15 M. 484

1896 April 15.

Appellate Criminal.

19 M. 310=6 M. L. J. 173=1 Weir 296=1 Weir 893.

19 M. 310=6 M.L.J. 173=1 Weir 296=1 Weir 893.

APPELLATE CRIMINAL.

Before Sir Arthur, J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* KALIAN AND OTHERS.*
[31st March and 15th April, 1896.]

Penal Code—Act XLV of 1860, Section 224—Escape from lawful custody—Salt Act (Madras)—Act IV of 1889, Sections 46, 47.

The Madras Salt Act 1889, only authorises searches for contraband salt and arrests of the parties concerned in the keeping of such salt to be made by officers of the Salt department without search warrant in cases where the delay in obtaining such search warrant will prevent the discovery of such contraband salt:

Held, that where the circumstances did not justify the officer in beliving that the delay in obtaining a search warrant would prevent the discovery of contra- [311] band salt, he had no power to search or arrest persons without such warrant and the escape by the persons so arrested from custody was no offence within the meaning of Section 224, Indian Penal Code.

[R., 10 Ind. Cas. 667 (668)=9 M.L.T 414=(1911) 1 M.W.N. 231; D., 21 M. 296 (298) =1 Weir 135.]

APPEAL under Section 417 of the Code of Criminal Procedure against the judgment of acquittal passed in appeal case No. 50 of 1895 by the Head Assistant Magistrate of South Arcot against the conviction and sentence passed by the Stationary Sub-Magistrate of Chidambaram.

The facts of the case are as follows:—

About 2 A.M. on the morning of 18th March a party consisting of the Salt Sub-Inspector, Mannargudi (first prosecution witness), three petty officers (witnesses 2 and 3 and another), about 32 Salt peons, the station house officers of Mannargudi and Komaratchi and four police constables in all about 42, went from Mannargudi to the Cheri of Puthur, a village some few miles from Mannargudi, and searched the houses of the pariahs for contraband salt, &c. Twenty-eight houses were thus searched and twenty-one individuals were arrested. The complaint is that while the Salt officers were taking these persons to Mannargudi station in default of their giving security, they under the instigation of a mob of some 200 villagers headed by one Velu Pillai, made their escape from the custody of the Salt officers in spite of the efforts of the latter to retain them in custody. The Salt Sub-Inspector of Mannargudi deposed that he received information at about 9 P.M. on the night of the 17th March from his petty officers and peons with reference to the existence of contraband salt in the village of Puthur, and that having recorded his reasons for dispensing with the search warrants he proceeded to make search without them. He stated that to obtain a search warrant he would have had to wait until next morning, that he was informed the contraband goods would be destroyed by that time, and that as some 20 or 30 warrants would have to be prepared by the Sub-Magistrate's clerks the matter would certainly come out.

It appeared, however, that the body of police, which took part in this search was on requisition made by him almost a week before to his Inspector and by the latter to the Inspector of Police summoned

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* Criminal Appeal No. 702 of 1895.

for the night of March 17th for the express purpose of searching for contraband salt in villages Witness stated that he made this requisition, as there were one or two villages in his range notorious for the existence of contraband salt, but that he had no [312] definite information before the 17th, on the night of which he got information of the houses in Puthur with their owners' names The Head Assistant Magistrate came to the conclusion that the Sub-Inspector was aware of the state of things in Puthur, and intended to institute a search there some time before the night of 17th March and that the evidence of Arunachellam, a petty officer in Salt department, to the effect that he did not inform the Sub-Inspector of the existence of contraband salt in Puthur until the latter asked him for information on the night of 17th March was false He found that the Sub-Inspector intended prior to the night of the 17th to search Puthur, that he ought therefore according to the law as it stands to have applied to the Magistrate for a warrant, that, as he failed to do so, his subsequent action was *ultra vires*, and that as the appellants were not therefore in lawful custody, their escape from that custody was not an offence

1896 April 15. — Appellate Criminal. — 19 M. 310=6 M. L. J. 173=1 Weir 206=1 Weir 893

Against this acquittal the Public Prosecutor (Mr *Powell*) for the Crown appealed

Mr *Wedderburn* and *Krishnasami Ayyar*, for the accused

JUDGMENT

The Stationary Sub-Magistrate of Chidambaram convicted eighteen pariahs of Puthur, who had been arrested by officers of the Salt department on the 18th March 1895, of having escaped from lawful custody on the same day, an offence punishable under Section 224, Indian Penal Code.

On appeal, the Head Assistant Magistrate acquitted them on the ground that the Salt officers had made the arrest unlawfully, and that escape from such custody was no offence

Against this acquittal the Public Prosecutor now appeals on behalf of Government

It is admitted that the Sub-Inspector of the Salt department had no other authority to make the arrests than that given by Section 47 of the Madras Salt Act, 1889 The question is whether under the circumstances, his action was in accordance with the provisons of that section It empowers an officer of the Salt department whenever he "has reason to "believe that contraband salt is being kept in any place and "that the delay in obtaining a search warrant will prevent the discovery thereof" after certain formalities to search such place, seize any contraband salt therein, and arrest any person concerned in the keeping of such salt. The Sub-Inspector has sworn that he got information that there was contraband salt in the paracheri of Puthur about [313] 9 P.M on the 17th March, that he had no time to get a search warrant from the Magistrate before the next morning, and that had he waited until the next morning to obtain a search warrant the matter would undoubtedly have come out, as twenty or thirty warrants would have to be prepared by the clerks, and that the salt would have been destroyed. He admits that he applied for police aid a week previously, but says it was to aid in searching villages generally, and that there were several notorious villages in the neighbourhood He says he only got definite information of the houses and the owner's names on the night of the 17th. These satements are not contradicted by any evidence, and we are not disposed to regard them as false We think, hiwever, that there can be little

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doubt but that the Sub-Inspector could have obtained the information sooner had he cared to do so, and that in any case, he could have applied to the Magistrate for a search warrant even after he got the information, and was not justified, under all the circumstances, in making the search and arrest without doing so. The Sub-Inspector asked for police aid a week before the 17th. It was not, in fact, used for any search except that of Puthur. The Sub-Inspector's petty officer, Arunachella Pillai, knew that there was contraband salt in Puthur for two or three days before the 17th; but he says that he did not tell the Sub-Inspector until the night of the 17th and adds "I do not volunteer information to my superiors, but "if they ask me I inform them." It seems to us clear that the Sub-Inspector knew in a general way that there was contraband salt in the paracheri of Puthur for some days before the 17th, and that he could have learned full particulars had he chosen to enquire of his petty officer. It can hardly be believed that he was in ignorance that the latter was in possession of detailed information. The Sub-Inspector says that during the past four years he has conducted some two-hundred searches, but has never once applied to the Magistrate for a warrant. It seems to us that this indicates the existence of a system whereby the intention of the Legislature is habitually frustrated. It is clear from Section 46 of the Act that it contemplates searches being ordinarily made under the authority of warrants issued by a Magistrate. Section 47 was intended to be availed of only in cases where "the *delay* in obtaining a search warrant" from a Magistrate would prevent the discovery of the salt. The Act does not allow a salt officer to make a search without warrant [314] because he fears that the *publicity* involved in asking for a warrant will prevent the discovery of the salt. He has power to make the search only when the *delay* involved in getting a warrant would prevent such discovery. Apparently, however, the system of this Sub-Inspector is never to get definite information until just before the time of the intended search, and then to make the search himself without warrant, alleging in justification that the delay in obtaining the warrant would lead to the destruction of the salt. We think that this system, if it exists, as it appears to do, is an abuse of the powers given by the Act which calls for the attention of Government and of the superior officers of the Salt department.

In the particular case now before us, the evidence shows that the Sub-Inspector could have obtained the Magistrate's warrant without causing any delay whatever in conducting the search. The Sub-Inspector received detailed information at Mannargudi at 9 P.M. on the 17th March. He and his men did not start for Puthur until 2 A.M. the next day. He thus had five hours wherein to have gone to the Magistrate and got a warrant. The Magistrate lived only "one or two furlongs" away from where the Sub-Inspector was, so that the time that would have been required would not have been more than a few minutes. It is suggested that twenty or thirty warrants would have had to be written, and that the Magistrate could not be asked to do this at night and without the aid of his clerks. We observe that there are twenty-eight houses, and only twenty-eight, in the Puthur paracheri, and all of these were searched. The Sub-Inspector, therefore, had reason to believe that there was contraband salt in every house in the paracheri, and intended to search them all. He could, therefore, have asked for a single warrant to search all the houses in the paracheri. This could have been granted by the Magistrate and written with his own hand in a few minutes. A Magistrate is

always on duty, and must be prepared to act, on urgent occasions, at other than the ordinary office hours. We think that in the present case no delay ought to, or would have resulted, had the Sub-Inspector applied to the Magistrate for a warrant. That being so, he was bound by law to have obtained the warrant before making the search, and the search without warrant, and the arrests which followed it, were both illegal. We cannot admit the contention of the Public Prosecutor that the exercise of the power given by Section 47 is " left entirely to the discretion " of the [315] officer concerned, and that the wrongful exercise of the discretion does not make the arrest invalid. The officer has power only within the limits allowed by law, and must exercise his powers strictly in accordance with law When he fails to do so his action is illegal, and the arrest is unlawful. If the arrest is unlawful, there is no offence under Section 224, Indian Penal Code, in escaping from it In the present case we find that the Sub-Inspector failed to comply with the law, and that his arrest of the accused was unlawful They were, therefore, rightly acquitted, and we dismissed this appeal.

1896 April 15. — Appellate Criminal. — 19 M. 310=6 M. L. J. 173=1 Weir 206=1 Weir 933.

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19 M. 315.

APPELLATE CIVIL

Before Mr Justice Shephard and Mr. Justice Subramania Ayyar

JAYINILABDIN RAVUTTAN (*Counter-Petitioner, Plaintiff and Purchaser*), *Appellant v* VIJIA RAGUNADHA AYYARAPPA MAIKAN GOPALAR (*Defendant, Petitioner*), *Respondent* *
[20th, 23rd March and 1st April, 1896]

Civil Procedure Code—Act XIV of 1882, Section 311—Setting aside a sale on the ground of material irregularity—Non-disclosure amounting to fraud

A creditor had obtained a decree on the footing of a mortgage and in execution brought the property of his judgment-debtor to sale At the time of sale the decree-holder, who had obtained leave to bid, entered into an agreement with P to the effect that if P would dissuade other persons from bidding, he (the decree-holder) would purchase the whole property for Rs 83,000 and convey it on certain terms to P P thereupon exerted his influence and succeeded in persuading would be purchasers from bidding and in consequence the property was sold on 11th April 1891 for Rs 83,000, which was a little more than half its actual value The sale was confirmed on 29th June 1891 and the judgment-debtor who at the time of the sale was a minor under the Court of Wards, attained his majority on 21st April 1894 and filed this petition praying to set aside the sale on the 15th May 1894

Held, that the omission on the part of the decree-holder to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment-debtor to say that in point of law no leave to did was granted and that the [316] withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore the sale must be set aside

[**On appeal,** 23 M 227 (**P.C.**)=27 I A 17=4 C W N 228=10 M L J. 1, **F.,** 36 C 226 (230)=9 C L J 244=13 C W N 18=4 M L T 421]

APPEAL against the order of C. Venkobachariar, Subordinate Judge of Tanjore, passed on civil miscellaneous petition No 487 of 1894

The petitioner (defendant) in original suit (No. 85 of 1882) presented a petition, dated 15th May 1894 under Section 311 of the Code of Civil

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* Appeal against Order No 131 of 1895.

1896 April 1. — Appellate Civil. — 19 M. 315.

Procedure, asking the Subordinate Court of Tanjore to set aside the auction sale, dated 11th April 1881 of a portion of his zamindari for a debt of about Rs. 42,306 incurred by his father, which sale was confirmed on 29th June 1891. At the time of the sale petitioner was a minor under the Court of Wards and attained his majority on 21st April 1894. The petition was opposed by Jayinilabdin (the auction purchaser) as counter-petitioner. The following objections to the validity of the auction-sale were relied upon by the petitioner.

(1) That the sale took place before the expiration of thirty days from the dates on which the sale notices were alleged to have been published in the villages (the dates of publication in the villages were 13th and 15th March 1891).

(2) That the proclamations of sale were not as a matter of fact published in the villages.

(3) That the interest of the Zamindar in the villages was not properly described in them.

(4) That on the date of sale an agreement was entered into between Papanad Zamindar and Jayinilabdin, in consequence of which, intending purchasers were dissuaded from bidding at auction.

(5) And lastly that the petitioner sustained damages, as the villages were sold for prices much below what they were worth.

The counter-petitioner denies that there was any fraud in the sale, and says that it took place after thirty days from the date of the affixing of the notification of sale in the Court-house, and that the notifications were published in the villages. He further states that he did not dissuade intending purchasers from bidding at auction, that he entered into no agreement with Papanad Zamindar, that there was no agreement that he should purchase the villages for low prices, that the prices fetched were fair, and that petitioner suffered no damage. It is contended further that the petition is barred and that it is unsustainable.

[317] With regard to the points thus raised for decision the Subordinate Court found that the proclamation of sale was made and duly published in the villages; but that there was material irregularity within the meaning of Section 311, Civil Procedure Code, inasmuch as thirty days did not intervene between the posting up of the proclamation in the villages and the date fixed for the sale. He held on the authority of *Tasadduk Rasul Khan* v. *Ahmad Hussain* (1) and *Arunachellam* v. *Arunachellam* (2) that though this material irregularity occurred, the sale ought not to be set aside in the absence of proof of substantial damage of the petitioner. As to the third objection the Subordinate Judge found that the interest of the Zamindar in some of the villages was not properly described in the sale proclamations, but held on the authority of *Olpherts* v. *Mahabir Pershad Singh* (3), *Arunachellam* v. *Arunachellam* (2) that this was not a sufficient ground for setting aside the sale. He also held that it was not proved that this irregularity caused any damage to the petitioner. As to the fourth ground of objection the Subordinate Judge held that the agreement (Exhibit C) was made on the date of sale between Papanad Zamindar and Jayinilabdin (counter) petitioner as follows:—

" Agreement executed on the 6th April 1891 to Sabhapati Pillai Avergal son of Sivachithambaram Pillai of Kilappaluvoor of Trichinopoly District, residing in Maharnombu Chavadi, Pookkara Street, Third Division, Tanjore, by Chinnayya Rowther *alias* Zainoolabdin Rowther, son of Mohamed

(1) 21 C. 66. (2) 12 M. 19. (3) 10 I.A. 25.

Meera Rowther, residing at Okkur, Pattukottai taluk, Tanjore District. Execution petitions having been put in for the purpose of the realization of the decree amounts in these two suits, namely, original suits Nos. 85 of 1882 and 21 of 1883 on the file of the Subordinate Court of Tanjore, the decrees whereof hold liable these eight villages as hypotheca, namely, Karakkottai, Kambarkovil, Omakkavayal, Kuttangudi, Irambavayal, Sirukottaiyur, Vennathur and Kodamangalam comprised in the Zamindari of Singavanam of Pattukottai taluk, this day has been set down for the sale of the said eight villages which are held liable for the decrees Consequently, if I should purchase the said villages at auction sale as agreed upon in our conversation, I shall, as per request made by you to me, convey to you at your expense the said eight villages to be purchased [318] at auction sale on my receiving from you payment in cash on any date within one year, Rs 85,000 being the price of the said eight villages as agreed to now, together with interest thereon at three-fourth per cent. per mensem from this day to the 1st April of the ensuing year 1892, that is to say, within one year and every sort of expenditure incurred in respect of the said villages with interest thereon at the rate aforesaid. If any other than myself should purchase at auction some (any) of the said eight villages, the sale amount in respect of the villages which may be so purchased at auction shall be deducted from the said sum of Rs. 85,000 and the remaining sum together with interest, &c , thereon as set forth above shall on payment on any date within one year be received by me and the villages which may be purchased by me at auction will be conveyed to you If, as set forth above, the amount, &c , be not paid and sale deed obtained within one year, this agreement shall stand null and void "

The Subordinate Judge held that the above agreement was made for the benefit of the Papanad Zamindar and counter-petitioner, and that in consideration of the counter-petitioner consenting to reconvey the villages if he should purchase them, the Papanad Zamindar undertook to prevent bidders from competing with him in the auction, and that the agreement was verbal and was a condition precedent to the agreement (Exhibit C).

With regard to the value of the villages the Subordinate Judge found that they were worth 1½ lakhs of rupees or about Rs 70,000 more than the amount realized by the auction, and that this loss was attributable, not to pure accident, but to want of fair competition in the auction due to the compact between the Papanad Zamindar and counter-petitioner to dissuade people from bidding.

The Subordinate Judge therefore set aside the sale on the condition of petitioner paying Rs. 83,000 due to the counter-petitioner within six months from the date of his order (15th March 1895) Each party to bear their own costs.

Both parties appealed to the High Court. The counter-petitioner against the order setting aside the sale in civil miscellaneous appeal No. 131 of 1895 and the petitioner against the order to pay Rs 83,000 within six months in civil miscellaneous appeal No. 120 of 1895.

The other points argued appear sufficiently from the order of the High Court.

[319] *Bhashyam Ayyangar* and *Desikachariar*, for appellant
Pattabhirama Ayyar, for respondent.

ORDER.

The appellant is the purchaser of eight villages sold on the 11th April 1891 at an auction sale held in execution of decrees passed against the

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respondent and his father. The respondent, who was at the date of sale a minor, has obtained an order setting aside the sale, and against that order this appeal is brought.

The material facts found by the Subordinate Judge and forming the ground for his order are as follows:—

One of the decrees, in execution of which the sale was held, was a mortgage decree obtained by the appellant himself. The amount due under that decree at the time of the sale was about Rs. 60,000. The other decree was held by a third person whose agent, as it will appear, was Sundaram Chetti. The amount due under that decree was about Rs. 17,000. On the day for which the sale was advertised, the 6th of April, an agreement was made between the appellant and a person representing the Papanad Zamindar to the effect that the former should purchase the whole property for Rs. 85,000 and convey it on certain terms to the Zamindar. On the same day the appellant obtained from the Court leave to bid. So far there is no doubt as to the facts. But the Judge further finds that it was part of the agreement between the Zamindar and the appellant that the Zamindar shall dissuade other persons from bidding at the auction and that the Zamindar acted in accordance with the undertaking with the result that the eight villages were finally knocked down to the appellant at an aggregate price which was substantially below their real market value. The price which the appellant paid was Rs. 78,070, with the expenses of sale and the like amounting to Rs. 83,000. The real value of the property is according to the Judge's estimate about Rs. 1,50,000. This estimate is attacked by the appellant's vakil mainly on the ground that the statement (Exhibit XXXI) on which the Subordinate Judge relies under-estimates the proportionate peishkash payable by the eight villages. The evidence with regard to the statement which purports to show the income of the villages for five years and the peishkash payable on each is not altogether satisfactory. The witness who speaks to it does not say for what purpose it was prepared, nor does he mention the materials on which he worked. It must be [320] assumed that the calculation of the peishkash payable by the purchaser is correct, and that accordingly the figure given in Exhibit XXXI is much lower than it should be. The inference naturally arising is that the other figures representing the income are also too low. We cannot accede to the suggestion that we must accept the figures representing the income as correct and reject the figures supposed to represent the peishkash, and thus arrive at the conclusion that the net income of the villages is less than what Exhibit XXXI would make it appear to be. There is, however, other evidence in support of the Subordinate Judge's finding. There is the evidence of the same witness who speaks to Exhibit XXXI, namely, the late manager under the Court of Wards, with reference to another statement made by him regarding the value of the villages. His evidence with regard to this statement in which the value is put at a figure exceeding Rs. 1,50,000 is much more satisfactory. There is other evidence as to the prices which witnesses say they were prepared to give for single villages, and there is the circumstance of large claims being made by the appellant for melvaram payable in respect of some of the villages. On the whole there is, in our opinion, ample evidence to support the Judge's finding as to the value of the villages.

In regard to the other matters of fact on which the Subordinate Judge has recorded findings we also agree with him. The sale began on the 6th April and each village was put up as a separate lot. No village

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was sold on that day, but the biddings were by order of the Court carried on from day to day till the 11th, when finally all the eight villages were sold and bought by the appellant. This seemingly extraordinary way of conducting a sale is said not to be unusual. Looking at the reports of the bids on the 11th of April, which of course was the only day on which serious bids were made, we find that in the case of Kambarkovil, Ilambavayal, Kodamangalam, Karagottai and Sirukottaiyur there was only one bidder besides the two decree-holders, one of whom was represented by Sundaram Chetti. In the case of Vennattur those two were the only bidders. In the case of Kuttangudi there were two other bidders. For the most valuable village Karakottai the two decree-holders were the only bidders whose bids could be regarded as serious.

Sheik Ismail Sahib was one of the most frequent bidders. The account he gives of himself when examined as a witness for the [321] respondent is not very satisfactory, and it seems doubtful whether in his bids he really meant business. Sundaram Chetti, the agent of the other decree-holder, was not examined, and it is not certain whether his employer had obtained leave to bid. The probability is that the bids were made merely with the view of raising the price to such a figure as to secure the payment of the debt due under that decree as well as the debt due to the respondent. This remarkable absence of competition, notwithstanding the fairly full attendance at the auction, might, if otherwise unexplained, be attributed to the fact that there were two decree-holders in the field. But there is evidence that effort was made to prevent competition. There is the evidence of several persons present at the sale whom the Judge has believed. Their story is strongly corroborated as well by the evidence with regard to the terms on which the agreement of the 6th April was made, especially the evidence of the District Registrar, as by the fact that the public did abstain from competing. There is in addition the significant fact that the vakil Srinivasa Pillai is not prepared to deny positively the conversation to which the District Registrar speaks.

The question then is whether, on the facts as found by the Subordinate Judge, the order was rightly made. The order is made under Section 311 of he ode, and it is based on the ground of irregularity in the conduct of the sale. In our opinion there has been no irregularity within the meaning of the section. No charge is made against the person conducting the sale. The charge is made against the respondent and those who acted in concert with him, and it amounts to this, that they acted in such a way as to prevent the best price being obtained and thus caused loss to the judgment-debtor. So far as this particular charge is concerned we are further of opinion that it does not amount to a charge of fraud. Putting aside for the present the fact that the purchaser was the decree-holder and confining our attention only to the agreement made before and the conduct of the parties at the sale, we do not think that any fraud was established. There is some authority for the position that an agreement between two persons not to bid against each other will constitute sufficient ground for opening the biddings (Bigelow on Fraud, p. 580. *Pachayappan* v. *Narayana* (1) founded on Sugden's "Vendors and Purchasers," [322] old edition, p. 93.) But according to the better opinion, that is not good law. It was distinctly held in "*In re* Carew's Estate Act" (2) that such an agreement, made with the view of dividing the land between the two parties to it, was no ground for setting aside the sale (see *Doorga Singh*

(1) 11 M. 269. (2) 28 L.J. Ch. 218.

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v. *Sheo Pershad Singh* (1)). The object of such an agreement and the means by which the object is gained are alike lawful and innocent, and the number of persons who enter into the agreement can make no difference. It is not suggested that there was any intimidation practised or any obstruction offered to possible bidders, nor again is it said that any misrepresentations were made at the auction in order to deter people from bidding. Probably the zemindar is a man of influence in the neighbourhood and there was some sympathy for the family of the judgment-debtor. These circumstances, together with the presence of the decree-holders as bidders, account for the facility with which other rivals were kept out of the field. The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with zemindar, the purchaser did not go beyond the limit of what he was entitled to do in order to make a good bargain. (*Mogul Steamship Company* v. *McGregor, Gow & Co.* (2).)

The case, however, against the purchaser assumes a different complexion when it is remembered that he was not a stranger to the property, but a mortgagee holding a decree who, without special leave to bid, could not become purchaser. The case illustrates the importance of exercising the discretion to grant leave sparingly, and only in cases where it is made clear that the sale will be advantaged thereby. Ordinarily it is not to the advantage of a sale that a person who has enjoyed special opportunities of knowing the property and its value should be allowed to compete with strangers. They are naturally led to think that his bid represents the extreme value of the property (*Tennant* v. *Trenchard* (3)).

The agreement of the 6th April was clearly material to the consideration of the question whether leave to bid should be granted. The effect of the agreement was practically to preclude the appellant from going beyond Rs. 85,000. It was supposed to be made for the benefit of the judgment-debtor, and the friends of the [323] latter concurred in it on that supposition But it is plain that in reality the agreement, if carried out, left the judgment-debor at the mercy of the zemindar. Had he become the purchaser, he could not have been compelled to convey the property to the judgment-debtor. The arrangement was of such a nature that it could not possibly have been countenanced by any Court having regard to the interest of the minor judgment-debtor. It is admitted that nothing was said about it when application for leave was made That the agreement was in existence at that time there is no manner of doubt. In our opinion the omission on the appellant's part to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. The case is one in which there was a duty incumbent on the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The withholding of information is, in our judgment, no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser. In the foregoing remarks we have laid no stress on the fact that the judgment-debtor was a minor. We have only assumed that there was no consent on his part, as a peroen *sui juris* to the arrangement under which the sale took place. Obviously

(1) 16 C. 194. (2) L.R. 23 Q.B.D. 614. (3) L.R. 4 Ch. 547.

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a judgment-debtor, who being of full age, had consented to the arrangement, could not afterwards have challenged the sale. But the judgment-debtor was a minor and he is entitled to challenge the sale if it is shown that his interests were not duly protected by those whose duty it was to have regard to them. If, independently of any decree, the minor's property had been put up to auction and bought by the mortgagee under an arrangement similar to that actually made, there can be no doubt that on his coming of age the mortgagor would have been entitled to repudiate the transaction. Had the guardians of the minor done their duty by him, a reserve price would probably have been fixed on the property, the application of the decree-holder for leave to bid would have been resisted, and they certainly would not have acquiesced in a plan so perilous to the minor's interest as that which with their approval, was conceived and carried out For these reasons we agree that the sale must be set aside

[324] Both the above questions may, in our judgment, be properly raised between the judgment-debtor and purchaser who is a party to the decree

In modification of the order appealed against we direct as follows —

Unless the respondent pays into Court the sum of Rs 83,000 within one week from the reopening of the Subordinate Court, the eight villages must be advertised again for sale to the highest bidder at the upset price of Rs. 83,000 The effect of this will be that, if there is no higher bidder, the appellant will be held to his bargain As the appellant has been in possession lawfully, he is entitled to the mesne profits in lieu of interest up to the date of payment or that of the fresh sale if any There will be no order against the appellant with regard to mesne profits nor any in his favour as to interest Each party to bear his own costs of the appeal

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19 M 324.

APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Subramania Ayyar

TIRUMALASWAMI AYYANGAR (*Plaintiff*), *Appellant* v
TIRUMALAI GOUNDAN AND ANOTHER (*Defendants*),
Respondents.* [23rd April, 1896]

Patta, grant of—Effect of reversal—Appeal to Board of Revenue

The grant of a patta by a Collector is conditional on the result of an appeal against such grant to the Board of Revenue

[R. 29 M 461 (465)=1 M L T 278]

SECOND appeal against the decree of T Weir, District Judge of Coimbatore, in appeal suit No 39 of 1893, reversing the decree of G Ramaswami Ayyar, District Munsif of Coimbatore, in original suit No. 206 of 1891

Suit for possession of lands and damages for loss of produce

The facts of the case were as follows —

The plaintiff and first defendant, both darkhasted in or about June 1887 for the lands in dispute. The Tahsildar appears to [325] have been of opinion that the plaintiff, Tirumalaswami Ayyangar, had a preferential right to the lands, but passed no order on the subject, confining himself to a recommendation to this effect

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* Second Appeal No 523 of 1895.

1896 APRIL 23. — APPELLATE CIVIL. — 9 M. 324.

The then Collector, being at the time on jamabandi, did not accept the Tahsildar's recommendation, but held that first defendant, Tirumala Goundan, had the preferential right and ordered that the land must be given to him (Exhibit III).

The Collector's decision (Exhibit III) that the lands should be given to first defendant is dated 9th June 1887. On the 22nd June following a patta was accordingly issued in the name of the first defendant. On the 11th August 1887 the first defendant sold the land to second defendant under the sale deed (Exhibit I).

In the meantime, the plaintiff had preferred an appeal against the Collector's decison, awarding the land to first defendant to the Board of Revenue. The appeal was pending before the Board of Revenue until March 1888. On 12th March 1888 the Board, after considering the report of the Collector and Head Assistant Collector (Exhibit H on the record) passed a resolution that the lands darkhasted for be given to the plaintiff Tirumalaswami Ayyangar. The plaintiff having been refused possession by the second defendant, has brought this suit to establish his right and the District Munsif has given him a decree.

The District Judge held that the Board of Revenue were precluded from interfering in appeal with the patta presented to the first defendant by the Collector by the fact that that patta had already issued on the following grounds:—

"In *Collector of Salem* v *Rangappa* (1) the High Court accept the "view that on a construction of the Board's own Standing Order a patta "can be (ought to be) issued only after the expiration of the time allowed "for appeal. In this case the patta was issued as a fact on 22nd June, "that is, thirteen days after the date of the Collector's decision. The "patta may be taken to have been wrongly or mistakenly issued, that is "to say, in apparent disregard of the rules; but as a matter of fact "it was issued, and it was issued by a competent authority, *viz.*, Collec- "tor To apply the language of that case to the present case it may be "that the Collector would not have issued the patta had he paid a due "regard to the rules, but he did, as a fact, [326] issue it. This being "so, the decision in *Collector of Salem* v. *Rangappa* (1) seems clearly in "point, *viz.*, that such a mistake (that is, one not arising from fraud or "incompetency and the like) does not justify the cancelment of a patta "issued by a competent officer in favour of one who has come into "occupation of the land under it."

With regard to the contention that the patta was only issued conditionally he held: " I am unable to find, however, that there is any- "hing in the evidence beyond the fact that an appeal might be made to "show that the patta in the present case was issued conditionally.

" A subsequent order of the Board, dated 10th June 1892, expressly "providing that pattas granted by subordinate officers shall be considered "conditional, cannot have retrospective effect, and the fact that such an "order was found necessary affords, it may be said, some additional "grounds for the view that grants of pattas theretofore made were not "held to be conditional."

The decree of the plaintiff was therefore reversed with costs.

Plaintiff preferred this second appeal.

Mr. *Parthasaradhi Ayyangar*, for appellant.

Desikachariar and *Seshachariar*, for respondents.

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(1) 12 M. 404.

JUDGMENT.

1896 April 23. — Appellate Civil. — 19 M. 324.

In our opinion the grant of a patta must, as long as an appeal against the decision of the Collector remains possible, be held to be conditional and subject to the result of the appeal Here an appeal was presented within due time, and it was ultimately successful Even under the old Standing Order (*Collector of Salem* v *Rangappa* (1)) this is clearly implied

We must reverse the decree of the District Judge and remand the appeal for disposal on the other issues

Costs to abide and follow the result

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19 M. 327

[327] APPELLATE CIVIL

Before Mr. Justice Shephard and Mr Justice Subramania Ayyar

ARUNACHELLA CHETTI (*Plaintiff*), *Appellant* v SITHAYI AMMAL AND ANOTHER (*Defendants*), *Respondents* * [20th April, 1896]

Mortgagee and mortgagor—Right of mortgagee in possession to execute repairs—Transfer of Property Act IV 1882, Section 72

Transfer of Property Act, Section 72 (*b*) does not permit a mortgagee in possession to effect improvements Consequently in a suit for redemption the costs of such improvements cannot be legally charged against the mortgagor seeking to redeem

[Diss, 10 A L J 124=16 Ind Cas 635, R., 9 O C 18 (23)]

SECOND appeal against the decree of M B Sundara Rau, Subordinate Judge of Bellary and Salem, in appeal suit No 46 of 1894, modifying the decree of Y Krishna Rau, District Munsif of Salem, in original suit No 535 of 1893

The plaint set forth that plaintiff sold the plaint house to the defendants on the 25th April 1889 for Rs 600 and delivered possession to them; that, on the same day, the defendants executed an agreement to plaintiff stipulating that, if the plaintiff paid the said Rs 600 back to defendants on any day within three years from the date of the agreement, the defendants should at once deliver possession of the house to the plaintiff, that, as the house was worth Rs 800 at the time of the sale and as the sale and agreement were executed at the same time, the sale was made subject to the conditions mentioned in the agreement, that, within the three years aforesaid, *i e* , on the 8th April 1892, the plaintiff was ready to pay Rs 600 to the defendants and asked the defendants to come to the registrar's office, receive the said amount and execute a reconveyance to the plaintiff, but the defendants made delay with a fraudulent intention and said that the sale deed was mortgaged to a third party and that they would at once redeem the mortgage and then execute the sale deed, that plaintiff was then and now is ready to pay the said amount, and that, subsequently, the plaintiff asked the defendants to receive the said amount and to execute the conveyance, but the defendants have not done so Hence the suit to compel the defendants to execute [328] a reconveyance of the house to the plaintiff after receiving Rs 600

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* Second Appeal No 413 of 1895

(1) 12 M 404.

1896 April 20. — Appellate Civil. — 19 M. 327.

The defendants admit the execution of the agreement, but deny the other allegations in the plaint.

They further alleged that after the expiry of the term plaintiff was told the house needed repairs and was asked if he would repay the mortgage and take it back; but that plaintiff said he did not want it, that defendants have repaired the house at the cost of Rs. 200, and that if it be found that the house should be reconveyed to plaintiff, he be ordered to pay Rs. 200 to defendant for the cost of repairs which were indispensable.

The Munsif found that the agreement in question amounted to a mortgage and that the present suit was a suit for redemption, and finding that repairs to the extent of Rs. 200 had been executed, decreed that on payment of the principal sum due under the agreement, together with Rs. 200, the cost of the repairs, within six months, the defendant should be entitled to redeem and that each party should bear his own costs.

The Subordinate Judge confirmed this decree except as to costs.—

"With regard to the nature of the repairs effected, the Subordinate "Judge found as follows:—

"The repairs effected are raising a wall, renewal of tiling, putting up a tiled verandah for a thatched one, and building some pials "for the protection of the house. These repairs cannot be said to be "either additions or improvements. Putting a tiled verandah in place "of a thatched one may, in some circumstances, appear absolutely "necessary for preservation of the house. There is no evidence that it "was unnecessary for preservation.

"I think the work done comes more appropriately under the head of "substantial repairs than under either improvements or additions."

He also found it proved that after the expiry of the term, *viz.*, 25th April 1892, the first defendant went and requested plaintiff to pay her due and take the house, as it was badly in want of repairs, and that the tenants threatened to quit; that plaintiff told her he had no money, that he did not want the house, and that she could repair it.

Plaintiff preferred this second appeal.

Sadagopachariar, for appellant, contended that a mortgagee in possession has no power to lay out money for repairs and add it to [**329**] the mortgage amount. Transfer of Property Act, Section 72, Clause (*b*), does not cover improvements of this description.

Sundara Ayyar, for respondents argued that in this case there was evidence that the plaintiff consented to the repairs being done and the money spent.

ORDER.

The finding of the Subordinate Judge is very unsatisfactory. In one passage he says that the work done by the defendant was in the nature of repairs, and in another place he uses language implying that substantial improvements were effected. What has to be determined is whether the expenditure was necessary to preserve the house from destruction. (See Transfer of Property Act, Section 72.) A mortgagee is not at liberty to effect improvements and charge the mortgagor therewith.

It is suggested that the plaintiff is liable because he consented to the work being done. But this consent would not make him liable unless given under circumstances to make it equivalent to a promise to reimburse the cost to the defendants.

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We must ask the Subordinate Judge to find

(i) whether the expenditure was necessarily incurred for the preservation of the property.

(ii) whether, if not, the plaintiff agreed to repay the cost

The findings are to be submitted within one month after the re-opening of the Court after the recess Seven days will be allowed for filing objections after the findings have been posted up in this Court

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19 M. 329.

APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Subramania Ayyar

MULLAPUDI BALAKRISHNAYYA (*Defendant*), *Appellant* v VENKATANARASIMHA APPA RAU (*Plaintiff*), *Respondent* *

[21st April, 1896.]

Suit for kattubadi and karnam's emoluments—Provincial Small Cause Courts Act—Act IX of 1887, *Schedule* (13)—*Civil Procedure Code—Act XIV of* 1882, *Section* 586—*No second appeal*

Where plaintiff sued for arrears of kattubadi and karnam's emoluments, the value of the suit being less than Rs 500

[330] *Held*, that kattubadi and karnam's emoluments are neither a charge on or interest in immoveable property, and that no second appeal lay

[F, 24 M 508 (511), R, 22 M 11, 22 M 229 (233), 11 M L J 115 (116)]

SECOND appeal against the decree of E C Rawson, Acting District Judge of Kistna, in appeal suit No 918 of 1893, modifying the decree of A Ramasami Sastri, District Munsif of Gudivada, in original suit No 218 of 1892.

Suit to recover arrears of kattubadi for Faslis 1297, 1298 and 1299 and karnam's emoluments due by the defendants as owners of kattubadi inams Plaintiff set up an agreement to convert the rate in existence at the time of the permanent settlement, *viz* , Rs 4 per putti of grain into a money rate, and he also relied on an alleged custom to pay money rent The Munsif found neither the contract to accept money rates nor the custom proved, but held that the plaintiff was entitled to a decree both as regards the kattubadi and also the karman's emoluments based on the rate in existence at the time of the Permanent Settlement in 1802

The District Judge varied the decree in certain particulars, which are not now material.

Sadagopachariar, for respondent, raised the preliminary objection that the suit was of a Small Cause nature and that therefore no second appeal lay under Section 586 of the Civil Procedure Code; he also contended that the question of the karnam's emoluments did not fall within Second Schedule (13) to Act IX of 1887, Provincial Small Cause Courts Act

Sriramulu Sastri, for appellants

JUDGMENT

This is a suit of a Small Cause nature, being a suit for kattubadi The mere fact that the plaintiff asserted that the kattubadi was chargeable on land cannot be taken to alter the nature of the suit when, in fact, it is not so chargeable Notwithstanding the decision in *Venkatarama*

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* Second Appeal No 397 of 1895

1896 APRIL 21. — APPELLATE CIVIL. — 19 M. 329.

Doss v. *Maharajah of Vizianagram* (1) we must say that in our opinion kattubadi is not, in the absence of any custom or contract to the contrary, chargeable on land. The plaintiff, it is to be observed, abandoned the claim for a charge and obtained a decree for money only. Then it is argued that the claim for the money due on account of emolument payable to karnams is a claim within Article 13 of the schedule to the Small Cause Courts Act. It is said that it is a due payable to the plaintiff by reason of his interest in immoveable [331] property. If the claim were made by the karnam, it would not be of that character, although it might come under other words of the same article. As the claim is made by the zemindar, it must rest on some custom or contract. It is certainly not a claim made by reason of any interest in land. For these reasons we must hold that no second appeal lies, and we, therefore, dismiss the appeal with costs.

[REPORTER'S NOTE.—The same point is decided in Second Appeal No 1061 of 1894 referred to in 19 M. 104]

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19 M. 331=6 M.L.J. 125.

APPELLATE CIVIL.

Before Mr. Justice Shephard.

VASUDEVA UPADYAYA (*Defendant No.* 2), *Appellant v.* VISVARAJA TIRTHASAMI AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.** [12th November, 1895, and 20th and 25th February, 1896.]

Civil Procedure Code, Sections 244, 232, 235—"*Judgment-debtor.*"

T's predecessor in interest had a mortgage on certain land and was made a party to a partition suit, in which a share in the land was allotted to a member of the family subject to a proportionate share of T's mortgage and also subject to a proportionate share of a certain decree debt. The then plaintiff got his share of the property made over to him. After the date of the decree *i e*, the decree in the partition suit, T purchased the equity of redemption in the mortgaged property from certain members of the family In a subsequent execution of the partition decree, part of the land was sold for money due as costs and mesne profits by T's vendors of the equity of redemption and T was ejected T objected under Section 332 of the Code, but the Court refused to order redelivery; in a suit brought by T for possession: *Held,* that T was not a judgment-debtor within the meaning of Sections 224, 232 and 235, Civil Procedure Code, and that the suit was not barred by the provisions of Section 244

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in appeal suit No 279, of 1893, remanding original suit No. 188 of 1892 to the Court of the District Munsif of Mangalore.

By a usufructuary mortgage, dated 1864, three undivided brothers, Narasimha Upadya, Venkatarama Upadya and Lakshmi-[332]naraina Upadya, mortgaged certain lands to plaintiff's predecessor in title.

Vasudeva, one of Venkatarama's sons obtained a partition decree, in original suit No. 352 of 1876, on the file of the Mulki Munsif Court for his one-fifteenth share in the family property including the lands now in

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* Appeal against order No. 64 of 1895.

[In 6 M.L.J. 125, for No. 64, No. 66 is given.—ED.]

[N.B.—See Letters Patent Appeal on this at 20 M. 407.—ED]

(1) 19 M. 103.

1896 FEB. 25. — APPELLATE CIVIL. — 19 M. 331=6 M.L.J. 125.

dispute, subject to the payment of the proportionate share in the usufructuary mortgage debt and also the proportionate share of a certain decree debt. In this suit plaintiff's predecessor in title, the mortgagee, was impleaded as the fourth defendant The plaintiff in the partition suit got his share of the property made over to him in 1878-79 After the date of the decree in the partition suit the plaintiff purchased the equity of redemption in the mortgaged property from certain members of the family. In 1889, the first defendant, as the assignee of the decree in favour of Vasudeva Upadya in the partition suit, original suit No 382 of 1876, took out execution against the judgment-debtors and their representatives including the present plaintiff who was the ninth counter-petitioner, and part of the land was sold for money due for mesne profits and cost payable by defendants Nos 1, 2, 3, the uncles of Vasudeva Upadya, who were the plaintiff's vendors of the equity of redemption Plaintiff was ejected and raised objections under Section 332, Civil Procedure Code, but the Court refused to order re-delivery Whereupon the plaintiff filed the present suit, and the Munsif held that under Section 244 no suit lay On appeal the District Judge reversed the decree of the Munsif and remanded the suit for disposal on the merits The material portions of his judgment is as follows —

"The question is whether the plaintiff went into Court properly under "Section 332, or whether he really went into Court under Section 244 "Was he a person other than the judgment-debtor within the meaning of "Section 332, Civil Procedure Code? 'Judgment-debtor' is defined in "Section 2 to mean any person against whom a decree or order has been "made 'Decree' and 'order' are both defined, and for the purpose of "this case, we may consider the expression 'judgment-debtor' to mean "any person against whom a decree has been made using the word decree "to mean the formal expression of an adjudication on any right claimed "when the adjudication decides the suit. If there had been no decree at "all against the plaintiff, he could not be held to be a person against whom "a decree had been made, and so in that case he [333] would not have "been a 'judgment-debtor' In this case there was a decree against "him But the part of the decree that was being executed, was not "against him, and so far as that part of the decree was concerned, he was "a stranger To speak of a man as a 'judgment-debtor' with reference "to a part of the decree that has no application to him, will be to give the "words a strained meaning. I am inclined to think on the wording of "the Act that the plaintiff should be classed as a person other than the "judgment-debtor within the meaning of Section 332 or 335 There may "be many decree-holders and judgment-debtors created by one decree and "the same party may be a decree-holder and a judgment-debtor under the "same decree No doubt, Section 244 is very wide in the wording of "paragraph (c) and includes questions arising between parties to the suit "relating to the satisfaction of the decree, but Sections 332 and 335 would "appear to be of the nature of provisos to that section"

Defendant No 2 appealed

Narayana Rau, for appellant

Ramachandra Rau Saheb, for respondents

JUDGMENT

The first respondent (hereinafter referred to as the respondent) being plaintiff in the suit claims certain property in virtue of a sale effected in 1879 by the appellant's uncles in his favour The appellant claims the

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same property as purchaser at a subsequent sale held in execution of a decree, dated the 9th July 1877, and passed in a partition suit in which the appellant was plaintiff. In that suit the appellant's father and uncles were defendants and the respondent was also joined as a mortgagee of part of the family property. By the decree in the partition suit the respondent was made liable with his co-defendants for certain moneys payable to the appellant; there were other matters in the decree in regard to which the defendants other than the respondent were made liable. In 1889 application was made by the appellant for execution of the decree as against all the judgment-debtors including the respondent; and in pursuance of that application the abovementioned property was sold to satisfy the appellant's claim as against the judgment-debtors other than the respondent. The respondent took objection to this and made a claim which was unsuccessful. Accordingly, the present suit was brought to raise the question whether the property claimed by the respondent belongs to him in virtue of his purchase or [334] whether it was the property of the judgment-debtors and as such liable to be seized and sold in execution of the decree against them. It is contended on the appellant's behalf that this question is one relating to the execution of the decree to which both appellant and respondent are parties, and that therefore it cannot be made the subject of a fresh suit. On the other hand, it is pointed out by the respondents' vakil that the particular application which led to a sale of the property was not directed against the respondent but against other persons, and the decision in *Nagamuthu* v *Savarimuthu* (1) was cited. In my opinion the present case is not in principle distinguishable from the case cited. I do not think it makes any difference that the application for execution was made at one and the same time against the respondent and other judgment-debtors. The liability of the latter under the decree, in discharge of which the sale took place, was distinct liability which did not in any way concern the respondent. *Nagamuthu* v. *Savarimuthu* (1) decides that, if against one defendant there is no liability under the decree, any question arising out of the execution against the other defendants is not, as between the first-named defendant and the decree-holder, a question relating to the execution of the decree within the meaning of Section 244 of the Code of Civil Procedure. In the present case the decree was capable of being executed against the respondent. He was not a stranger to the execution proceedings altogether, but it was an accident that he had notice of the application which led to the sale. It might have happened that he had no notice, or again that against them the decree might have been satisfied before the application against the others was made. In the latter case I conceive it could not be said that there was any question as between him and the decree-holder as to the execution of the decree. The District Judge refers to the language of Sections 332 and 335, and suggests that these sections should be read with Section 244. The suggestion appears to me a sound one and it confirms me in the view taken of the law in *Nagamuthu* v. *Savarimuthu* (1).

I am of opinion that the suit being instituted by one who was no party to the particular proceedings in execution is not barred by the Section 244 of he Code. I therefore dismiss the appeal with costs.

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(1) 15 M. 226.

19 M. 335.

1896 March 20.

APPELLATE CIVIL.

19 M. 335.

[335] APPELLATE CIVIL

Before Mr Justice Subramania Ayyar

MUTHUVIJAYA RAGHUNADHA RAJU TEVAR AND OTHERS (*Plaintiffs*), *Appellants* v CHOCKALINGAM CHETTI AND OTHERS (*Defendants Nos* 1 *to* 86), *Respondents* *

[17th and 20th March, 1896]

Joinder of plaintiffs—Wrongful act affecting the rights of the several plaintiffs

Where certain persons were alleged to have committed a wrongful act by evicting the plaintiffs from certain land in which the first plaintiff claimed to be entitled to the melvaram and the other plaintiffs to the kudivaram

Held that a suit brought by the plaintiffs jointly was not bad for misjoinder

[R., 13 C P L R 130 (135)]

APPEAL against the order of C Gopalan Nayar, Subordinate Judge of Madura (East), passed in original suit No 47 of 1893 This is a suit by the Zemindar of Sivaganga and five Mahajanams of the hamlet of Peria Pudukulam in the village of Oruchirangamadai in the said zamindari to obtain a declaration that cheis 96-13-10 of nanja lands in that hamlet are the property of the plaintiffs, and to recover their possession from the defendants Nos. 1 to 85, together with Rs 8,101-5-6 for mesne profits for the faslies 1299 to 1301 The first plaintiff's claim is based on his title as melvaramdar of the hamlet by virtue of his position as hereditary trustee of the Vayal' Chari Sattram, while the plaintiffs Nos 2 to 6 and 86th defendant are said to be its kudivaram tenants It is alleged in the plaint that the defendants Nos. 1 to 8 are the owners by right of purchase of the Dharmasanam village of Rangian, which lies to the east and south of the plaint lands; that the hamlet of the Peria Pudukulam being uninhabited, plaintiffs Nos. 2 to 6 used to cultivate its lands with the assistance of defendants Nos 12 to 85, who belong to the Rangian village, that these defendants raised the crops on these lands in fasli 1298 with the permission of these plaintiffs, but, at the instigation of the defendants No. 1 to 11 and without plaintiff's permission such crops were unlawfully cut, carried away and misappropriated by all the defendants; that the produce for the subsequent faslies 1299 to [336] 1300 has also been similarly misappropriated by them and that they, defendants Nos 1 to 85, are keeping wrongful possession of the lands against the plaintiff's wishes Defendants Nos 1 to 4, among other pleas, object to the suit on the ground of multifariousness as the causes of action of all the plaintiffs are distinct and several They also deny all the main allegations in the plaint, the plaintiffs' title to the lands and the trespass or wrongful possession alleged in the plaint and claim the plaint lands of cheis 96-13-0 as constituting the waterspread of the Rangian tank and, as such, belonging to that village

Mr *P A DeRozario*, *Bhashyam Ayyangar* and *Desika Chariar*, for appellants.

Mr *Parthasaradhi Ayyangar*, for respondents

JUDGMENT

The plaintiffs sue for possession of certain lands from which they state they have been wrongfully evicted Their case is that the first

* Appeal against Order No 44 of 1894.

1896 MARCH 20. — APPEL-LATE CIVIL. — 19 M. 335.

plaintiff holds the velvaram right and the plaintiffs Nos. 2 to 6 the kudivaram right in the village of Peria Pudukulam, that the lands in dispute form part of the said village, that the defendants Nos. 12 to 85, who had been cultivating the lands under the plaintiffs Nos. 2 to 6, had, at the instigation of the defendants Nos. 1 to 11, cut and carried away the crops that had been raised for the fasli 1298, and that ever since the defendants Nos. 1 to 85 have combined together and retained possession of the lands, alleging that the same form part of the village of Rangian belonging to defendants Nos. 1 to 11.

'The Subordinate Judge held that the plaint was, on the face of it, bad for misjoinder of parties and causes of action.

Now when two persons are interested in a piece of land—one as melvaramdar and the other kudivaramdar—and a third party commits a wrongful act which affects the rights of the persons so interested, it may, I think, properly be held that the land is common to both to the extent of entitling them to sue jointly in respect of the wrongful act, treating such act as giving rise to but one cause of action affecting the two persons more or less (compare the observations in *Venkatachelam Chetty* v. *Andiapyan Ambalam* (1). This view would, of course, prevent the unnecessary multiplicity of suits which would otherwise result. For, taking this very case, and even supposing that the plaintiffs Nos. 2 to 6 do not hold [**337**] all the lands jointly sharing the crops only, but that they hold definite parcels of lands on account of the share of each, and that each of these plaintiffs brings a suit against the defendants in respect of so much of the lands in question as belongs to him, the point to be decided in each of such suits would be whether the respective lands form part of the Peria Pudukulam village. This point would have to be tried in the first plaintiff's suit also, since that suit would embrace every one of the lands comprised in the various suits supposed to be instituted by the plaintiffs Nos. 2 to 6. It is therefore difficult to see what useful purpose can be served by refusing to permit the first plaintiff, the melvaramdar and the other plaintiffs, the kudivaramdar, to sue together and have the question whether the whole or any and which part of the disputed lands is attached to Peria Pudukulam village tried and settled once for all.

As to the objection that the various defendants themselves claim or are likely to claim portions of the disputed land as their separate property, I think that is altogether immaterial, because the point to be decided is not what the interests of the defendants are should the plaintiffs fail to establish their case, but whether the plaintiff's case is true.

The order of the Subordinate Judge seems, therefore, to be wrong, and I reverse it and direct that the plaint be restored to the file and dealt with according to law.

The costs will abide and follow the result.

(1) 2 M. 232 (233).

19 M. 337=6 M.L.J. 140.

APPELLATE CIVIL

Before Mr Justice Subramania Ayyar and Mr. Justice Benson

1896 MARCH 31.

APPELLATE CIVIL.

19 M. 337=6 M.L.J. 140.

KOLANDAYA SHOLAGAN (*Defendant No. 2*), *Appellant* v VEDAMUTHU SHOLAGAN (*Plaintiff*), *Respondent* *

[6th and 31st March, 1896]

Hindu law—Suit by reversioner to set aside alienations by widow—Fraudulent consent given by nearest reversioner

In a suit brought by the nearest reversioner of a Hindu widow who had alienated portions of her husband's estate with the consent of the nearest reversioner alive at the date of the alienation (since deceased), it was found that [338] the alienations were colourable transactions fraudulently got up for the purpose of defeating the plaintiff's claim

Held, that the consent of the nearest reversioner, who must have been aware of the fraud, was of no avail to validate the transactions impeached, and that they were therefore invalid as against the plaintiff

[R, 26 M 143 (154)=12 M L J 197]

SECOND appeal against the decree of J A Davies, District Judge of Tanjore, in appeal suit No 400 of 1893, confirming the decree of N. Sambasiva Ayyar; District Munsif of Trivadi, in original suit No 321 of 1892

Suit by plaintiff as the nearest reversioner of one Sangamalam, the deceased husband of the first defendant, for a declaration that a sale deed and a mortgage, executed on the 17th March 1881, were executed fraudulently and not for proper purposes, and were therefore invalid beyond the life-time of the first defendant

The defendants pleaded that the alienations were made in order to discharge the debts of Sangamalam, the deceased husband of the first defendant, and for money borrowed by the first defendant for necessary and proper purposes, and that the transactions in question were assented to by the then nearest reversioner Vengu Sholagan, and that the plaintiff was entitled to no relief The Munsif found that the sale of 17th March 1881 in favour of the second defendant was an unreal transaction, and that the mortgage in his favour of the same date was a fraudulent and colourable transaction except as to a small portion

With regard to the consent given by Vengu Sholagan to the said transactions, the munsif found that the consent was given, but that it could not validate them as they were fraudulent and collusive transactions He held that, where the transaction impeached is found to be collusive and fraudulent, no amount of consent on the part of the next reversioner will validate it as against remote reversioner On appeal filed by the second defendant, the District Judge agreed with the Lower Court on the result of the evidence, and with regard to the consent given by Vengu Sholagan, the judgment is as follows —" The only point that remains is " whether the next reversioner's consent validated the transaction He " is the second defendant's father and must have been aware of the " fraudulent nature of the transaction His consent was therefore a " fraudulent consent and is thereby vitiated " The appeal was accordingly dismissed with costs

[339] Defendant No. 2 appealed.

* Second Appeal No 233 of 1895.

1896 MARCH 31.

APPELLATE CIVIL.

19 M. 337=6 M.L.J. 140.

Sivasami Ayyar, for appellant.

S. Subramania Ayyar, for respondent.

JUDGMENT.

The finding is that the transfers made by the widow in favour of the appellant were not made, as alleged by him, for purposes binding upon the respondent, a reversioner. It was, however, contended on behalf of the appellant that, notwithstanding the above finding, the alienations should be upheld on the principle of Hindu law recognised by the Judicial Committee in *Behari Lall* v. *Madholal Ahir Jaya Wall* (1), since the intention of the widow in transferring the lands in dispute was to benefit the appellant and the transfers were made with the assent of the person who was the nearest reversioner then. Now to admit of the doctrine of law laid down in the case cited being applied, it should be shown that the widow's estate was completely withdrawn, so that the whole estate should get vested at once in the grantee as effectually as if the widow had renounced in favour of the nearest reversioner and the latter as full owner had conveyed the property to the grantee. But that is not the case here, as one of the items of the property in question purports to have been transferred by way of mortgage only. Even if the transaction were really a mortgage, the widow would be interested as the holder of the equity of redemption. Moreover both the Courts find that the debt, on account of which the mortgage is said to have been executed was never due. Consequently the land comprised in the instrument of mortgage must be taken to be her property still. Her life estate not being at an end, foundation for the application of the rule of law relied upon on behalf of the appellant fails and the second appeal is dismissed with costs.

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19 M. 340=6 M.L.J. 177.

[340] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

KLLIPARA PULLAMMA (*Plaintiff*), *Appellant v.* MADDULA TATAYYA AND OTHERS (*Defendants Nos.* 1, 3, 4, 5 *and* 9), *Respondents*.*
[23rd April, 1896.]

Limitation Act, Section 20—Payment of interest as such—A mere credit of interest made in accounts of defendants.

In a suit brought by a creditor against certain persons to whom she had lent money on interest:

Held, that, in order to save the bar of limitation, a mere credit of interest entered in the accounts of the defendants was not a sufficient payment of interest as such under Section 20, Limitation Act, to save the bar.

[F., 29 M 234 (235)=16 M.L.J. 99, R., 24 B. 493 (499); 9 O.C. 221 (223).]

SECOND appeal against the decree of N. Saminadha Ayyar, Subordinate Judge of Ellore, in appeal suit No. 125 of 1894, modifying the decree of E. J. S. White, District Munsif of Ellore, in original suit No. 317 of 1892.

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* Second Appeal No. 460 of 1895.

(1) 19 C. 236.

1896 April 23. — Appellate Civil. — 19 M. 340=6 M. L. J. 177.

The first four defendants are brothers, and they, with the other defendants, admittedly lived until lately in union and carried on business jointly, the first defendant Tatayya being the manager The plaintiff lent them some money, and on the 18th December 1888, her account was adjusted by the first defendant, who signed an acknowledgment on her account for a sum of Rs 4,181-8-7½ (Exhibit C3) Various sums are said to have been paid subsequently to and by the plaintiff The account was again adjusted on the 9th April 1891, when the second defendant (admittedly not the manager of the family) signed an acknowledgment for Rs 2,924-12-1½ After allowing for several subsequent debits and credits, the suit is brought for a balance, alleged to be due to the plaintiff of Rs. 1,592-11-10½. The defendants plead that the debt has been discharged and that it has become barred by limitation The adjustment referred to on 9th April 1891 was not proved, and no evidence was adduced to prove that the suit [341] account was in the nature of a banking account; it appears, therefore, to be simply an ordinary account for money lent for the purpose of saving the bar of limitation The plaintiff relied on an entry which appears in her own account as well as in that of defendants, showing a payment to her of Rs. 200 on account of interest on the 6th October 1891 On the evidence the Munsif found that the sum of Rs 200 was paid by the defendants jointly to the plaintiff on 6th October 1891, and that the suit was therefore not barred On appeal the Subordinate Judge found that the sum of Rs 200 was not paid by the first defendant or under his orders to the plaintiff towards interest as such, and that the suit was barred by limitation as to the main portion of the amount claimed, but gave a decree for Rs 103-1-0, the amount of four items admitted to be due by the defendants with interest up to date of plaint

From the accounts filed in the suit by plaintiff and defendants (Exhibit D2) and Exhibit E1), it appeared that the plaintiff was credited by the defendants with Rs 303-13-8 on 12th October 1890, being interest at 12 annas per cent for fourteen months and seventeen days, namely, from 23rd July 1889 to 10th October 1890.

The plaintiff preferred this second appeal

Pattabhirama Ayyar, *Ethiraja* and *Sivagnanam*, for appellant

Mr *Parthasaradhi Ayyangar* and *Sivasami Ayyar*, for respondents

JUDGMENT

The plaintiff lent certain sums to the defendants, and the account between them was last settled on the 18th December 1888 In November 1892, the plaintiff sued for the balance of principal and interest due. In order to take the case out of the statute of limitations, certain alleged payments were relied on. The District Munsif found that one of these, *viz* , of Rs. 200 on the 6th October 1891, was true, and that there was no bar by limitation. The Subordinate Judge, however, found that the payment was not made and dismissed the plaintiff's suit, except as regards a small sum admitted by defendants The finding of the Subordinate Judge as regards this payment is a finding of fact, and although we do not regard his reasons for the finding as altogether satisfactory, we have no power in second appeal to go behind it

It has, however, been found by both Courts that a sum of Rs. 303 was credited in the defendants' books (Day book and [342] Ledger) to the plaintiff's account with them on the 10th October 1890 as

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interest due on her loan to date, and it is strongly urged before us that this amounts to a payment to her sufficient, under Section 20 of the Limitation Act, to give a new starting point for limitation. No authority in support of this construction of the section has been brought to our notice, and the current of English decisions on the English statute is opposed to it (*Amos* v. *Smith* (1), *Maber* v. *Maber* (2), *Hart* v. *Nash* (3)). The broad rule deducible from those cases seems to be that though the payment need not be in money, but may be in goods, or even by a settlement of account between the parties, yet the payment must be of such a nature that it would be an answer in a suit brought by the plaintiffs to recover the amount. If that test be applied to the present case, can it be said that the credit of the sum by the defendants in their books to the plaintiff's account with them in such a payment to her as would be an answer in a suit brought by her to recover the money and the interest? Clearly it would not. We find, too, that in a case (very like the present case) the Bombay High Court has decided that such a credit of interest is not a payment within the meaning of Section 20 (*Ichha Dhanji* v. *Natha* (4)). We, therefore, find that this credit is not sufficient to remove the bar by limitation.

The only other ground urged on us is that the transaction was not a loan, but a deposit, by plaintiff, in which case limitation would only run from the date of demand for payment under Article 60, Schedule 2 of the Act, and the suit would not be barred. The District Munsif expressly states that this plea was given up before him, and there is no affidavit to show that this statement is incorrect. The mere reference to it in the written arguments filed before the District Munsif is no proof that it was not given up after that paper was put in.

In the result, the second appeal fails and is dismissed with costs.

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19 M. 343.

[343] APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

BAVA SAIB AND ANOTHER (*Defendants*), *Appellants v.* MAHOMED (*Plaintiff*), *Respondent.** [14th July, 1896.]

Muhammadan law—Hibbat—Incomplete gift.

Where a Muhammadan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house:

Held, that the gift was null and void, as there was no entire relinquishment of the house by the donor and the case did not fall within the exceptions allowed by Muhammadan law.

[**N.F.**, 6 Bom. L.R. 983 (991); **Expl.**, 16 Ind. Cas. 616 (617)=23 M.L.J. 734 (736)= 12 M.L.T. 305; **D.**, 30 M. 305 (307)=17 M.L.J. 562=2 M.L.T. 180]

SECOND appeal against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 418 of 1894, reversing the decree of A. Kuppuswami Ayyangar, District Munsif of Negapatam, in original suit No. 179 of 1893.

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* Second Appeal No. 539 of 1895.

(1) 1 H. & C. 238 (2) L.R. 2 Ex. 153.
(3) 2 C. M. & R. 337. (4) 13 B. 338.

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The facts of the case were as follows —

Plaintiff sued to recover a house, of which he had been dispossessed by defendants, which was given to him at the time of his marriage as *hibbat* under the Muhammadan law by his mother's sister Beebee Sa. Beebee Sa had bought the house in 1879 from her husband Mahomed Madar, who had bought it in 1869 from one Avva Nachiar

The first defendant pleaded that the sale by Mahomed Madar to his wife Beebee Sa was a nominal transaction to defeat Mahomed Madar's creditors, denied the gift to plaintiff by Beebee Sa, and claimed to hold the house under Golusan Beebee, third defendant, another wife of Mahomed Madar.

The second defendant is the husband of the third defendant

The District Munsif found that the conveyance to Beebee Sa by her husband was a nominal one to defeat creditors, and that the gift by Beebee Sa was genuine, but was not valid because it was not reduced to writing and registered as required by [344] the Transfer of Property Act He decreed against plaintiff who appealed.

The District Judge on appeal found that the gift was really made, that the provisions of the Transfer of Property Act did not apply (see Section 129), and that the donee accepted the house and took possession, but that Beebee Sa, the donor, lived with him in the house until her death some four or five months afterwards With reference to the rule of Muhammadan law that a gift to be valid must be accepted and accompanied by delivery of possession (MacNaughten's Principles, Chapter V, Clauses 2 and 4), and that if the donor continues to live in the house, the delivery of possession is not complete (MacNaughten's Precedents, Chapter IV, case xxii), he held that, considering the relationship of the donor to the donee, and that she was maintaining him, the fact of her remaining in the house could not be held to detract from her entire relinquishment of the house given, and that the gift was valid according to Muhammadan law

He also found that the sale by Mahomed Madar to the donor was a valid sale and gave a decree for the plaintiff with costs

The defendants appealed

Mr *J. G. Smith* for appellants referred to *Ameeroonissa Khatoon* v *Abedoonissa Khatoon* (1), *Mohinidin* v *Manchershah* (2) and *Mogulsha* v. *Mahamad Saheb* (3)

Mr *N Subramaniam*, for respondent.

JUDGMENT.

The rule of Muhammadan law in regard to *hibbat* is that the gift must not be implied. It must be expressed and unequivocal and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

Where, as in this case, a house is the subject of the gift, if it continues to be occupied by the giver, there is no complete gift (See case xxii at page 231 of MacNaughten's Precedents, 4th edition).

The only exceptions are where the house gifted is given by a husband to a wife, or by a father or guardian to his minor child or ward (*vide* Mac Naughten's Principles of Muhammadan Law, [345] 4th edition, Chapter V, page 51, and *Ameeroonissa Khatoon* v *Abedoonissa Khatoon* (1)) In this

(1) 2 I A 87 (104) (2) 6 B 650 (662). (3) 11 B. 517.

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case the donee is not shown to come within the exceptions, and we must, therefore, hold that the District Judge was wrong in finding the gift was valid.

We accordingly reverse the decree of the Lower Appellate Court and restore that of the Court of First Instance. The respondents must pay the appellant's costs in this and the Lower Appellate Court.

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19 M. 345.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SUBBARAYA MUDALI (*First Defendant*), *Appellant v.* MANIKA MUDALI AND OTHERS (*Plaintiffs*), *respondents.**
[23rd, 24th and 27th March, 1896.]

Suit for partition—Death of plaintiff subsequent to decree—Right of survivorship vested in defendant—Vested right of plaintiff's representative not affected.

M., a minor and only son by his next friend, sued his father and certain alienees of the family property for partition and obtained a decree. Subsequent to decree and pending appeal, the plaintiff died and M's mother was brought on the record as deceased plaintiff's legal representative

Held that as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed so the defendant can raise no other defence against him than he could have raised against the deceased plaintiff and that a decree for partition operates as a severance of the joint ownership.

[**F.**, 35 M. 239 (240)=10 Ind. Cas. 660=21 M.L.J. 240=9 M.L.T. 421=(1911) 1 M.W.N. 223; 8 Ind. Cas. 736 (738); **R.**, 28 B. 201 (207).]

APPEAL against the decree of W. F. Grahame, District Judge of South Arcot, in original suit No. 1 of 1892.

Plaintiff sues in *forma pauperis* by his next friend and grandfather for partition and delivery to him of his half share in the family immoveable and moveable properties specified in the plaint and to recover mesne profits. The suit is valued at Rs. 4,199-8-0.

The first defendant was plaintiff's father. Defendants 2 to 12 were alienees of certain portions of the family property under alienations created by the first defendant, the particulars of which were set forth in the plaint and schedules thereto.

[346] The District Judge held that the plaintiff, though a minor, was entitled to sue for partition (*Kamakshi Ammal* v. *Chidambara Reddi* (1)), that the property in suit was joint family property, that certain sales of the family property, *viz.*, those in favour of defendants 4, 5, 7, 8 and 11 could not be set aside, but the plaintiff was entitled to one-half of the purchase money realized by such sales amounting in all to Rs. 423-12-0 from the first defendant. The Court also held that plaintiff was entitled to mesne profits for three years, and also to one-half of the moveables or their value Rs. 429-8-0, and the decree also granted certain other reliefs not material for the purposes of this report.

The first defendant appealed to the High Court and pending appeal the plaintiff died, and his mother was brought on the record as his representative by an order dated 22nd July 1895.

Ethiraja and *Sivagnanam*, for appellant.

Mahadeva Ayyar and *Masilamani Pillai*, for respondents.

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* Appeal No. 63 of 1895.

(1) 3 M. H. C. R. 94.

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JUDGMENT

The first point taken is, inasmuch as the plaintiff has died since the date of decree and after the filing of the appeal, leaving only his mother who has been brought on the record as the representative, the father is entitled by survivorship It is said that the partition effected by the decree is not absolute so long as the decree remains appealable The rights of the party are accordingly liable to be affected by events happening subsequently There can be no question that the mother of the plaintiff is the person who represents him on his death and would therefore be entitled to the benefit of the decree The right to continue a suit for partition after the death of the plaintiff would, of course, not devolve on his widow or other heir not being a coparcener with the defendant, because immediately on the death happening before decree, the right of survivorship would take effect It would not be the ordinary case of a suit abating on the ground of the right to sue not surviving, but it would be the case of a right extinguished by confusion owing to the fact that all the rights in respect of the property became vested in one and the same person The further prosecution of the claim would be as impossible as it is when the right to demand a debt and the liability to pay it coincides in the same individual But after decree for partition once [347] made it is difficult to understand how the vested right of the plaintiff's representative can be affected or destroyed.

The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased

By the decree in all suits relating to property, the rights of the parties are determined and the death of one of them merely has the effect of putting a representative in his place. It seems strangely anomalous to hold that such a representative may be recognized, but that his position is not identical with that enjoyed by the deceased Authorities were, however, cited in support of the view contended for In *Padarath Singh* v *Raja Ram* (1) it was held that the plaintiff, who sued to set aside an alienation made by his father, having died after decree obtained, his mother, who was made respondent in the appeal, could not continue the suit The terms of the decree in the plaintiff's favour are not given, but there can be no doubt that it was a decree for the son's share of the property. More recently in a case, which appears to be precisely similar, the contrary conclusion was arrived at by the Full Bench of the same Court (*Muhummad Hussain* v *Kushelo* (2)) In Bombay in *Sakharam Mahadev Dange* v *Hari Krishna Dange* (3) at page 115 upon a different state of facts, the principle has been laid down that a decree for partition so long as it remains under appeal does not effect a severance of joint estate It was accordingly held that, by reason of the death of one of the defendants during the pendency of the second appeal, the plaintiff's share was enlarged If this decision is correct, it must follow that, as the share given under the decree may be varied, so it may be extinguished altogether

In the Madras case decided in the Privy Council (*Chidambaram Chettiar* v. *Gauri Nachiar* (4)) the point did not arise, because there was no appeal against the decree for partition. It is merely an authority for the position that such a decree may operate as a severance of joint

(1) 4 A. 235. (2) 9 A 131 (132) (3) 6 B. 113 (4) 2 M 83.

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estate. The two cases cited appear to us to lay down a rule which is not only inconsistent with the general principle that the rights are fixed by the decree and that the decree can only be attacked on grounds which were available to the [348] unsuccessful party in the Court of First Instance, but would also lead to most inconvenient results.

If the decree by itself effects no partition and does not operate as a conveyance to each party of his share in the estate, then however just and right, however unimpeachable it may have been when made by the Court of First Instance, it must, for an indefinite length of time, remain uncertain what rights the parties possess under it. A new peril would be added to the position of a purchaser *pendente lite*. He would not only have to consider the merits of the case in which the decree had been passed, but would also have to consider the chances of his vendor surviving the period over which the appeal might continue. The purchaser from the party who had obtained a decree for his share of the joint estate would be no better off according to this view than the purchaser from a member of an undivided family in its normal condition. By the birth of children into the family or by the destruction of part of the family estate the share purchased by him might come to be diminished, or, as in the present case, the death of the vendor might put an end to it altogether. These difficulties are avoided by adhering to what we consider the right principle, *viz.*, that, by the decree in a partition suit, a severance of the joint ownership is effected, the operation of a decree among parties not consenting to a division being equivalent to that of mutual conveyances among parties consenting to a partition of the joint estate.

On the question of fact we agree with the District Judge. The property purchased by the father, it is clearly proved, was not bought by his self-acquired funds. With regard to the property sold by the father before the suit in respect of which the Judge has made the father liable for half the purchase-money, we do not find that it is clear that the proceeds still remain in the father's hands. The plaintiff, therefore, has no claim to a share of them. In this respect, *viz.*, as to Rs. 483-12-0, the appeal must be allowed.

As to the mesne profits and movables we see no reason to differ from the District Judge. Subject to the above modification we must dismiss this appeal—proportionate costs.

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19 M. 349=1 Weir 45 and 631.

[349] APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Boddam.

QUEEN-EMPRESS *v.* PUKOT KOTU AND OTHERS.*
[23rd July, 1896.]

Abkari Act—Act I of 1886 *(Madras), Sections* 31, 36—*Penal Code, Sections* 99, 147 *and* 353.

A Sub-Inspector of Salt and Abkari attempted, without a search warrant, to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act and was obstructed and resisted:

Held, that having regard to Section 99 of the Penal Code, even though the Sub-Inspector was not strictly justified in searching a house without a warrant,

* Criminal Appeal No. 138 of 1896.

the persons obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of their obstruction as it was not shown that that officer was acting otherwise than in good faith and without malice

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[F., 21 M 296=1 Weir 125 (136), R., 18 Ind Cas 894=14 Cr L.J 142=15 P L R 1913=20 P W R 1913 Cr D., 6 Cr L J 105=17 M L J 323]

APPEAL under Section 417 of the Code of Criminal Procedure against the judgment of acquittal passed by J Hewetson, District Magistrate of Malabar, in criminal appeal No. 13 of 1895

The judgment of the District Magistrate was as follows —

" The four appellants, together with two women who have not " appealed, have been convicted of rioting and using force to a public " servant while in execution of his duty The Sub-Inspector, a petty " officer and five peons went to the first appellant's house and found him, " as they swear, selling toddy Thereupon the Sub-Inspector wanted to " search his house, drew his sword, and tried to effect his object by " force.

" Now, before a search could be legally made without warrant, the " Abkari officer must, under Section 31 of Act I of 1886, ' record his " reasons and the grounds of his belief ' Under Section 36 he is also " bound by the proceedings of the Criminal Procedure Code, *i.e.*, before " commencing the search, he must secure the presence of, at least two " respectable witnesses The Sub-Inspector did neither of these things. " His procedure was therefore grossly illegal He was not acting in the " execution of his duty, and the appellants were *justified* in preventing " the search until the requirements of the law were fulfilled It does " not appear that they used more force than was requisite for the purpose. " The [350] Sub-Inspector's sword was damaged, his cap lost, and his " coat torn, but no wounds or bruises are alleged As soon as the Adhi-" kari came, the search was made without opposition It, therefore, " seems to me that even if the appellants did all that the prosecution " alleges, they committed no offence, and must be acquitted I reverse " the finding and sentence of the Lower Court, and cancel the appellant's " bail bonds "

The Acting Public Prosecutor (Mr *Subramaniam*), for the Crown.

The prisoners were not represented

JUDGMENT

The District Magistrate appears to have had no ground for his finding that the Sub-Inspector acted irregularly in making the search. But, assuming the Magistrate's finding had been correct, the irregularity would have afforded no justification for the defendants' acts

When the Magistrate states that the defendants were ' justified ' in their resistance, we presume he means by the right of private defence (for we can conceive of no other justification), but the Magistrate has overlooked the provisions of the first and second clauses of Section 99 of the Penal Code, which do not allow of the exercise of that right when an act such as this is done by a public servant or under the direction of a public servant which the Sub-Inspector was

We must therefore reverse the District Magistrate's order of acquittal and direct that the appeal be restored to the file and heard and disposed of upon its merits. Ordered accordingly.

[Reporter's note See *Reg* v. *Vyankatrav*, 7 B. H. C. R. Crown cases 50.]

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

In re MAKKI, APPELLANT IN S. R. No. 11703.
In re RAMAN, APPELLANT IN *S. R.* No. 13187.*
[31st January, 1896.]

Court Fees Act—Act VII of 1873, Schedule I—Appeal—Stamp leviable for costs

When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by [351] the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of the first schedule of the Court Fees Act.

[F., 6 O.C. 135 (138); R., 14 Ind. Cas. 284 (285)=118 P.L.R. 1912=120 P.W.R. 1912.]

CASE referred for the decision of the High Court under Section 5 of Act VII of 1870 by H. W. Foster, Registrar of the High Court, Appellate Side, Madras.

The case was stated as follows:—

" The question which has given rise to this reference is whether, under certain circumstances, costs awarded by the decree of a Court should not be regarded as part of the ' value of the subject-matter in dispute ' for the purpose of calculating the fees payable under Schedule I of the Court Fees Act on a memorandum of appeal against the decree.

There are two second appeals now pending admission in which the point has been directly raised.

The first of these arises out of original suit No. 24 of 1889 on the file of the Subordinate Court of Calicut. In this case the plaintiff sued fifteen defendants to recover a paramba with mesne profits and damages amounting to Rs. 363, and he tendered Rs. 30 as compensation for improvements. The Subordinate Judge gave a decree against first defendant (who alone contested the suit) for surrender and for payment of Rs. 136 as damages and mesne profits, but fixed the compensation for improvements at Rs. 140. The decree also directed the first defendant to pay the whole of the plaintiff's costs.

The first defendant appealed to the District Court (App. 1017 of 1890), and took express objection to the order as to costs. The District Judge of South Malabar confirmed the decree except as to costs regarding which he ordered that each party should bear his own.

Against this decree the plaintiff has presented a second appeal which, amongst other grounds, he contends that " the District Judge having accepted the findings of the Subordinate Judge, that the first defendant was guilty of committing waste and of forging receipts should not have interfered with the Subordinate Judge's order as to costs," and that " the plaintiff is under the circumstances at least entitled to proportionate costs."

The second case arises out of appeal No. 338 of 1891 on the file of the Subordinate Court of North Malabar. In this appeal the [352] Subordinate Judge, reversing the decree of the District Munsif, who dismissed the suit with costs (original suit No. 72 of 1891 on the file of

* Referred Case No. 1 of 1893.

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District Munsiff of Cannanore), gave a decree for plaintiff as prayed for with costs throughout payable by first defendant The first defendant has now preferred a second appeal, of which one of the grounds is that "under the peculiar circumstances of this case the Lower Appellate Court ought not to have decreed the payment of costs of this suit"

As a rule, costs decreed by a Lower Court are not computed as part of the subject-matter in dispute for the purpose of assessing Court fees on an appeal, but when an appellant expressly questions the propriety of the order as to costs, when he treats the costs awarded as a matter separate and independent from the other reliefs given by the decree, and contends that even if the rest of the decree is upheld, the order as to costs should be modified in his favour, it is the practice in this office to add the amount of the costs in respect of which there is a contention to the value of the other matter in respect of which the appeal is made for the purpose of arriving at the total value of the "subject-matter in dispute" Each of the above two cases being of this nature the appellant has been called upon to pay Court fee on the amount of costs disputed

Each urges that he is not liable to this payment on the general ground that costs form no part of the subject-matter in dispute. The authorites relied on for this contention are *Doorga Doss Chowdhry* v *Ramanauth Chowdhry* (1), *Nilmadhub Doss* v *Bishumber Doss* (2) and High Court Proceedings, dated 10th November 1875, No. 2739

The first case cited *Doorga Doss Chowdhry* v. *Ramanauth Chowdry* (1) was an application to the Privy Council to admit an appeal without a certificate from the High Court. The substantive amount of the decree was below the minimum limit at which an appeal was allowed by the rules, but for the appellant it was argued that he was entitled to add the *costs* awarded against him by the decree, such addition would have brought the figure up to the minimum limit, but the Privy Council held that "the costs of a suit are no part of the subject-matter in dispute, and cannot be used for the purpose" for which the appellant sought to use them

In the second case *Nilmadhub Doss* v. *Bishumber Doss* (2) a similar opinion seems to be indicated, though the necessity for [353] deciding the point did not arise The third authority is a Proceeding of the High Court passed on a question referred by the Acting District Judge of South Canara as to whether "when the objection taken by the respondent under Section 348 (561) of the Code of Civil Procedure has reference only to so much of the Lower Court's decree as disallows costs, any additional fee is payable under Section 16 of the Court Fees Act" The Court, while pointing out that its answer was not authoritative, stated in reply the opinion that no additional fee was authorized in the case referred, and quoted the dictum in the Privy Council case above cited, that "costs are no part of the subject-matter in dispute."

This Proceeding seems exactly in point supposing the expression "subject-matter of the suit" used in Section 16 of the Court Fees Act to be equivalent to "subject-matter in dispute" used in Schedule I of the Act. The plaintiff obtained a decree as prayed for, but his costs were disallowed and he appealed against that part of the decree disallowing his costs by putting in a memorandum of objections.

My reasons for not accepting the decision as final, however, are first, that the Proceeding disclaims any authoritative force, and, secondly, that

(1) 8 M I A. 262. (2) 13 M I A 85=3 B L R P.C 27

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the practice of the Registrar's office has never been brought into conformity with the rule laid down. The Privy Council ruling cited in the Proceeding does not appear to be on all fours with the cases referred. In the case before the Privy Council it would appear that costs followed the result in the High Court, and consequently an appeal against the amount absolutely allowed by the decree involved an appeal against the order as to costs. In such cases, it is not the practice in the High Court to reckon in costs in computing the value of the subject-matter. If costs are in no cases to be regarded as part of the subject-matter in dispute, it would seem to follow that costs ought not to be permitted to be made a separate and independent subject of appeal. But if a separate ground of appeal on the subject of costs is permitted, then the apportionment of costs might be the only question raised in appeal, and then on the construction contended for an appeal might be filed free from Court fees.

The point is of importance since it is of frequent occurrence, and as there is some doubt in the matter, I make this reference.

The question for decision is as follows:—

[354] "When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, should the value of such distinct relief be reckoned as part of 'the subject-matter in dispute' for the purposes of the first Schedule of the Court Fees Act, or should the said value be excluded from computation?

Ryru Nambiar, for appellant in S. R. No 13187.

Mr. *Wedderburn*, for the Government Pleader, *contra*.

DECISION.

The appellant has made the costs the subject-matter of dispute, and therefore a Court fee stamp is leviable.

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19 M. 354 = 2 Weir 468.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Boddam.

QUEEN-EMPRESS *v.* VASUDEVAYYA.* [23rd July, 1896.]

Criminal Procedure Code, Act X of 1882, *Section* 419—*'Presented'*

The Criminal Procedure Code, Section, 419, requires that a criminal appeal shall be delivered to the proper officer of the Court either by the appellant or his pleader. Where a petition of appeal was not presented to the Court, but was deposited in a petition box kept for the convenience of parties within the Court precincts and intended for the deposit of papers for the Court:

Held, that it had not been presented and was rightly returned for legal presentation.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by L. C. Miller, Acting District Magistrate of South Canara.

The case was stated as follows:—

"I have the honour to forward the petition of pleader M. R. Ry. Pangal Subba Row on behalf of Vasudevayya, accused in calendar case

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* Criminal Revision Case No. 286 of 1896.

No 510 of 1895, on the file of the Stationary Second-class Magistrate of Udipi, against the order of the Acting Head Assistant Magistrate, rejecting the appeal against the finding and sentence of the Sub-Magistrate, for the order of the High Court

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[355] "The petition of appeal was first placed in the petition box kept within the precincts of the Head Assistant Magistrate's Court within the prescribed time The Head Assistant Magistrate returned the petition with the following endorsement, dated 11th January 1896 —

"'Criminal appeals must be personally presented or by pleader'

"The appeal was again presented in person, but on this occasion the Magistrate passed orders, dated 29th January that 'the appeal is out of time and is therefore rejected'

"The High Court has held in the Criminal Revision Case 316 of 1894 (1) and in *Queen Empress* v *Arlappa* (2), that the transmission of an appeal *by post* was not a sufficient compliance with Section 419, Criminal Procedure Code But in this case the appeal petition was placed in a receptacle kept for the convenience of parties within the Court precincts intended for the deposit of papers for the Court If this be considered duly presented and a sufficient compliance with the provisions of the section, I request that the appeal may be ordered to be taken on the file and heard on its merits"

Counsel did not appear

ORDER

As ruled by the learned Chief Justice in *Queen Empress* v *Arlappa* (2) the word 'presented' in Section 419 of the Code of Criminal Procedure "evidently means that such petition shall be delivered to the proper officer of the Court either by the appellant or his pleader"

It is clear that what the law requires is that the petition of appeal be presented by one or other of those two persons, and not by any body else In order to secure this, it is necessary that the presentation be made in person So that the same reason applies for not recognizing a petition found in a petition box as to one sent by post, namely, that it might have been deposited there by a third person who could not legally present it The Head Assistant Magistrate was, therefore, right in returning the petition of appeal in this case for legal presentation, and when that presentation was made, the appeal being time-barred was rightly rejected

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19 M. 356=1 Weir 313.

[356] APPELLATE CRIMINAL

Before Mr Justice Subramania Ayyar, Mr Justice Davies and Mr. Justice Benson

QUEEN-EMPRESS v KALIYANI

[4th June, 6th, 20th and 21st July, 1896]

Penal Code—Act XLV of 1860, Section 304—Act done with the knowledge that death would be a probable result

Where the prisoner by gripping and squeezing the testicles of deceased reduced them to a pulpy condition thereby causing an injury which resulted in death due to the shock so inflicted on the nervous system

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* Referred Trial Case No 24 of 1896

(1) Weir's Criminal Rulings, 3rd edition, p. 1006 (2) 15 M 137

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Held, PER DAVIES, J., that the death was an unforeseen result for which prisoner could not be held liable, and that she ought to be convicted under Section 303, Penal Code.

Held, PER SUBRAMANIA AYYAR and BENSON, JJ., that death was a probable consequence of the prisoner's act, and that she was guilty under Section 304, Penal Code, of culpable homicide not amounting to murder.

CASE referred by T. Weir, Sessions Judge of Coimbatore, for confirmation of the sentence of death passed upon the prisoner in sessions case No. 44 of 1896 under Section 374, Criminal Procedure Code, and APPEAL by the prisoner against the said sentence.

Mr. *Travers Drapes*, for the prisoner.

Mr. *J. G. Smith*, for the Acting Public Prosecutor in support of the conviction.

On the 4th June 1896 the case was sent back to the Sessions Judge by Davis and Benson, JJ., for the evidence of Dr. Lancaster to be taken, and on receipt of the said evidence called for and upon hearing the arguments of counsel, the Court delivered the following judgments

The same counsel appeared as on the previous hearing.

Davies, J.—Upon the further evidence given by the District Medical Officer, Dr. Lancaster, who was present at the *post-mortem*, we have no reason to doubt that the death of Kalan was due to the injuries done to his testicles, and not to disease or other cause. And the evidence, as well as the admissions of his wife, Kaliyani, the prisoner, make it clear that it was she who caused those injuries by squeezing the testicles with her hand.

[357] But in convicting her of murder and sentencing her to death, the Sessions Judge has not sufficiently taken into consideration whether the woman could have been aware that her act would in all probability lead to a fatal result, and so intended it.

The gripping and squeezing of the testicles is well known to be a very common form of assault in this country among the lower classes of the people, but in a lengthened experience of twenty seven years as a Magistrate and Judge, I have never heard until now of a single case in which that particular form of assault, *unattended by other violence*, has proved fatal. And in the various works on Medical Jurisprudence that I have consulted, I have been able to find only one reported case of the kind. How then can we rightly attribute to this woman a knowledge that by her act—one so frequently committed among people of her class without ill effects—she would cause death or even be likely to cause it? In my opinion, it is impossible to hold her responsible for so unforeseen a result, and I would acquit her altogether of any charge of culpable homicide.

The next question is whether she ought to be found guilty of causing hurt or grievous hurt. The only kind of grievous hurt that she might have intended to cause was emasculation, but that, like causing death is not shown to be at all a probable result of squeezing the *testes* merely by the hand, and therefore it cannot be taken that she contemplated it.

The fact is that she and her husband were having a fight, in the course of which she attacked him in the way stated. That has been her account from the beginning, and here again it seems to me the Sessions Judge has done her scant justice in not giving some weight to the provocation she undoubtedly received. Her husband was ill and was troublesome in consequence. She tried to keep him quiet by pushing him down.

* The case of Moobrack in 1845 (*vide page* 479 of Chevers' Medical Jurisprudence).

He bit the little finger of her right hand, and they fell together by a raggi stone where a knife lay Her husband seized this knife and made a dash at her throat with it She then proceeded to maul him in the way described while he tore at her hair, and it was in this encounter that they were seen by the two eye witnesses and separated The rest of the woman's story is well corroborated by the eye-witnesses and the medical evidence The second witness, Aaron, admits that the [358] woman complained to him that her thumb (it really was the little finger) had been bitten, and, though he protesses to have seen no marks of the bite, the Hospital Assistant did find marks on her little finger which he says may have been caused by a bite The third witness, Karuppan, further states that the woman told him that her husband had cut her with a knife on the throat and that he saw a slight mark there which was bleeding—and the Hospital Assistant, who saw this mark also, says it may have been inflicted with a knife There was, in fact, a knife lying at the spot, which the prisoner at once pointed out as the knife that had been used Though the Hospital Assistant is of opinion that the wound on the neck was self-inflicted, because it was 'fine,' his opinion is entitled to no weight in the face of the fact that the wound was seen in existence by the third witness at the termination of the fight before there was time for concoction, and after the fight the woman was kept under guard and had no opportunity to cause the wound without being detected So that I am satisfied that the woman's story is substantially true

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The only point remaining is whether in the circumstances she was justified in using the violence she did to her husband The effect of that violence, according to the evidence of Dr Lancaster, was much bruising of the glands and their reduction to a pulpy condition Considering that her husband was admittedly in an enfeebled condition and not fit to move about according to the prisoner's own statement, that she appears to have commenced the assault, and that the injuries she received were trifling and her husband was not strong enough to do her any serious harm, I consider that she was not entitled to resort to the extreme measure she adopted to defend herself from his feeble attacks—she being as described a woman of strong physique Whatever provocation she received from her husband, she appears to have brought upon herself by a too hasty temper (I am taking her own account, the only one we have of the origin of the quarrel) and that provocation was not really grave enough to excuse her in inflicting what must have been the most excruciating pain upon a man already suffering from severe sickness I would, therefore, find her guilty of the offence of voluntarily causing hurt under Section 323 of the Penal Code and sentence her to six months' rigorous imprisonment, to count from this date The maximum sentence for the offence is one year and she has already been in jail for more than four months

[359] BENSON, J —In this case a woman named Kaliyani has been convicted of having murdered her husband, Kalan, and has been condemned to death

The facts of the case are briefly as follows —

Kalan was a postal runner, and lived with his wife, the accused, on the Coffee Estate of Mr Beaver at Kollakombe The wife worked as a cooly on the estate On the 22nd of February last Kalan was seized with violent vomiting and purging which continued up to the 28th February. At 6 A M on that day Aaron, the second witness, who lives within five or six yards of Kalan's house, and who is both a school

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master and writer on the estate, heard Kalan cry out " Ey-Eyoh, she is biting my testicles," and on running to Kalan's hut, saw him lying at the entrance on his back. The accused was sitting on Kalan's chest, holding his throat with her right hand and twisting and pulling his testicles with her left hand. Her hair was waving in Kalan's face, and he was pulling it and crying out " Ey—Eyoh "! Aaron called on her three times to let go her hold of her husband's testicles, but she would not. He then threatened to send in the Pariah, Karuppan, (third witness), who had come with him, and finally did send him to the door, whereupon she loosed her hold. Kalan then stood up, with difficulty, and reached the door, where he fell down with a cry of pain, pointing to his testicles and saying " See, sir, she has bitten me." This is the account given by Aaron. He looked at the testicles and noticed some bleeding. Substantially the same account of the occurrence is given by the cooly, Karuppan (third witness) who ran to the spot at the same time with Aaron, but he denies that Kalan said his testicles were bitten. He says that the words used by Kalan were " Sir, she had seized and twisted the testicles: they are paining and wounded: bring some water that I may pour it on the wound." Aaron adds that he asked the accused what was the cause of the quarrel, and she replied: Look at my thumb: he has bitten me." He looked at her thumb, but could not notice any mark of a bite on it, or any injuries on the woman.' Aaron then ordered Karuppan to keep watch over Kalan and his wife, and he himself went to call the roll on the estate. After he had gone, Karuppan asked Kaliyani why she had acted in this way to her husband, who was already sick, and she replied " Sir, he came to cut me with a knife: it is true I twisted his testicles," and she pointed to the front part of her throat where there was a slight slit, which was slightly [360] bleeding. She also showed a knife near the door with which she said that Kalan came to stab her. After roll-call Aaron told Mr. Beaver what had happened, and they then, at 8 A.M., went to Kalan's hut. Mr. Beaver found him in a very weak state. Kalan told him that " his wife had assaulted him grievously that morning—sitting on his chest and strangling him with one hand, and subsequently biting him on his testicles." Mr. Beaver asked the accused, she had done so, and she said that she had pinched but not bitten them. Mr. Beaver asked Kalan the reason of the assault, and he said that, being very cold in the morning, he asked his wife to make a fire for him, whereupon she got in a great temper and assaulted him as above described. The accused did not say to Mr. Beaver that she had been assaulted by her husband, and made no complaint of ill-treatment by him, and, though present when Kalan told his story, made no objection to it except by denying that she took certain money. Mr. Beaver thought that Kalan was dying, and knowing that he had saved money, asked him if he wished him to take charge of it. Kalan said that he had Rs. 300 in two tins in the house. They searched for it, but could not find it. Kalan then accused his wife for having made away with it, but she emphatically denied knowing anything about it. Kalan was then removed to the Post Office and died the same morning at 11-30 o'clock. Karuppan was left in charge of the accused at Kalan's hut. About noon she asked leave to go and ease herself, and, on her return, she showed Karuppan two tins of rupees saying, " This is the money we have earned: I have got it with me." The tins contained over Rs. 200, and were made over to the Magistrate who arrived soon afterwards. Kalan's body was taken to Coonoor, and a *post-mortem* examination was made by the Hospital Assistant and Surgeon Lieutenant-Colonel

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Lancaster, the District Medical Officer of the Nilgiris Only the former was examined at the trial before the Sessions Court, but, after the case was referred to this Court, we desired the Sessions Judge to obtain the evidence of Dr Lancaster also. It shows that there was a wound on the front part of the scrotum, probably produced by a wrench or twist There were no marks of any teeth on the scrotum, but the wound was covered with dried blood On opening the scrotum, the testicles, or glands proper, were found to be "very much bruised and reduced to a pulpy condition." There was no apparent disease of the testicles Their condition was due not to disease but to injury, and Dr Lancaster considered that a prolonged [361] severe squeeze if the testicles, even with the left hand of the accused, would have been sufficient to produce the appearances which he saw at the *post-mortem* He considered that the injury to the testicles was the cause of Kalan's death, and added that, even, it the man had been in sound health, the injury would have caused his death. The Hospital Assistant says that the testicles were "almost absolute pulp No solid parts remained," and was positive that shock from injury to the testicles was the sole cause of death

Such is the evidence for the prosecution The accused called no witnesses for her defence, but it is now necessary to examine her various statements Those made to the witnesses have been already noticed On the 28th February, just after Kalan's death, she was examined by the Magistrate, and she then stated that Kalan was leaning against the wall and she hit him on the shoulder to make him lie down. She adds, "He bit the last finger of my right hand on account of anger. I pressed and seized his cheek, mouth, asking him to let off my hand As soon as I seized his mouth he seized the hair of my head with his right hand, sat down pushed me down I had placed the knife now shown me on the raggi stone He took that knife and wounded me in the neck I felt, saying 'he cuts the neck' Nothing was got His testicles came in contact with my hand I pinched the testicle with my nail and pulled' On the 25th March she again made a statement to the Magistrate In it she said nothing about having hit her husband, but stated that he fell more than once in the fire, and that, on her picking him up a second time, he bit her little finger, and she then details the quarrel in much the same language as before Her statement at the trial was to the same effect

As to the character of the offence committed by the accused, it must be determined mainly by reference to her intention and the knowledge which she had as to the probable effect of her violence The Sessions Judge has found her guilty of murder, being of opinion that "the horrible nature of the injury (having regard especially to the relationship of the parties), and the persistent force which must have been used, *point clearly to an intention to cause death*" He also thought that some weight should be given to the fact that Kalan, after having eaten of food prepared by the accused on the 22nd February, at once showed signs of having been poisoned, and to the fact that traces of arsenic were found in his stomach and [362] kidneys and liver after death Apparently the suggestion is that the accused intended to poison Kalan, and that it is therefore to be inferred that she intended to kill him when she grievously assaulted him On this point I think the Judge is in error The accused was not charged with having given poison to her husband, and had no opportunity of meeting the suggestion or of explaining the symptoms indicative of poison It may be that the deceased was taking some native medicine in which as is well known, arsenic often forms an ingredient No doubt Aaron says

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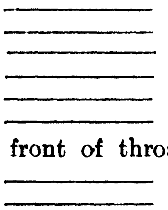
that Kalan refused medical aid, and seemed to think that his wife was killing him, and it may be that enquiry would elicit sufficient grounds for charging Kaliyani with having attempted to poison him. But for the purpose of the present trial, I think the indications of poisoning should be put aside altogether, for the reasons already stated, and the intention and knowledge of the accused should be gathered from the other facts and probabilities of the case.

I agree with the Sessions Judge in finding that the accused's version of the affair, *viz.*, that she acted in self-defence when her husband pushed her down and attempted to cut her throat with a knife, cannot for a moment be accepted. It is to be observed that she said nothing about the knife to Aaron when he questioned her as to the cause of the quarrel, but drew his attention to an alleged bite on her thumb, of which, however, Aaron could find no trace. It was not until after Aaron had gone away that she apparently saw a knife lying by the raggi stone, and then told Karuppan that the deceased had come to cut her with the knife, and pointed to a slight bleeding scratch on the front of her throat. The nature of this injury is accurately stated in the certificate and evidence of the Hospital Assistant who examined the woman. In his certificate he describes it as consisting of " six very fine linear scratches in front of the throat, 1¼ inches long, but very superficial, and another linear scratch below it," and he gives a diagram of the injury thus—



In front of throat

[363]. In his evidence the Hospital Assistant described them as " like thread marks," and he saw no blood on them. I examined the knife in Court and found the edge smooth and incapable of inflicting such a wound, apart from the extreme improbability of an angry man being able to do so much, and no more, when armed with a knife and engaged in a deadly struggle with a woman. I have no doubt at all but that these scratches were inflicted with the human nail, rough and serrated as it would probably be in the case of persons of the accused's rank in life. They may have been self-inflicted as the Hospital Assistant thought, or they may, as I think is more probable, have been inflicted by Kalan in struggling with the woman. It is to be observed that the accused said nothing about the knife when Mr. Beaver questioned her as to the cause of the quarrel Mr. Beaver understands Canarese, the language of the parties, well, and spoke to them in that language. He was the employes of the accused, and she would certainly have told him if she had any such justification for her assault. She not only made no such plea, but did not deny the version given in her presence by Kalan, *viz.*, that when he asked her to make a fire she got in a great temper and assaulted him in the manner stated. Lastly, I observe that she makes no reference to the knife in the account of the occurrence given in her appeal memorandum. I conclude then that the allegation regarding the knife is wholly false. As to the minor injuries, she complains of having been bitten by the deceased, but Aaron did not see any injury on her. She made no complaint of injury to

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Mr Beaver, and the Hospital Assistant describes the so-called bite as "three small bruises on the little finger," which he thinks might have been a bite, or might have been caused in the struggle The bruises, however, caused, were quite trifling injuries, and could form no justification for the grievous assault committed by her There is, apparently, no reason to doubt the truth of the statement made by the deceased to Mr Beaver that when he asked the accused to light the fire for him she got into a great temper and assaulted him The reason for the assault no doubt seems hardly sufficient, but I think it probable that she was angry with him for his intention of sending away his money to his village instead of giving it to her He seems to have known that he was going to die, and he asked Aaron on the previous evening to send the money to his village by Post Office Order. The accused's statements show that she claimed the money [364] jointly with her husband, and was only prepared to let his brother have a little of it as matter of grace Even on the morning of the assault, and before Kalan's death, she had made away with the money, though protesting that she knew nothing about it Throughout her statements the money has occupied a most prominent place It may well have occurred to her that if her husband should die, she would be able to secure all the money, instead of allowing it to be sent away to Kalan's village in Mysore However that may be, it is certain that in the quarrel with Kalan she resorted to a form of attack not very uncommon among women of her class, and did so with such force and persistence that she reduced the man's testicles to pulp and killed him by the shock thus given to the nervous system If she was then thinking of the money, and intended to kill the man or know that death would most probably result from the act, she would be undoubtedly guilty of murder It was, however, suggested that this form of attack is so common and so rarely fatal that she could have had no such intention or knowledge and ought to be found guilty only of having voluntarily caused hurt Norman Chevers, however, says that this form of assault is "extremely liable to prove fatal" (Medical Jurisprudence, p 478, Ed. of 1870), and Surgeon-Lieutenant-Colonel Lancaster says that the injuries would have proved fatal even "if the man had been in sound health" I think, too, that great weight must be given to the fact that the man was then in an extremely weak condition, having been vomiting and purging continuously for six days All this was well known to the accused He was so weak, as she herself says, that he fell several times that morning when trying to move about before the assault When the woman seized his testicles she must have done so because she knew that they were a vulnerable part where she could cause him the maximum of pain, and when she continued to squeeze and pull and twist them, notwithstanding his cries, and notwithstanding the interference of Aaron and Karuppan, it seems difficult to say that she did not intend to cause his death or know that she was likely to do so Looking, however, to the ignorance of women of her class, and to their indifference to physical pain, I am disposed to give her the benefit of the doubt, and to acquit her on the graver charge of murder She may, perhaps, not have intended to kill her husband, or have known that death would most probably result from her assault. She must, however, in [365] my opinion, have known that death would be a *probable*, if not *the most probable*, result of her act. She was therefore, in my judgment, guilty, at the least, of culpable homicide not amounting to murder I would alter the conviction accordingly, and, looking to all the facts of the case, I would sentence her to seven years' rigorous imprisonment.

1896 JULY 21. In consequence of the difference of opinion between their Lordships the Honourable Mr. Justice Davies and the Honourable Mr. Justice Benson, the case was referred to a Third Judge, the Honourable Mr. Justice Subramania Ayyar, as provided by Sections 378 and 429 of the Criminal Procedure Code.

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Mr. *Travers Drapes*, for the prisoners.

The acting Public Prosecutor (Mr. *N. Subramaniam*), for the Crown.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The facts of the case have been so fully referred to by my learned colleagues that it is unnecessary for me to repeat them. It is indisputably established that Kalan died in consequence of the injuries inflicted upon him by his wife, the accused, on the 28th February last As to the charge of murder as well as the question whether the accused intended to cause Kalan's death, my learned colleagues are agreed that the finding should be in her favour. Though my mind is not quite free from doubt on the point, yet I assume that the unanimous conclusion arrived at by my colleagues is binding upon me. Even if it were otherwise, considering that the circumstances which chiefly create the doubt in my mind, *viz.*, the fact that the violent vomiting and purging from which the deceased suffered for several days commenced shortly after he took the food given to him by the accused on the 22nd February, his belief that he was poisoned and lastly the discovery of traces of arsenic in his stomach, kidney and liver, were in the course of the preliminary enquiry and the trial not directly brought forward by the prosecution, as they ought to have been, so as to give the accused a full and proper opportunity of meeting them, I feel I cannot but, particularly at this very late stage of the case, leave those circumstances entirely out of my consideration. The chief question is what offence then did the accused's act amount to? In determining this question it is necessary to bear in mind the nature and extent of the injuries, together with the circumstances in which they were inflicted, and the knowledge to be attributed to the accused with [366] reference to the consequences likely to flow from such injuries, according to general experience. Now at the time the deceased was attacked by the accused he was, she well knew, in an extremely weak state of health, since he had been suffering from violent vomiting and purging continuously from the 22nd up to date of the offence. The evidence shows that he was scarcely able to move about. In this very enfeebled condition he was found on the morning of the day of his death stretched on the ground, with the accused, a woman of strong physique, sitting on his chest, pressing his throat with one hand and twisting his testicles with the other. The witnesses, Aaron and Karuppan, who came to the spot in consequence of the cries of the deceased, asked her to desist, but she would not and did not stop the twisting until Karuppan went in for the purpose of preventing further injury. That the pulling and wrenching by the accused must have been attended with considerable force and persisted in for a comparatively long time is manifest from the almost absolutely pulpy condition in which the medical witnesses found the parts injured. In acting so as to produce such an extraordinary result, can it be reasonably said that the accused did not know she was likely to cause the death of her husband? The argument on her behalf is that similar assaults are frequent in this country, but yet they rarely, if at all, prove fatal, and therefore a knowledge that death will probably result from such injuries ought not to be attributed to the accused. I am unable to accede

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to this argument, for it is impossible to deny, as pointed out by Dr Chevers in his work on Medical Jurisprudence, that this form of assault is extremely liable to prove fatal That such assaults have resulted in death is shown by the cases referred to in the work above cited and by others which have come to my notice One specific recent instance which I have been able to trace is Criminal Appeal No. 391 of 1893, and curiously enough it came from the very district in which the present case happened There the body of the deceased bore marks of violence on the throat and the scrotum, which latter was swollen to the size of a cocoanut The Hospital Assistant, who conducted the *post-mortem* examination, thought that the immediate cause of death was strangulation but he added that the swelling in the scrotum should have resulted from squeezing, which was enough to have caused death independently of any other violence The first accused in the case who, the evidence showed, must have had a [367] share in the infliction of the injury was convicted of murder by the Sessions Judge On appeal, the learned Chief Justice and Shephard, J, upheld the conviction, observing that the medical evidence showed that the man, in all probability, died of injury to the scrotum I should also not omit to remark that the knowledge that injuries like those in question are highly dangerous to life is not confined to medical men, since the same is shared widely by other people as well I doubt whether any person of ordinary sense and understanding, even among the lower orders in this country, is really ignorant that violent blows or kicks administered on the parts in question might and would probably result in death

In these circumstances, it seems to me unsafe to hold that a person who so effectually destroys the delicate parts of a man's body, as the accused did here, does nothing more than what in law would amount to hurt There may be cases in which the Courts would be bound to say that a person who inflicts such injury should be taken to have known that death would be the most probable consequence. In such cases the act may amount to murder Here I certainly think that the accused should be held to have known that death would at all events be *a Probable, if not the most probable*, consequence, and I have, therefore, no hesitation in agreeing with Benson, J, that she should be found guilty of culpable homicide not amounting to murder

Next, as to the question of sentence. Here also I am unable to take a lenient view of the case against the accused. No doubt her story that she was acting in self-defence was put forward from the very commencement. But the different versions given by her from time to time as to what is said to have taken place are, in some very material respects, contradictory. The most important of her allegations, *viz*, that the deceased attacked her with a knife and hurt her, I totally disbelieve, and I think that the superficial scratches found on her throat and said to have been caused by the knife were, probably, as surmised by Benson, J, produced by the deceased's nails in the course of the struggle The probable explanation for the slight wound on one of her fingers is perhaps similar. And considering the extremely poor condition in which the deceased was on the 28th in consequence of his prolonged and exhausting illness, it is difficult to suppose he could have then done anything so as to produce on her mind the apprehension that he was about to do serious harm to her person. What, in truth, [368] displeased and prompted her to attack the deceased appears to have been the direction given by him on the 27th to one of the witnesses in the case to send away to his (the deceased's) brother the cash in the house amounting to over Rs. 200.

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This direction the accused seems to have much resented and the fact that, before she attacked him, she had without his knowledge taken possession of the money and secreted it, suggests that her brutal treatment of the man was not altogether really due to any grave provocation given by him at the time of the attack. In these circumstances, any punishment less than that proposed by Benson, J., would, in my opinion, be inadequate.

The result is the conviction of the accused must be, and is hereby, altered into one under Section 304, Indian Penal Code, and the accused is sentenced to rigorous imprisonment for seven years.

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19 M. 368.

ORIGINAL CIVIL.

Before Mr Justice Subramania Ayyar

SIMON AND OTHERS (*Plaintiffs*) v. HAKIM MAHOMED SHERIFF (*Defendant*).* [10th August, 1896.]

Promissory note—Contemporaneous collateral agreement consistent with the terms of the promissory note—Suit properly brought under Chapter XXXIX, Civil Procedure Code.

The plaintiffs advanced money to defendant for the supply of certain goods On defendant's failure to supply the goods, plaintiffs pressed for repayment and a promissory note payable on demand for the amount due was executed, at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly consignments, the first consignment to be made within fourteen days of the date of the promissory note. On defendant's failure to send the consignments as promised a suit was brought under Chapter XXXIX, Civil Procedure Code:

Held, that the suit was rightly filed under Chapter XXXIX that the agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay, that such collateral agreement was no answer to the suit on the promissory note and that the plaintiff was entitled to a decree

[369] SUIT under Chapter XXXIX, Civil Procedure Code, for Rs. 7,881-8-7 being principal and interest due on a promissory note, dated 2nd May 1896, payable on demand and executed by the defendant. Demand was made on 19th May 1896. The plaint was filed on 6th July 1896 On 24th July 1896 the defendant moved on a petition for leave to defend under Section 533, Civil Procedure Code, supported by an affidavit to the following effect:—" I admit the promissory note of the 22nd May " 1896, but say that, when I executed the same, I gave an undertaking " in writing to the plaintiffs in pursuance of an agreement come to with " the latter at the time through their attorneys Messrs. Wilson & King, " whereby I agreed to ship fortnightly through the plaintiffs free consign- " ments of not less than Rs 2,000 in value each until the note should be " liquidated, the first of such consignments to be made at the expiration " of fourteen days, from the date of the promissory note.

" I further admit that, owing to untoward circumstances over which " I had no control, I was not in a position to make a shipment as per " terms of the foregoing written undertaking on the date mentioned " therein; but say that on the 30th May last I sent two respectable per- " sons, C. Ghulam Muhammad Sahib, a merchant and Inayat Hussain " Sahib Manager, Registration Department, Deputy Collector's Office,

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* Civil Suit No. 117 of 1896.

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"to treat with the fourth plaintiff in view to substitute a new agreement "more favourable to me in the place of that mentioned in the previous "paragraph, the terms of the new agreement being that a sum of Rs "1,000 was to be paid down at once and monthly payment of Rs 500 to "be made on the 1st July, 1st August and 1st September 1896, and "thereafter payments of Rs 1,000 monthly to be made on the 1st day "of every calendar month commencing from 1st October next. This "arrangement was to cover the plaint promissory note and all anticipated "shortfalls, and the fourth plaintiff, as I am informed and believe the "same to be true, accepted the proposed terms on behalf of his firm and "received Rs 1,000 then paid into his hands by the aforesaid persons "on my behalf and faithfully promised to give me through them a letter "embodying the foregoing terms, together with a receipt for the sum of "Rs 1,000 then paid into his hands on the Monday following.

"But in breach of the foregoing agreement, the plaintiffs' firm failed "to send me the promised letter embodying the new terms, but sent "instead a receipt for Rs 1,000 on account of re-draft for Rs 1,369-11-10, "of which I had no previous notice.

[370] "I charge the plaintiffs have acted in bad faith. I am advised "that this is a good case for me to enter my defence on merits." In reply thereto the fourth plaintiff filed an affidavit denying the alleged substituted agreement and admitting the receipt of Rs 1,000 paid on behalf of the defendant, but alleging that it was paid by a Muhammadan without any instructions as to the account against which it was to be placed and that consequently the plaintiff had appropriated it towards another redraft which was due and had been presented to the defendant more than once for payment.

Mr *Ryan*, for defendant (petitioner).

Mr *Norton*, for plaintiffs.

The Court refused leave to defend.

Mr. *Ryan*, for the defendant, moved on the 27th July 1896 for an order precluding the plaintiffs from proceeding with this suit under Chapter XXXIX, Civil Procedure Code, on an affidavit sworn by defendant as follows :—"I admit the plaint promissory note of the 2nd May 1896, but say "that, when I executed the same, I gave an undertaking in writing "to the plaintiff in pursuance of an agreement come to with the latter, "at the time through their attorneys Messrs. Wilson & King, whereby I "agreed to ship fortnightly through the plaintiffs free consignments of "not less than Rs 2,000 in value each until the note should be liquidated "—the first of such consignments to be made at the expiration of fourteen "days from the date of the promissory note.

"The promissory note was a part only of the agreement entered into "between me and the plaintiffs and my obligation under the said promissory note is modified by the agreement in writing referred to in "paragraph 1."

Mr *Ryan*, for defendant. There was a written agreement at the time of the promissory note that modified the liability under the so-called note and made it not a promissory note under the Negotiable Instruments Act. To see what the agreement was, we must look at the whole contract and construe both documents together. The agreement made at the time of the note shows how the note was to be liquidated, *viz.*, by consignments and in no other way.

[By Court.—What if you made no consignments.]

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Mr. *Ryan.*—Then the money would be due. But looking at the whole agreement the liability to pay money is conditional on the failure to consign. In that view, the note is not unconditional. You cannot paste a piece of paper over one part of an agreement.

[371] [By Court.—Suppose you fail to consign for five years, what is the plaintiffs' position; can he sue?]

Mr. *Ryan.*—Yes, but not on the note; this is not a promissory note. It never was a promissory note. Negotiable Instruments Act XXVIII of 1881, Section 4. There is here a contract to deliver goods in lieu of paying money, in other words a sale.

[By Court —Then he could only sue for damages for breach.]

Mr. *Ryan* —On failure to deliver. He has a right of action on the reement.

[By Court —Was this promissory note delivered as an escrow?]

Mr. *Ryan.*—No. There was an immediate liability controlled by the ntemporaneous agreement. He cited. *Bowerbank* v. *Monteiro* (1) and rr v. *Stephens* (2).

Mr *Norton,* for plaintiff. The contemporaneous agreement is collate- l to the promissory note. There is only an agreement not to sue on the ote if consignments were made. The note can be sued on by itself.

JUDGMENT.

The plaintiffs advanced a sum of money to the defendant on his pro- ising to supply certain goods. He, however, having failed to do so, the aintiffs instructed their solicitors, Messrs. Wilson & King, to take steps r the recovery of the amount advanced. When the defendant learnt is, he requested the solicitors, through his vakil Mr. Ambrose, that ey should defer taking legal proceedings. Thereupon Messrs. Wilson King addressed to Mr. Ambrose, on the 2nd May 1896, Exhibit I which as follows: —

"With reference to my conversation with you this morning regarding Messrs. Carl. Simon's claim against Ghouse Sheriff Sahib and Co. I am instructed to inform you that they are prepared to stay proceedings on your clients giving them an on-demand promissory note for the amount due up to date, *viz* , Rs. 7,189-9-11, *plus* Rs. 21, costs already incurred by them, such promissory note to carry interest at 9 per cent., and on your client undertaking to ship fortnightly through our clients, free consignments of not less than Rs. 2,000 in value each, until the note is liquidated. The first of such consignments to be made at the expiration of fourteen days from the date. If these terms are agreeable to your client, please send us a promissory note in the terms above mentioned signed by [372] your client and a letter also signed by your client under- taking to make the above shipments. The above offer is open until 3 P.M. to-day and is made without prejudice to our clients' strict legal rights." This offer was accepted by the defendant, who executed xhibit A and forwarded with it Exhibit II which runs thus:—

"With reference to the promissory note (Exhibit A) executed by us this day in your favour for Rs. 7,210-9-11, we undertake to ship fortnightly through you free consignments of not less than Rs. 2,000 in value each, unitl the promissory note is liquidated, the first of such consignments to be made within fourteen days from this date.' Admit- dly, the defendant did not send any consignment as he promised to do.

(1) 4 Taunt, 844. (2) 9 B. & C. 758.

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The present suit for the recovery of the amount due under Exhibit A was instituted under Chapter 39 of the Civil Procedure Code. The defendant applies for leave to defend on the ground that if Exhibit A and Exhibit II are taken together, it will be seen that the former was not a mere promissory note and the suit would not lie under the chapter quoted

Of course parties to what purports to be a mere promissory note may, contemporaneously with its execution and delivery, enter into another agreement with reference to such instrument The terms of that agreement may, on the one hand, be so inconsistent with the terms of the document, purporting to be a promissory note, as to render it clear that the parties never intended to invest what seems a promissory note with the attributes of an instrument really of that description On the other hand, the terms of the agreement may go to show that it was not intended that the document which on the fact of it is a promissory note, should not operate as such In the former class of cases, the two agreements must be construed to be parts of but one contract, not severable by the Court for the purpose of giving to one of the two parts, an effect, that it would have had, if such part alone formed the whole contract In the latter class of cases the agreements are treated as distinct contracts capable of standing side by side

The contention on behalf of the defendant seemed to be that the present case fell under the first class of cases Now if, as in *Hartley* v. *Wilkinson* (1), the unconditional promise to pay contained in Exhibit A were qualified into a conditional one by Exhibit II the [373] former instrument cannot of course be held to be a promissory note Manifestly, however, no such qualification is found to exist in Exhibit II. Again if, as in *Leeds* v *Lancashire* (2), the effect of Exhibit II were to render the amount mentioned in Exhibit A a sum *not certain* that also would be fatal to the view that the latter document is valid as a promissory note. But it cannot be pretended that Exhibit II affects in any way the *certainty* of the amount payable under Exhibit A Yet again, if the provisions to be found in Exhibit II had been inserted in the same paper, as Exhibit A and as a part of the contract to pay the amount therein mentioned, then the instrument would of course have had to be declared to be one containing more than what a proper promissory note should contain, and therefore not a negotiable instrument (compare *Kirkwood* v *Smith* (3)) For, in the case just supposed, the circumstance that all the provisions were thus linked together in one and the same document would by itself lead, almost irresistably to the conclusion that the intention was to make the promise to pay the money and the agreement to send the free consignments, terms of the same indivisible contract. Here, however, the two agreements are evidenced by separate documents, and the fact that the parties thought it necessary to make the undertaking set forth in Exhibit II, quite distinct from the promise to pay money, contained in Exhibit A, is pregnant against the suggestion that the parties meant to qualify the negotiable character of the latter instrument That the requisition that free consignments should be sent by the defendant emanated, not from him, but from the plaintiffs, is strongly in favour of the view that, so far as the latter were concerned, the arrangement about these consignments was merely a supplemental provision made for securing a speedy realization of the debt due to them, and by no means intended to

(1) 4 Camp, 127 (2) 2 Camp, 205 (3) (1896) 1 Q B D 582

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derogate in any way from their right, as payees under the promissory note, to demand unconditional payment of the sum due. As to the defendant's intention, the circumstance that, until the present contention was put forward about three weeks ago, he had spoken of Exhibit A as a promissory note and acted upon the footing that it was such, cannot but lead to the inference that he also intended it to be a valid promissory note.

Such being my opinion of the transaction with reference to the circumstances in which the two documents came into existence, is [374] there anything in the provisions contained in Exhibit II, which compels me, in spite of the obvious intention of the parties as explained above, to decide that Exhibit A is not in reality a promissory note. The learned counsel for the defendant seemed to argue that, reading the documents, in question, together, it must be held that the plaintiffs agreed not to enforce payment of the amount of the note until the defendant had had time to send free consignments sufficient to discharge the debt. I have no doubt that the plaintiffs meant to wait and would have waited if the defendant was at all inclined to keep his engagement to forward such consignments. But I should hesitate to say that they entered into a legally binding arrangement not to claim payment before the expiry of the period during which the consignments were to be sent. I think it would be scarcely reasonable to hold that the palintiffs entered into such a contract with the defendant, simply because they were prepared to afford him facilities for his repaying the money due to them, in the manner contemplated by Exhibit II. But suppose that the plaintiffs legally bound themselves to wait, as suggested on behalf of the defendant, it is difficult to see how that renders Exhibit A the less a promissory note. The reasoning on which the decision of the House of Lords in *Salmon* v. *Webb and Franklin* (1) rests, is clearly in favour of the view that an agreement by the payee not to enforce payment of the debt due under a promissory note, for a limited time does not, in any way, trench upon the negotiable character of the instrument. In that case, it was found that the payees of a promissory note paybale on demand, had entered into a contract with the maker of the note and with certain other parties who, like the maker himself, had an interest in the money, lent under the note, that no suit should be brought thereon till, the youngest of the persons, so interested had arrived at a cerain age. Nevertheless, the payees sued on the note during the lifetime of the specified individual and before he had attained the age fixed. The agreement referred to was pleaded by the maker as a defence to the claim. *Baron Parke* in stating the opinion of the majority of the Judges, who were consulted on the occasion, expressed himself thus: "My "brother Erle thinks that upon the facts stated in the plea, the defendant "did not intend to deliver the note so as to make himself liable until "the happening of one of the contingencies there specified. [375] The "other Judges think that the meaning of the phrase 'contemporaneously "with and at the same time' is merely that the agreement alleged in "the plea was made at the same time with the promissory note, not that "it was part and parcel of the same instrument and to be treated and construed as if it was written on the same paper. We consider it, therefore, "to be a collateral undertaking, perfectly consistent with the existence of a "note containing an absolute promise to pay; and such a collateral agree-"ment is no answer to the declaration; because it is an agreement not to "sue for a limited time only and a covenant not to sue for a limited time

(1) 3 H. L. Cases, 510.

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"is no answer to an action" The House of Lords agreed with the view taken by the majority of the Judges as expounded by the learned Baron, and held that the plea set up by the maker was bad in substance

I am, therefore, of opinion that the ground of defence urged by the defendant is unsustainable, and I refuse to grant leave to defend The application is dismissed with costs There will be a decree for the plaintiffs as prayed

Wilson & King —Attorneys for plaintiffs
Ramanuja Chariar —Attorney for defendant

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19 M 375=6 M L J. 195=2 Weir 680.

APPELLATE CRIMINAL

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Benson

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QUEEN-EMPRESS v VIRASAMI * [26th, 27th and 31st March and 3rd August, 1896]

Witness—Committed for trial for offence under Section 193, Penal Code -Criminal Procedure Code, Sections 282, 428, 477, 526 A—Incompetence of juror—New trial—Application for transfer

On the trial of certain prisoners on a charge of dacoity a witness gave false evidence and was committed under Section 477, Criminal Procedure Code, for trial on a charge under Section 193, Penal Code After such committal it was discovered that one of the jurors empannelled in the dacoity case was deaf and partly blind, and thereupon under Section 282, Criminal Procedure Code the case was tried *de novo* before a competent jury

[376] The trial of the charge under Section 193, Penal Code, was fixed for the November sessions, but on the 17th October 1895 on prisoner's application the trial was adjourned to 2nd December 1895 On 20th November the prisoner's vakil put in a petition, alleging that he had moved the High Court for a transfer of the case On this petition coming on for disposal, the prisoner's vakil moved *orally* for an adjournment under Section 526-A, Criminal Procedure Code, which was refused On the 30th November the prisoner's vakil put in a petition in which he prayed for an adjournment under Section 526-A This petition was refused and the trial began on 2nd December and judgment was written and pronounced on 5th December In the meantime application had been made to the High Court for a transfer and that petition was disposed of on 4th December granting the transfer prayed, the High Court apparently being not aware that the trial was at that time proceeding before the Sessions Court On 5th December after the trial in the Sessions Court was concluded and before judgment was delivered, a fresh petition was presented for an adjournment on the ground that a telegram had been received from the High Court transferring the case, but the Sessions Judge refused to act upon it in the absence of orders from the High Court and delivered judgment convicting the prisoner During the trial before the Sessions Court the prisoner applied for an adjournment on the ground that two witnesses for the defence were absent, one being too ill to attend, the other not having been served with the summons, but the Sessions Judge considering the application was made merely for purposes of delay and to defeat the ends of justice and that their evidence would not be material, refused to adjourn for their evidence to be recorded

Held, first that the fact that the trial for dacoity had to be commenced *de novo* did not exonerate the prisoner from the obligation to speak the truth imposed by Section 14 of the Indian Oaths Act X of 1873 in the first trial, which became abortive owing to the incompetency of one of the jurors,

Secondly, that Section 526 A, Criminal Procedure Code, is imperative, but that the object of Sections 344 and 526 when read together is merely to give a

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* Criminal Appeal No. 704 of 1895

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party reasonable time to move the High Court and obtain its orders and that in the present case there was sufficient time for such application to have been made, if due diligence had been observed.

Thirdly, that the order for transfer made on 4th December, which, in fact, did not reach the Judge till after judgment was pronounced did not vitiate the proceedings; and that the Sessions Judge was not wrong in refusing to adjourn the case on the strength of a telegram said to have been received by prisoner's vakil stating that the High Court has ordered a transfer.

Fourthly, that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of the two absent witnesses that their evidence was material and must be recorded and certified to the High Court under Section 428, Criminal Procedure Code.

[**F.**, 13 Cr. L J 746=17 Ind. Cas. 58=1 P.R. 1913 Cr. =254 P.L.R. 1912=42 P.W.R. 1912 Cr. 6 C.W.N. 717 (719) ;**R.**, 31 C 715 (720)=8 C.W.N 910; **D.**, 29 C. 211 =6C.W.N. 251.]

APPEAL against conviction and sentence passed on prisoner by F. H. Hamnett, Sessions Judge of Kistna, in sessions case No 35 of 1895.

The facts of this case appear sufficiently for the purposes of this report in the judgment of the High Court.

[377] *Sriramulu Sastri*, for accused.

The Public Prosecutor (Mr. *Powell*), for the Crown.

ORDER.

The accused, G. Virasami, is a police constable. During the trial of a dacoity case, Sessions Case No. 26 of 1895 of Kistna, he was examined as a witness and made statements which the Sessions Judge considered to be false. The Sessions Judge, therefore, immediately after the evidence was given, committed the accused for trial before his own Court under Section 477, Criminal Procedure Code. The trial of sessions case No. 26 then proceeded, and after the Judge had summed up to the jury, but before they gave their verdict, a juror stated that he was deaf and partly blind. The Judge then chose a new jury, and commenced the trial of the dacoits *de novo* under Section 282, Criminal Procedure Code, and they were eventually convicted. The present accused was afterwards tried in due course and convicted of an offence punishable under Section 193, Indian Penal Code and was sentenced to two years' rigorous imprisonment.

Against this conviction he now appeal, both on the merits, and on several preliminary grounds.

The first ground is that, as the trial of sessions case No. 26 had to be commenced *de novo*, it must be regarded as null and void for all purposes, and any statement made therein by a witness, canot be the subject of offence under Sections 191 or 193, Indian Penal Code. We cannot admit this contention. The accused was legally affirmed, and was bound under Section 14 of the Indian Oaths Act X of 1873 to speak the truth. The Sessions Judge was a Court, and had jurisdiction to try the case in the course of which the accused gave the evidence that is said to be false. The fact that one of the jurors was afterwards found to be deaf, and, therefore, incapable of doing his duty as a juror, necessitated the examination of the witnesses *de novo* before a competent jury. This was in fairness to the persons then accused, but it did not and could not, in any degree, diminish the obligation which lay on the present accused, as a witness in the case, to speak the truth. Can it be contended that if, owing to the death of a juror during the trial, the witnesses had to be examined *de novo*, their prior statements, if false, could not be made the subject of a prosecution for giving false evidence? Again, if, in the cases under consideration, a witness, having been duly examined, should die in

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the interval between his examination and the retrial necessitated by the death [378] or incapacity of a juror, can it be contended that his evidence could not be used in the retrial under Section 33 of the Indian Evidence Act? We apprehend that these questions must be answered in the negative It follows, we think, that there was nothing in the retrial of sessions case No 26 to absolve the present accused from the obligation under which he lay to speak the truth when examined as a witness in the first trial

The next preliminary objection is that when the accused made an application under Section 526-A, Criminal Procedure Code, on the 30th November 1895 for the adjournment of the case in order that an application might be made to the High Court to transfer it, the Sessions Judge illegally refused any adjournment though he was absolutely bound by law to grant an adjournment In support of this view, attention is drawn to the words of the section and to the decision of the Calcutta High Court in *Queen-Empress* v *Gayitri Prosunno Ghosal* (1) Under this section, which was added to the law by Act III of 1884, the complainant or the accused has the right, before the commencement of the hearing, to notify to the Court his intention to make an application to the High Court for transfer of the case, and, if he does so, the section goes on to provide "the Court shall exercise the powers of postponement or adjournment given by Section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon before the accused is called on for his defence" These words the Calcutta High Court held to be obligatory, and, in the case before it, it held that the Magistrate's refusal to grant the adjournment asked for was illegal, and it consequently set aside all the proceedings which followed that illegal refusal We are asked to follow that decision, and to set aside the present trial in consequence of the Sessions Judge's refusal to grant the adjournment asked for on the 30th November The trial of the case was fixed for the 2nd December, and if the application of the 30th November was the first application made under Section 526-A, we think that the Sessions Judge would have been bound to have granted an adjournment, since it would not have been possible to have made an application to the High Court and obtained its order, in the interval between the 30th November and the 2nd December [379] We find, however, that on the 20th November the accused put in a petition stating that he had applied to the High Court for a transfer of the case, and a verbal application was then made for an adjournment of the trial on that account, but was refused on the ground that the case had already been adjourned, on the accused's application, from the November Sessions to the December Sessions, and that a further adjournment was unnecessary The contention that is pressed upon us by the accused's vakil is that the Sessions Judge had no discretion in the matter, and that the words of the section "shall exercise the powers of postponement" simply mean "shall postpone" and rendered some postponement, were it only for a day absolutely necessary, in order to comply with the provisions of the section, and this, whether, when the application was made, there was, or was not, time enough, before the trial, to make the application to the High Court and obtain its orders We cannot admit this interpretation of the section, nor do we think that the ruling of the Calcutta High Court can be taken as necessarily sanctioning such an interpretation No doubt the words "shall exercise," &c, are obligatory, but the obligation is not,

(1) 15 C. 455

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necessarily and under all circumstances, to grant a postponement, but only to give the party a reasonable time for obtaining the orders of the High Court. The postponement is no part of the essence of the obligation. By itself a postponement might be either useless, if it were for too short a time, or superfluous, if there was sufficient time without any postponement. The essence of the obligation is that the party should have a reasonable time to move the High Court and obtain its orders. If he has such reasonable time when the application is made, there is no obligation to grant any further time. We think that this is clear not only from a commonsense appreciation of the object which the Legislature had in view, but also from a consideration of the language of the section and the reference to Section 344. This section gives the Court power to postpone a trial, with certain formalities, if, for certain reasons, "it becomes necessary or advisable" to do so Thus the necessity, or at least the advisability, of granting a postponement, is, under Section 344, a condition precedent to the existence of the power of postponement When, therefore Section 526-A says that, under certain circumstances, the Court shall exercise the powers of postponement given by Section 344, it carries with it the limitation contained in that [380] section to cases in which it is necessary, or at least advisable, to grant the postponement, in order to attain the object which Section 526-A has in view, *viz.*, to obtain the orders of the High Court on the application for transfer In the Calcutta case the application for transfer was made on the 19th November, and the case was heard, and judgment given on the 21st idem Evidently in that case the interval was insufficient to move the High Court and obtain its orders, and the Magistrate, in refusing the adjournment, neglected the essential obligation laid on him by the section. In the present case, if the application of the 30th November were the first application, we should hold that the Sessions Judge was legally bound to have granted an adjournment, inasmuch as the interval between that date and the 2nd December (the date fixed for the trial) was insufficient to admit of an application to the High Court. But as a fact, the application for postponement under Section 526-A was first made on the 20th November, and the interval between that and the 2nd December was, in our opinion, a time reasonably sufficient for the accused, with due diligence, to have moved the High Court for a transfer, and to have obtained its orders thereon. The Sessions Judge was, therefore, justified in refusing an adjournment on the application of the 20th November, and nothing occurred subsequently to render it necessary for him to grant on the 30th the application which he refused on the 20th, for we must hold that the accused's act in making his first application to the High Court with an insufficient affidavit was want of diligence on his part. The result is that, under the circumstances, the refusal of the Sessions Judge to grant an adjournment was not illegal, and the second preliminary objection fails.

A third preliminary objection is that the Sessions Judge, having, before he pronounced judgment, learned that the High Court had transferred the case, ought to have adjourned the case, instead of pronouncing judgment. This objection is untenable The trial began on the 2nd December, and the judgment was written and pronounced on the 5th December. The order of the High Court was made on the 4th December in ignorance, apparently, that the trial had commenced two days previously, but the order did not reach the Sessions Judge until after the judgment was pronounced. We cannot say that he was wrong in refusing to adjourn the case, at so late a stage, on the strength of a [381] telegram

said to have been received by the accused's vakil to the effect that the High Court had passed an order to transfer the case. 1896 Aug. 3. — Appellate Criminal. — 19 M. 375-6 M.L.J. 195-2 Weir 680.

The fourth preliminary objection is that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of two absent witnesses. One of these witnesses was proved to be too ill to travel, and the other was not served with a summons. The Sessions Judge held that the witnesses were "persons of very ordinary status, whose evidence would in no case carry much weight," and added "The accused wishes to call them to speak to the same facts as other witnesses of just as much respectability whom I have discredited. I rule that the witnesses are not material witnesses." For this reason, and because he thought that the application was made "to delay the case and defeat the ends of justice," the Sessions Judge refused the adjournment. We cannot agree with the Sessions Judge that the witnesses were not material witnesses. From the accused's statement on the 3rd December 1895 it appears that one of the witnesses, Subbarayadu, was to prove that Appi Reddi took food with him at Prattipadu on the night of the 5th June, and the other witness, Kotayya, was to prove that he was Appi Reddi at the police station and at the search of Pichamma's house on that day. If those statements are true, the whole case against the accused must fail, for the whole question at issue, is whether Appi Reddi was, or was not, taken to Prattipadu on the 5th June. The matters as to which the witnesses were to speak were, therefore, the very matters on which the guilt or innocence of the accused depended, and were obviously material. It was not open to the Sessions Judge to decide on the credit to be attached to their evidence before he had an opportunity of hearing it. The Sessions Judge, therefore, exceeded the discretion given to him by Section 216, Criminal Procedure Code, and it is obvious that the accused has been prejudiced in his defence by the Sessions Judge's refusal to obtain the evidence of these witnesses. We do not, however, think it necessary on this account to set the trial aside, but we resolve under Section 428 to direct the Sessions Judge to now take the evidence of these two witnesses and certify the same to this Court. We also resolve to direct the Sessions Judge to take the evidence of the station-house officer of Prattipadu as he, of all others, must be in a position to say with certainty whether Appi Reddi was or was not kept in his station on the 5th June, as [382] alleged by the accused. The fact that this witness was absent from the district is no sufficient reason for neglecting to obtain his evidence. As a public servant he might have been departmentally required to return to the jurisdiction of the Court, or a commission under Section 503, Criminal Procedure Code, might have been issued for his examination.

It is not clear whether the evidence expected of the police writer of Kakiman referred to in paragraph 10 of the judgment is relevant. If the Judge finds that it is so, his evidence should also be taken. The evidence now called for may be taken by the Judge himself, or if there is sufficient reason, on commission under Section 503.

It must be certified to this Court within three weeks from this date.

This case coming on for rehearing this day after the receipt of the fresh evidence called for in the order of this Court, dated the 31st March 1896, the Court delivered the following

JUDGMENT

The further evidence now recorded makes it certain that the finding of the Sessions Judge that Appi Reddi was never taken to Prattipadu is

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correct. It follows that the three statements specified in the charge are false and that the appellant was rightly convicted. We agree with the Sessions Judge that a police officer who gives false evidence in a dacoity case deserves exemplary punishment. We confirm the conviction and sentence and dismiss the appeal.

Ordered accordingly.

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19 M. 382=6 M.L.J. 88.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

NARANAPPA AND ANOTHER (*Defendants Nos. 2 and 3*), *Appellants* v. SAMACHARLU (*Plaintiff*), *Respondent*.* [15th and 17th January, 1896.]

Suit to set aside a sale effected by a mortgagee prior to Transfer of Property Act—Act IV of 1882, Sections 2, 99.

In a suit brought to set aside a sale effected by a mortgagee prior to the date when Act IV of 1882 (Transfer of Property Act) came into force:

[383] *Held*, that the Transfer of Property Act (Sections 2, 99) has no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the defendants passed before that Act came into force.

[**R.**, 30 M. 362 (366)=17 M.L.J. 325.]

SECOND appeal against the decree of L. Moore, District Judge of Bellary, in appeal suit No. 104 of 1893, reversing the decree of K. Murtirazu, District Munsif of Penukonda, in original suit No. 643 of 1892.

The facts of this case were as follows:—Defendant No. 2 had against the first defendant a money decree in original suit No. 456 of 1881, and a mortgage deed, dated 6th October 1875, Exhibit I. In execution of that money decree, defendant No. 2 got the mortgaged land attached and sold subject to the mortgage (Exhibit I) and he having himself bought them by permission of the Court obtained delivery and subsequently transferred some of the lands to the defendants Nos. 3 and 4. The plaintiff, in execution of a money decree obtained against defendant No. 1 in original suit No. 456 of 1881, but the attachment was removed by the Court upon claims preferred by defendants Nos. 2, 3 and 4.

The plaintiff has brought this suit to set aside the Court's order releasing the lands from attachment in original suit No. 464 of 1881 and to justify his own attachment of the lands in execution of the decree in that suit.

The District Munsif held with reference to Section 2 of the Transfer of Property Act that the sale by defendant No. 1 to defendant No. 2 was effectual as against the plaintiff and dismissed the suit with costs.

On appeal the District Judge reversed this decree and gave judgment for the plaintiff with costs relying on *Durgayya* v. *Anantha* (1).

Defendants Nos. 2 and 3 appealed.

Mr. *Parthasaradhi Ayyangar* and *Narasimhachariar*, for appellants.

Seshachariar, for respondent.

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* Second Appeal No. 112 of 1895.

(1) 14 M. 74.

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JUDGMENT

Sufficient attention has not been paid to the dates in this case. Before the 1st of July 1882 when the Transfer of Property Act came into force the appellants had obtained their decree, dated 20th November 1881, they had got the property [384] attached on the 9th March 1882, and in the month of April had obtained orders for sale.

This being so, we are of opinion that a legal relation was constituted between the appellants and their judgment-debtor before the Act came into force and that out of this relation arose a right to have the order for sale carried out. They are entitled to sell under the order whereas if Section 99 of the Transfer of Property Act is applicable they cease to be so entitled when the Act came into force.

We are therefore of opinion that the plaintiff is not entitled to rely on Section 99, and we are supported in this view by the decision in *Dinendra Nath Sannyal v. Chandra Kishore Munshi* (1).

The decree of the District Judge must be reversed and that of the District Munsif restored with costs in this and in the Lower Appellate Court.

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19 M. 384.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

KUNHI CHANDU NAMBIAR (*Plaintiff*), *Appellants* v. KUNKAN NAMBIAR AND OTHERS (*Defendants*), *Respondents*.*

[5th September, 1895 and 6th January and 17th July, 1896.]

Suit to redeem Kanom—Malabar compensation for Tenant's Improvements Act—Act I of 1877 (Madras), Section 3.

The sum to be allowed for tenants' compensation for improvements under Act I of 1887 (Madras) is to be calculated in proportion to the extent to which the estate has been permanently improved. The improvement for which compensation is payable as defined in Section 3† of the Act is not the tree itself, but the work of planting, protecting and maintaining it. The calculation must not be based on the future produce of the tree.

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(1) 12 C. 436. * Second Appeal No. 1742 of 1894.

† Section 3 is as follows:—

(1) For the purposes of this Act the term 'Improvement' means any work which adds to the value of the holding which is suitable to the holding and consistent with the purpose for which it was let.

(2) Until the contrary is shown, the following shall be presumed to be improvements within the meaning of this Act:—

[385] (*a*) the erection of dwelling houses, buildings appurtenant thereto and farm buildings,

(*b*) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes,

(*c*) the preparation of land for irrigation,

(*d*) the conversion of one crop into two crop land,

(*e*) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes, or waste land which is culturable,

(*f*) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes,

(*g*) the renewal or reconstruction of any of the foregoing works or alterations therein or additions thereto,

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[385] SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 465 of 1893, modifying the decree of A. Annasami Ayyar, District Munsif of Panur, in original suit No. 60 of 1893.

The facts of this case are as follow:—

Plaintiff sues the defendants to recover possession of 8 items of parambas with the improvements in them held by the defendants 1 and 2 under a registered kanom and kuikanom marupat, dated 30th Magaram 1055 (11 February 1880) granted to him by the latter on payment of the kanom and the value of the improvements, and for payment of Rs. 15 as rent in arrears and future rent at Rs. 100 a year and costs.

He alleges the plaint parambas are his jenm property, defendants 3 to 9 are tenants of defendants 1 and 2 in possession of the parambas.

Defendants 1 and 2 admit plaintiffs's title to the kanom kuikanom marupat of 1055 (1880) and the holding of the parambas under the marupat. They answer that the plaintiff's claim for payment of the rent sued for is premature, his claim for payment of future rent at Rs. 100 a year is irregular, and cannot be allowed, they have made improvements in the parambas of considerable value, they have no objection to surrender the parambas to plaintiff on receiving the kanom and the value of their improvements, and they are not liable for his costs in the suit.

Defendants 5, 8 and 9 state they are in possession of the parambas items 3, 4, 2, 6 and 7 as tenants of second defendant, they [386] have effected improvements in them of considerable value, and they should be paid the value of their improvements before eviction

Sixth defendant states he is not in possession of any of the plaint parambas, and he is not a necessary party to the suit

The remaining defendants do not appear.

The point for decision in the suit is· "To what compensation are the tenant-defendants entitled for their improvements in the parambas?"

The District Munsif after referring the matter to a Commissioner for report for the purpose of fixing the value of the defendant-tenants' improvements and with regard to the compensation awarded for the trees (the only matter now in dispute) gave judgment as follows:—

The average annual produce of the bearing cocoanut trees, with the exception of one tree in the paramba item No 1, may not exceed 25 or 30 nuts. The one good tree may yield about 50 nuts a year. It is an aged tree, considering the ages of the bearing trees, I think three years' purchase would be ample compensation for such trees. I allow Rs. 2 for each of the first mentioned trees and Rs. 3 for the one good tree. The arecanut trees in the parambas inspected are not young ones. The bearing areca trees cannot be paid for at more than 3 annas each. Each of the cocoanut trees which are just bearing must be paid for at least one rupee each. The costs of planting and cultivating a cocoanut tree up to a bearing age cannot be less than one rupee. One of the jack trees in the paramba item No. 1 shown as Jenmi's property should be included in the tenant's property. They should be paid its value Rs. 2 There is only one aged jack tree found in the paramba item No. 1. The admitted marupat Exhibit A shows the jenmis had two jack trees in the paramba. Possibly the

(*h*) the planting, protection or maintenance of fruit trees, timber-trees and other useful trees and plants;

(*i*) the protection or maintenance of such trees, the same having grown spontaneously during the tenancy.

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remaining one was lost or cut and removed subsequent to the date of the marupat. The average annual coconnut produce of the paramba item No. 2 may be about 2,000 nuts. First defendant says the paramba will yield about 2,500 nuts a year. But I think his estimate is one made by an out-going and interested tenant and is too high. The Commissioner has omitted to include in this account a young and bearing jack tree worth Rs. 1-8-0—the property of first and second defendants in the paramba item No. 2.

The parambas items 3 and 4 are situated on the slope of a hill. Their soil is very dry. The fruit trees, &c., do not seem to thrive [387] in them. Of the bearing cocoanut trees shown in the Commissioner's account eight are useless, and will bear no fruit at all. Their head portions have become very thin, and they have only a few leaves on them. The tenant can be paid no value for them. The remaining bearing cocoanut trees may bear 5 or 10 nuts a year. The jack trees are stunted in growth. They are unfit to be used as timber. They cannot also yield plenty of fruit. The bearing cocoanut trees and jack trees in the parambas items 3 and 4 cannot be paid for at the rate of more than one rupee each. The bearing cocoanut trees in the parambas items 6 and 7 seem to be good and should be paid for Rs. 3 and Rs. 2 as their least value instead of Rs. 2 and Rs. 1-4-0 each given by the Commissioner in his account; and he decreed that on the payment of the amount of the kanom and compensation awarded to each tenant the kanom should be redeemed.

On appeal the District Judge disallowed the compensation awarded for the two jack trees and confirmed the decree in other respects.

Ryru Nambiar, for appellant.

Narayanan Nambiar and *Kannan Nambiar*, for respondent No. 1.

The Court (COLLINS, C. J. and PARKER, J.) made the following

ORDER.

The Courts below have apparently calculated the value of the trees upon the capitalized value of their net produce for the estimated period of the life of the trees. This principle was (*Shangunni Menon* v. *Veerappan Pillai* (1)) held to be erroneous. A copy of the decision in that appeal—which was from South Malabar—will be forward to the District Judge and his attention will also be called to the decision in *Valia Tamburatti* v. *Parvati* (2).

As several of the trees for which compensation is asked are very old trees, it would seem that they must have been planted and in bearing condition long before the present tenancy which only dates from 1880. This being so, the question will arise whether the tenant is entitled to any compensation for improvements at all, except perhaps for the protection of the trees under Section 3, Clause (*h*), of Madras Act I of 1887. These trees, which were already fruit-bearing, must have been included in his lease and the rent fixed accordingly, and it may be that the *jenmi* has already paid compensation to the predecessor in the tenancy.

[388] With these remarks we will ask for a revised finding upon the issue in the case.

The finding is to be submitted within six weeks from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

In compliance with the above order, the District Judge submitted the following

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(1) 18 M. 407. (2) 13 M. 454.

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FINDING.

This suit has been remanded by the High Court for a revised finding to be returned as to the value of improvements to be awarded to the defendants in respect of the trees standing on the plaint parambas.

I am referred to two rulings of the High Court as to the principle to be followed in awarding compensation for improvements, *viz.*, the ruling in *Shangunni Menon* v. *Veerappan Pillai* (1) and that in *Valiatham buratti* v. *Parvati* (2).

In their remand order in the present suit the High Court observe: "As several of the trees for which compensation is asked are very old trees, it would seem that they must have been planted and in bearing condition long before the present tenancy which only dates from 1880. This being so, the question will arise whether the tenant is entitled to any compensation for improvements at all, except perhaps for the protection of the trees under Section 3, Clause (*h*), of Madras Act of 1887 * * * * and it may be that the *jenmi* has already paid compensation to the predecessor in the tenancy."

Exhibit A, the *marupat* sued on, clearly shows that the value of improvements has not been paid by the *jenmi* and that the tenants are entitled to get it on surrendering the land. Exhibit A enumerates the trees and fixtures belonging to the *jenmi* at the time of its execution and expressly stipulates that the tenants are to be paid the value of all the improvements *which they were in possession of then* and which they might make subsequently.

Exhibit A shows that the first and second defendants were in possession of the property before the date of its execution. There is a recital by the first defendant in a statement put in by him and plaintiff jointly that the well in *paramba* No. 4 was dug by first defendant in 1847. Exhibit B, which is a revenue account, shows that paramba No. 1 was assessed in first defendant's name in 1868.

[389] It is clear, therefore, that the first defendant was connected with the property some sixty years ago and it can be gathered from Exhibit A that all the trees, except those specified as belonging to the *jenmi*, were planted either by him or by his immediate predecessor and that compensation for them has not been paid by the *jenmi*.

It remains to be considered what compensation is due to the tenants for the trees. I take it that they are entitled to receive compensation in proportion to the extent to which the estate has been permanently improved and that this is represented by the market value of the trees at the time of the surrender. The original outlay incurred may be taken to have been recouped by long enjoyment of the produce.

It seems to me that the Munsif has given the correct market value of the trees as they stood at the time of valuation. He has taken their age and fruit-bearing capacities into account and his estimate seems by no means too high.

I find that the market value of the trees has been correctly fixed by the Munsif and that the tenants are entitled to get the amount awarded by him.

On this second appeal coming on for hearing on return to the order of this Court.

Ryru Nambiar, for appellant.

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(1) 18 M. 407. (2) 13 M. 454.

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Narayanan Nambiar and *Kannan Nambiar*, for respondents

The Court (COLLINS, C J, and PARKER, J) made the following

ORDER

We must accept the District Judge's finding that no improvements have yet been paid for and therefore that the tenant is entitled to be compensated for all improvements that have been made

The District Judge is right in stating that the tenants is entitled to compensation in proportion to the extent to which the estate has been permanently improved; but when he goes on to say that 'this is represented by the market value of the trees at the time of the surrender,' he is clearly in error. The 'improvement' for which compensation is payable as defined in Section 3 of Madras Act I of 1887 is not the tree itself, but the '*work*' of planting, protecting, and maintaining the tree—*vide* Clause (*h*) Any calculation based on the future produce of the tree must assume that the tenant is entitled to be compensated for the loss of the use of the land; but to this he is obviously not entitled, [390] since he can have no equity for the enjoyment of the land beyond the period of his lease.

The difficulty arises from the use of the expression 'market value' in the title of the Act The market value of a fruit tree, apart from the soil in which it grows, would be almost nil, but the 'improvement' to be paid for is the 'work' of planting and nurturing the tree, and not the tree itself—which is the result of the work

The compensation payable under Section 6 is the amount by which the value of the holding has been increased by the 'work' and in ascertaining this the condition of the 'work' and the probable duration of its effects should be considered; but it should be borne in mind that it is the 'work' as defined in Section 3, which is to be paid for, and not the result of the work

With these remarks we must ask the present Acting District Judge to return a revised finding upon the issue.

Further evidence may, if necessary, be taken.

The finding is to be submitted within six weeks from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court

In compliance with the above order, the District Judge submitted the following

FINDING.

This appeal has been remanded to ascertain the value of improvements calculated on the cost of planting and protecting the trees, constituting the 'work' to be paid for.

The issue was· "To what compensation are the tenant-defendants entitled for their improvements?"

The only dispute is as to the value of trees—cocoanuts, jacks, peppervines and areca-nuts. The District Munsif allowed Rs 3 for one good cocoanut tree, and Rs. 2 for the bearing cocoanut trees, As 3 each for the areca-nuts, Re. 1 for cocoanut trees just bearing, and Re. 1 to Rs 2 for jack-trees. My predecessor, Mr A Thompson, considered the District Munsif's valuation to be reasonable.

The plaintiff (appellant) has examined three witnesses and the respondents three witnesses They agree in stating that an acre of ground can raise as its main crop about fifty or sixty cocoanut trees, and also fifty areca-nut trees, four jack trees and about fifty pepper vines.

Plaintiff's first witness gives the cost of raising trees on an acre

1896. JULY 17. — APPELLATE CIVIL. — 19 M. 384.

till they bear fruit at Rs. 35. The second witness fixes it at Rs. 25 [391] or Rs. 30 and the third witness at Rs. 30. From their position they evidently speak from a *jenmi's* point of view and under-estimate the cost of the necessary work.

For the respondents, first defendant gives the cost for cocoanuts at Rs. 5 a tree or about Rs. 300 per acre. The second witness, a mappila, gives the cost at Rs. 3 or 4 per cocoanut tree.

They seem inclined to over-estimate the cost. The third witness is M. Gopala Menon, a pleader of this Court, who gives a more reasonable estimate, corresponding very nearly with that given by the District Munsif.

Seeing that the work consists of raising walls, digging pits, watering for a year or two, manuring and watching for a period of at least twelve years for cocoanut trees, I find that the District Munsif's estimate for improvements is reasonable.

I, therefore, agree with the former appeal decree of this Court on the finding in question.

On the return of the above finding, the Court (COLLINS, C. J., and BENSON, J.) delivered the following

JUDGMENT.

We accept the finding of the District Judge as to the amount of compensation to be paid. His order as to costs is correct.

We extend the time for redemption to three months from this date. With this modification we confirm the decree of the District Judge.

The appellant must bear the respondent's costs in this appeal.

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19 M. 391.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

CHINNATAMBI GOUNDEN (*Defendant No.* 1), Appellant *v.* CHINNANA GOUNDEN (*Plaintiff*), *Respondent.**
[27th April and 8th July, 1896.]

Contract—Continuing breach—Limitation—Civil Procedure Code, Sections 588 (28) 586.

T, who was the uncle of the first defendant and the father of the second defendant, agreed with C to sell certain land to him for consideration received and to cause the land, then standing in the name of a third party, to be registered in [392] C's name. It was further agreed that if T failed to convey and cause the change of the revenue registry, T should return the purchase money. C was put in possession, but in 1890 the second defendant conveyed the land to one M, who ejected C.

Held, that the right of appeal conferred by Section 588, Civil Procedure Code, is not controlled by Section 586, that the breach did not occur prior to November 1890, and that the suit was not barred.

APPEAL against the order of W. J. Tate, District Judge of Salem, in appeal suit No. 94 of 1895, reversing the decree of V. Malhari Rau, District Munsif of Salem, in original suit No. 791 of 1893 and remanding the suit for trial.

This is a suit for refund of Rs. 238, being the purchase money with interest under a contract for sale of certain lands entered into about ten or eleven years before date of plaint.

The plaintiff's case was that the lands in the plaint schedule belonged to the second defendant's father, Tanda Gounden, who received from

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* Appeal against order No. 21 of 1896.

the plaintiff Rs. 175 and delivered possession of the lands to him some ten or eleven years ago. Tanda Gounden promised to get the patta transferred to his own name from that of one Nallan in whose name he (Tanda Gounden) had bought the lands at a revenue sale and then to transfer it to the plaintiff's name. The patta was transferred to Tanda Gounden's name on the 13th July 1882 Sometime after this the vendor Tanda Gounden was convicted for giving false evidence in the Salem riot cases about the year 1883 or 1884 In 1888 or 1889 he was released from jail after he had worked out his term of imprisonment and died one year after his release. The plaintiff further says that after Tanda Gounden's death he asked the first defendant, the head and manager of the family, to transfer the patta, but the latter put him off with excuses and that the cause of action arose in December 1890, when he was dispossessed by one Muttu Payyan claiming to be second defendant's purchaser The defendants deny that the lands ever belonged to them or to Tanda Gounden named by plaintiff, and plead that the claim is barred by limitation

The Munsif held that under the arrangement relied on by the plaintiff the patta was to be re-transferred to him as soon as it was transferred to the name of the vendor, that the transfer to the vendor was made on the 13th July 1882, that the cause of action arose on that day, that the present suit for compensation fell under Article 115, Limitation Act, and was therefore barred

[393] On appeal the District Judge holding that the contract was a continuing one, and that the limitation under Article 115 would run from the time when the defendants put it out of their power to fulfil their contract, that is, from the date of the sale to Muttu Payyan and relying on *Imdad Ali* v *Nijabat Ali* (1) reversed the decree of the Munsif with costs and remanded the suit for disposal on the other issues

Defendant No 1 appealed

Sundara Ayyar, for appellant

Sivasami Ayyar, for respondent.

JUDGMENT

The objection, that the suit being one for the recovery of a sum of money less than Rs 500 and of a nature cognizable by a Court of Small Causes, no appeal against the order of the District Judge remanding the suit lies, is unsustainable, as the right of appeal conferred by Section 588 in a case like this is unaffected by Section 586 of the Code, *Collector of Bijnor* v *Jafar Ali Khan* (2) and *Mahadev Narsinh* v *Ragho Keshav* (3)

It was contended on behalf of the appellant (the first defendant) that the suit was barred by limitation No evidence having been taken, it is necessary in dealing with the said contention, to consider what the allegations relied upon on behalf of the plaintiff are As I understand the plaint, the oral contract for compensation for the breach of which the suit was brought, was this Tanda Gounden, uncle of the first defendant and father of the second defendant, about 1882 agreed to sell to the plaintiff certain land for Rs 175, received the amount from him and put him in possession of the land No sale-deed was, however, executed, as the land then stood registered in the public revenue accounts in the name of a third party But Tanda Gounden agreed to execute a sale-deed and cause the land to be registered in the plaintiff's name after the registry was transferred to that of Tanda Gounden himself It was further expressly agreed that if

(1) 6 A 457 (2) 3 A 18 (3) 7 B 292

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he failed so to convey and cause a change of the revenue registry he shall return the Rs. 175, the price received by him. The breach alleged was that in November 1890 the defendants on the death of Tanda Gounden fraudulently conveyed to one Muttu Payyna by a registered deed the land alleged to have been sold to the plaintiff, that in the next month Muttu Payyan ejected the plaintiff from possession and [394] that the defendants failed to repay the Rs. 175, notwithstanding demand made upon them for the refund thereof. The District Munsif held that the claim was barred by limitation inasmuch as the registry in the revenue accounts was transfererd to the name of Tanda Gounden admittedly more than three years prior to the institution of the suit and the breach of contract on the part of Tanda Gounden should, therefore, be taken to have occurred then No doubt after Tanda Gounden's name was registered in the accounts it was open to the plaintiff to call upon his alleged vendor to give effect to the promise about the execution of the sale-deed, &c. But, considering that the plaintiff was said to have been left in possession till December 1890, it can hardly be said that there was a breach of contract on the part of the vendor, unless and until further performance was distinctly refused. (Compare the observations of Garth, C.J., in *Ahmed Mahomed Pattel* v. *Adjein Dooply* (1), and there is nothing in the plaint to support the view that the date of transfer of the revenue registry to Tanda Gounden's name was agreed between the parties to be the date fixed for the execution of the conveyance to the plaintiff. The plaint allegations on this point convey nothing more than that the understanding was that until the land came to be registered in Tanda Gounden's name the plaintiff had no right to claim the execution of a conveyance. But it does not follow that the moment Tanda Gounden's name was inserted in the registers a cause of action accrued to the plaintiff *ipso facto*. As already observed, a refusal to complete the contract was necessary to give the plaintiff the right to sue. But, according to the plaint, there was no refusal prior to November 1890. The District Judge's view that the breach alleged was subsequent to that period and therefore the claim cannot, upon the plaint itself, be held to be barred appears to be right. His order reversing the District Munsif's decree must be upheld and the appeal dismissed with costs.

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19 M. 395.

[395] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

KALIYANARAMAYYAR (*Respondent*), *Appellant v.* MUSTAK SHAH SAHEB (*Petitioner*), *Respondent.** [4th August, 1896]

Religious Endowments Act—Act XX of 1863, Sections 3, 11—Suit by manager for rent—Muchalkas granted by the committee.

Where the committee of a religious institution governed by Act XX of 1863 obtained muchalkas in its own name from the tenants of land belonging to the institution instead of in the name of its manager:

Held, that this fact constituted a mere irregularity and that a suit brought by the manager on such muchalkas is maintainable.

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* Letters Patent Appeal No. 18 of 1896.

(1) 2 C. 323 (326, 327).

APPEAL under Letters Patent, Section 15, against the judgment of Subramania Ayyar, J, in civil revision petition No 160 of 1894 — 1896 Aug. 4. Appellate Civil. 19 M. 395.

The facts of the case were as follows —

The suit is brought by the manager of a Muhammadan temple called the Durga of Goripalayam to recover Rs 107-5-11 being principal and interest at one per cent per mensem due on 3 muchalkas executed by defendant to plaintiff for Faslis 1299, 1300 and 1301

The defendant objects to the maintainability of this suit on the grounds that the committee members had no right to issue pattahs and take muchalkas, that the plaintiff was not the manager during the 3 faslis in question, that the muchalkas were not given by defendant and that those who have signed them were not authorized by defendant to exchange pattah and muchalka on his behalf

The Subordinate Judge dismissed the suit

The material portion of his judgment is as follows —

Under Section 11 of Act XX of 1863, no member of a committee shall be capable of being or shall act as the trustee of a temple for the management of which such committee shall have been appointed, and it is the lawful trustee or the manager of the temple, for the time being that is entitled to the possession of its properties [396] and to the receipt of its income, and the members are not at liberty to claim to be put in his place Consequently the suit cannot be maintained on the pattahs and muchalkas exchanged by the committee members Again the manager who now sues as plaintiff was appointed in Fasli 1302, and there was no manager during the faslis for which rent is claimed and the muchalkas sued on were not executed by defendant and consequently plaintiff has no cause of action against defendant, *Panduranga* v. *Nagappa* (1)

The plaintiff preferred this petition to the High Court.

Krishnaswami Ayyar, for plaintiff

Sundara Ayyar, for defendant.

SUBRAMANIA AYYAR, J —The plaintiff, the present manager of a durga (a Muhammadan religious institution) sued upon certain muchalkas alleged to have been executed to the members of the committee, exercising supervision over the durga under Act XX of 1863 by the agent of the defendants for rent due by him to the durga for certain years. The Subordinate Judge, being of opinion that under Section 11 of the Act, it was the manager and not the committee that should have obtained that muchalkas from the defendants, held the plaintiff could not maintain this suit upon such muchalkas

The question is whether the decision of the Subordinate Judge on the point is right.

In dealing with this question it must be remembered that members of committee and managers constitute the different parts of the machinery provided by Act XX, for the due administration of the affairs of the religious institution falling within Section 3 of that enactment. And of these two parts members of committees are the persons in whom the general superintendence and control of such institutions are vested. In exercising such general control, it is an unquestionable duty of theirs to see that the rents payable to the institutions are punctually collected and all steps legally necessary for their collection are duly taken. In the performance of this duty, however, the procedure to be observed by them is to get the managers to make the collection and perform all acts necessary

(1) 12 M 366 (368)

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for the purpose. Now, if in deviation from this course, they take upon themselves to obtain muchalkas in their own names, what is it but an act done in the discharge [397] of their duty to see to the realization of the rents? Such an act done *prima facie* in the interests of the institution can hardly be said to be illegal or wrongful so as to make it void as is contended on behalf of the defendant. In my view it is an act which falls within their powers as the controlling authority though, in performing it, they acted in a manner which is not in strict conformity with the procedure prescribed by the law.

Moreover, in the face of the provisions of Section 12 of Act XX, it is scarcely possible to contend that there is anything in the nature of the act of collecting rents, considered by itself which renders such an act inconsistent with the proper performance by members of committees of their duties as the supervising authority. For, by the last part of that section, committees are empowered to collect rents directly in the case of lands transferred to them by or under the authority of the Board of Revenue. This provision, though confined to the case of such lands, shows that in the opinion of the framers of the Act, direct participation in actual management by collecting rents is not so outside the legitimate functions of committees as to compel Courts to decide that an act perfectly valid, if done by them with reference to the portion of the endowments consisting of lands transferred by the Board, is utterly void when it is done with reference to other portions of the landed endowments. It seems to me more reasonable to hold that, though the members of the committee in the present case deviated from the strict procedure in taking the muchalkas in their own names instead of having them taken by the manager in his name, yet their action is not absolutely illegal. In a case where a mortgage taken by a Bank was questioned on the ground that the mortgagees had no right to take a mortgage concurrently with the loan in order to secure it, as their charter only authorized them to take mortgages 'for debts previously contracted.' Chancellor Kent observed: "and if they should pass the exact line of their power it would rather belong to the Government * * * to exact a forfeiture of their charter, than for this Court in this collateral way, to decide a question of misuser by setting aside a just and *bona fide* contract." (*Silver Lake Bank* v. *North* (1)) (see also *Coltman* v. *Coltman* (2)). Similarly here the fact that the members of the committee overstepped the precise limits of their [398] authority in obtaining the muchalkas in question may be a ground for charging them with misfeasance under Act XX of 1863, but not for impeaching the documents executed for the rents justily due to the institution under their control.

In short, the obtaining of these documents is not a nullity, but is only an irregularity which could be waived by the defendant, and which he must be taken to have waived, if, as is alleged on behalf of the plaintiff, the defendant got his agent to execute them. The Sub-Judge's view that the suit failed on the ground that the muchalkas stand in the names of the members of the committee is therefore unsustainable.

It is next contended for the defendant that as he denied that the muchalkas were executed with his authority, and as the plaintiff failed to prove such authority, the Sub-Judge's decree should not be disturbed. The language of the judgment of the Subordinate Judge satisfies me that he decided the suit on the preliminary point discussed above, and did not

(1) 4 Johnson, Second Edition at p. 373. (2) L.R. 19 Ch. D. 64.

call upon the parties to go into evidence. The decree must therefore be set aside. The suit should be replaced on the file and dealt with according to law The costs here will abide and follow the result. 1896 AUG. 4. APPEL-LATE CIVIL. 19 M. 395.

Against this judgment the present appeal (under Section 15 of the Letters Patent) was preferred

Sundara Ayyar, for appellant

Respondent did not appear.

JUDGMENT

The case relied on (*Ramanadan* v *Rangammal* (1)) is not in point The order of the learned Judge is right We reject the appeal

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19 M. 398=6 M.L.J 202

ORIGINAL CIVIL

Before Mr Justice Subramania Ayyar.

DAVIS v. CUNDASAMI MUDALI * [10th August, 1896]

Indian Contract Act—Act IX of 1872, Section 63—Consideration

An agreement, extending the time for the performance of a contract falling under Section 63, Contract Act, does not require consideration to support it

[**F.**, 9 Ind Cas 763 (764)=9 M L T 270, **R.**, 34 M 156 (158)=6 Ind Cas 758=20 M L J 383=7 M L T 392, **D.** 23 B 348 (355)]

[**399**] SUIT for damages for breach of contract and interest.

The plaint set forth that one R S Sheppard is the author of, and was the owner of, the copyright in four books and that his copyright was duly registered in accordance with law, that the said books were printed, published and sold at different periods by different publishers and lastly by Messrs V J Manickavaloo Moodeliar and Company under agreement; that by the said agreement, dated the 21st day of April 1888, and registered on the same day the said R S Sheppard on certain terms and conditions transferred to Messrs V J Manickavaloo Moodeliar and Company, the right to print certain editions of the aforesaid books, the said editions being limited as therein provided, that in and by a document duly executed at Madras on the 12th November 1892 and registered on the 19th November 1892, and also by a previous document executed on the 26th April 1890 the said R. S Sheppard in consideration of the sum of Rs 500 paid to him by the plaintiff, sold to the plaintiff the copyright in each of the aforesaid books, subject to the rights of the said Messrs V. J Manickavaloo Moodeliar and Company, that under a document executed on the 19th November 1892 and registered on the same day the plaintiff sold to the said O Cundasami Mudali the coypright in the aforesaid books, subject to the rights of the said Messrs V. J Manickavaloo Moodeliar and Company, under the agreement of 21st April 1888, on the defendant agreeing to pay to the plaintiff the sum of Rs 10,000 in four equal instalments on the 10th April 1893, 10th October 1893, 10th April 1894 and 10th October 1894; that the conditions contained in the said document of 19th November 1892 in so far as the plaintiff is concerned have been fully complied with by the plaintiff, that the defendant has not

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* Civil Suit 110 of 1895

(1) 12 M 260 (266)

1896 AUG. 10. — ORIGINAL CIVIL. — 19 M. 398=6 M. L. J. 282.

up to date paid any money towards and on account of the amount which was agreed to be paid to the plaintiff under the document of 19th November 1892, and the said amount is now overdue; that the plaintiff charges the defendant is liable to pay interest on the said instalments on the expiration of the respective dates fixed for payment thereof at the rate of 12 per cent. per annum. Plaintiff prayed for a decree for Rs. 11,050 being the amount due as aforesaid. Plaintiff prayed that he may be decreed to have a lien on the copyright of the said books for the amount that may be decreed; that the defendant be decreed to pay further interest on the principal sum of Rs. 10,000 at 12 per [400] cent. per annum from date of filing plaint to date of decree; that the defendant, his servants and agents be restrained by injunction from dealing with the copyright of the books in any manner whatsoever; that the defendant be decreed to pay the costs and further relief.

The defendant admitted the agreement, but submitted that subsequent to the execution of the document referred to in the plaint, that is, on the 1st December 1892, the plaintiff and defendant had agreed in writing that the instalments in the said deed referred to were to commence and become payable on the accrual of the right in plaintiff to print and publish any one of the books in reference to the printing, publication and sale of which the said R. S. Sheppard had contracted with Messrs. V. J. Manickavaloo Moodeliar and Company in terms of the agreement, dated 27th April 1888; that the said writing was signed by the plaintiff and addressed to the defendant and a fresh starting point for the payment of the instalments was thereby substituted for the period originally fixed; that the right to print and publish any one of the said books has not accrued to defendant as the contract of the 27th April 1888 is still in force.

That consequently plaintiff is not entitled to bring this suit and defendant denied his liability to pay interest.

Mr. *K. Brown*, for plaintiff.

Masilamani Pillai, for defendant.

JUDGMENT.

Some years ago one Mr. R. S. Sheppard published four books, *viz.*, 'Manual of English for Matriculation Candidates,' 'English Lessons for F. A. and B. A. Candidates,' 'Middle School Manual of English' and 'Lower Fourth Class Manual of Grammar.' On the 21st April 1888 Mr. Sheppard executed Exhibit II to Manickavaloo and Company authorizing them to print and publish and sell at their own risk and expense and for their own advantage the seventh, eighth and ninth editions of the 'Manual of English for Matriculation Candidates' at 6,000 copies per edition, the fifth, sixth and seventh editions also at 6,000 copies each edition, and the third edition of 'English Lessons for F. A. and B. A. Candidates' to consist of 1,500 copies Further by this contract he bound himself, whilst the contract remained in force, not to publish or arrange with any others for the publication of the above books, or of any other books that may prejudicially affect the sale of any of the three books. It also appears that at [401] the date of the said contract, the whole of copies of the first edition of the 'Lower Fourth Class Manual of Grammar' which was the only edition of the book published, had been assigned to Manickavaloo and Company on the understanding that until those copies were disposed of no further edition of the book should appear.

Between 1888 and 1892, the plaintiff, who is the mother-in-law of Mr. Sheppard, became the assignee of the right of publishing all further editions of the four books And she executed on the 19th November 1892 Exhibit A transferring her right to the defendant in consideration of Rs. 10,000 made payable in four half-yearly instalments commencing from the 10th April 1893 On the 1st December 1892, however, she addressed to the defendant a letter (Exhibit I) whereby she agreed that the first instalment should not become due until the defendant, by the expiry of the contract with Manickavaloo and Company, was enabled to issue a fresh edition of any one of the four books

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19 M. 398=6 M.L.J. 202.

The present suit was instituted for the recovery of Rs 10,000 with interest, on the footing that the instalments had become payable as specified in Exhibit A, apart from Exhibit I The defence was that under the contract, as modified by Exhibit I, time for the commencement of payment had not arrived, since the contract with Manickavaloo and Company remained in operation, a large number of copies of the latest editions of all the four books being in their hands unsold

The questions for determination are (1) Was there any consideration for the agreement (Exhibit I) to extend the time for payment? (2) If not, is the agreement valid? (3) If the agreement is found valid, whether the condition laid down in Exhibit I for the arrival of the time for payment has happened

As regards the first question the defendant's contention was that though Exhibit I bears a date posterior to that of Exhibit A, in point of fact, the letter was written and handed to him in pursuance of an understanding come to between him and the plaintiff prior to Exhibit A being actually signed and delivered To support this allegation, there is nothing but the uncorroborated word of the defendant

Moreover the opening lines of Exhibit I itself, referring to a conversation of the 30th November 1892 which appears to have led up to the letter being sent, are scarcely consistent with the truth [402] of the defendant's story I find, therefore, that there was no consideration for the agreement

As to the second question, its determination depends upon the construction to be put upon Section 63 of the Indian Contract Act which provides, among other cases for one like the present, of an agreement to extend the time for the performance of a promise Before considering the provisions of the section, it would tend to a clear comprehension of them if I briefly refer to the state of the English Law on the subject Under that law the rule, rigorously followed out, that every agreement, relating to the discharge of a contract, save the exception recognized by *Foster v Dawber* (1) must, unless made under seal, be supported by consideration has not, as pointed out by Sir F Pollock in his work on Contracts (sixth edition, page 177), been productive of very happy results The learned author attributes such results to the carrying out of a general principle beyond the bounds within which it is reasonably applicable, or in other words to the doctrine of consideration, instead of governing the formation of contracts, being made to regulate and restrain their discharge also

Now the question arises whether the Indian Legislature intended to perpetuate such an unsatisfactory state of things in this country I think that it did not, that in the Contract Act the doctrine of consideration was not extended to the regulation and restraining of the discharge of

(1) 6 Ex 839

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contract by agreement and that the Legislature laid down by Section 63 a rule different from that of the English Law.

In the first place, the language of the section does not insist upon the presence of consideration in regard to the cases mentioned therein. This view is fully confirmed by the illustration (b) to the section. The case, put in that illustration, is that of a person entitled to a sum of money accepting a less amount than is due to him. Now according to *Foakes* v. *Beer* (1), cited for the plaintiff and which finally settled the law as to this matter in England, acceptance in full satisfaction of a debt of a smaller sum than the amount due does not operate as a complete discharge of the debt, even though such a discharge would result from the creditor similarly accepting some article, other than money, of less pecuniary value. But the law laid down by the illustration referred to is [403] the reverse of the English rule. Now it being thus clear that in the above typical instance, a person is capable of legally binding himself without consideration to forgo his right to the difference between the debt and the smaller sum accepted by him in full discharge of his debt and there being absolutely nothing in the language of Section 63 to indicate the recognition, with reference to the matter under discussion, of any distinction between the different cases, comprised in the section, it follows that the necessity for any consideration is dispensed with alike in all the cases to which the section relates, including that of agreements to extend the time for the performance of a promise.

This conclusion is further strengthened by the purely artificial character of the reasoning by which English Judges have sought to prevent the rule, requiring consideration in cases like the present, operating in practice unreasonably; as will be seen from the observations of Lord Denman, C J , in *Stead* v *Dawber* (2) where he dissented from *Cuff* v. *Penn* (3) and laid down that it cannot be maintained, that although there was an agreed substitution of other days than those originally specified, still the contract remained. In meeting an objection, based on the absence of consideration, to the view which was taken by him, the Chief Justice argued thus " Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement is imported into the new agreement which is substituted for it." The resort to such a fiction is obviated, in this country, by Section 63.

Here it may be asked whether Section 62, which also refers to cases of agreements relating to the discharge of contracts and the language of which at first sight may appear broad enough to include the cases falling under Section 63, is consistent with the view taken by me. From the mere fact that two sections were enacted on the subject, it must be taken that the legislature intended to draw a distinction between the set of cases comprised in Section 62 and that in Section 63. These sections therefore must be construed so as not to overlap each other. This would be done by holding that agreements referred to in Section 62 are agreements which more or less affect the rights of both parties under the [404] contract discharged by such agreements; whilst those referred to in Section 63 are such as affect the right of only one of the parties. The former case *ex hypothesi* necessarily implies consideration which is either the mutual renunciation of right or coupled with it the mutual undertaking of fresh obligations or the renunciation of some right on the

(1) L.R. 9 App. Cases 605. (2) 10 Ad & E. 66. (3) 1 M. & S. 21.

one side and the undertaking of some obligation on the other, that forms the consequence of an agreement to rescind, substitute or alter, mentioned in Section 62. It is only when the agreement to discharge affects the right of only one party, that consideration might be found wanting and there alone the Indian Law departs from the English Law, by making provision, for every such possible case, in Section 63

The result is that the agreement set up by the defendant which, as already stated, falls under Section 63 is binding though without consideration.

As to the third and the last question · In dealing with this, it is hardly necessary to say that the express undertaking given by Mr Sheppard to Manickavaloo and Company under Exhibit II that nothing will be done to the prejudice of the rights granted to them is fully binding on the defendant Though this refers to only three out of the four books spoken of in Exhibit I, the defendant does not stand in a different position as regards the remaining book, inasmuch as, in consequence of the express understanding between Mr Sheppard and Manickavaloo with reference to the first edition of this book, the defendant is debarred from issuing a fresh edition of the work until the previous one has been exhausted Therefore the sole fact to be found is whether, as alleged by the defendant, Manickavaloo and Company are still in possession of copies of all the four books so as to preclude him from publishing a new edition of any one of them That that is the case is established by the uncontradicted evidence of one of the witnesses called for the defendant It follows that the condition specified in Exhibit I for the arrival of the time for payment has not yet happened

The suit is premature and is dismissed with costs

Rencontre—Attorney for plaintiff

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19 M. 405 (P C.)=23 I A. 83=6 M.L.J. 113=7 Sar P.C.J. 45.

[**405**] PRIVY COUNCIL

PRESENT

Lords Watson, Hobhouse, and Davey and Sir Richard Couch

[*On appeal from the High Court at Madras*]

E O MUTHUSAMI MUDALIYAR AND OTHERS (*Plaintiffs*) v SIMAMBEDU MUTHUKUMARASWAMI MUDALIYAR (*Defendant*)

[19th March and 9th May, 1896]

Inheritance according to the Mitakshara, Chapter II, Section 6—Succession of bhandu —Priority of mother's half-brother over sons of father's paternal aunt

The statement of bhandus entitled to inherit given in the Mitakshara, Chap II, Section 6, is not an exhaustive one The maternal uncle of the deceased is omitted, but the sons of that uncle are specified

The omission to mention a maternal uncle does not signify that he is excluded from the first class of bhandus

The grounds of the judgment in *Giridhari Lal Roy* v *The Government of Bengal* (1) apply, not only to the heirship of a maternal uncle as against the claim in default of heirs, but also apply equally to questions between nearer and more remote bhandus A maternal uncle is, accordingly, an heir, though not specified in the Mitakshara list, and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than he is *

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(1) 12 M I A 448=1 B.L R P C 44 (51).

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A mother's brother by the half-blood stands on the same footing as her whole brother in regard to priority over more remote bhandus. A half-brother may be postponed to a whole brother, but there is no ground for his postponment to more distant kinsmen.

[R., 33 M. 439 (441)=5 Ind. Cas. 280=20 M.L.J. 275=7 M.L.T. 203; 24 M.L.J. 301 (304)=13 M.L.T. 213; 28 B. 453=6 Bom. L.R. 460; 20 M. 342.]

Appeal from a decree* (5th May 1892) of the High Court, affirming a decree (12th May 1891) of the District Court of Chingleput.

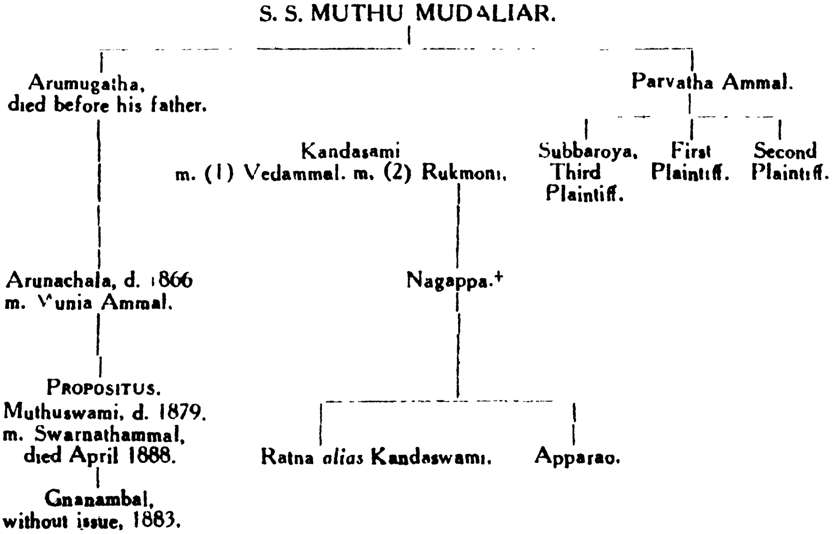
The first and second appellants were the sons, and the third appellant was the grandson, of Parvatha Ammal, sister of Arumugatha Mudaliar,, who was paternal grandfather of Muthuswami Mudaliar, the last male owner of the property, to which their suit laid claim.

The defendant (respondent) claimed under Nagappa Mudaliar, who was the half-brother of Muni Ammal, the mother of Muthuswami.

[406] The principal questions on this appeal were: (1) whether the sons and grandson of the aunt of the father of Muthuswami were entitled to inherit from the latter in priority over the descendant of the half-brother of Muthuswami's mother, Muni Ammal.

To answer the above involved the deciding another question (2) whether the maternal uncle's being of the half-blood made any difference as to whether he was an heir, and took priority over the other bhandus.

The relationship of the family, so far as it is material to this case, will appear from the following pedigree:—



The written statements of the parties, in effect, raised the question stated in the first issue,—whether the plaintiffs, or Nagappa, were the reversionary heirs entitled to succeed on the death of the widow Swarnathammal. Evidence was adduced at the hearing as to other questions in other issues as to whether there had been certain releases, and a will executed conferring rights on the defendant. But with this the District Judge did not proceed, being of opinion that his decision should be governed by the preliminary question whether the maternal uncle of the 'propositus'

* 16 M 23=2 M L. J. 296.—Ed.

† Nagappa in the above pedigree is the defendant's predecessor in title.

was his heir, and preferred to the plaintiffs, who [407] were the sons and grandsons of the paternal aunt of the father of the deceased It was admitted in the Court of First Instance that Nagappa was only the half-brother of Muniyammal, and the suit proceeded on the basis that Parvatha Ammal was the full sister of Arumugatha

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The District Judge decided the question in favour of the defendant, upon the construction put by the Judge upon the text of the Mitakshara in Chapter II, Section 6 He held upon the construction, placed by him on the words, that a maternal uncle was a man's own bhandu (atma-bhandu), and was as such entitle to inherit in preference to a paternal grandfather's sister's son, who, according to this decision, was his father's bhandu (his pitribhandu). Upon this construction he held that Nagappa was, at the death of Swarnathammal, the nearest reversioner of Muthuswami Thus, the title of the defendant was established, and the suit was dismissed.

The plaintiffs' appeal from this decision to the High Court was heard by a Division Bench (Sir T Muthuswami Aiyar, C I E , and Parker, JJ). The judgment of the District Judge was affirmed by the High Court *Muhuswami and others* v *Muthukumarasuami* (1)

Sir *R T Reid* and Mr *J H A Branson*, for the appellants

The following were the principal points urged The High Court had not been right in their construction of the rules as to bhandu's succession given in the Mitakshara, Chapter II, Section 6, but should have held that an uncle on the mother's side was not preferred as an heir, taking in priority over the son of the father's paternal aunt The Mitakshara in that section omitted the maternal uncle in the enumeration of bhandus entitled as heirs He, at all events, did not take in preference to the son of the sister of the grandfather of deceased

Under the Dayabaga, those who could offer oblations to paternal ancestors, as a father's paternal aunt's son could do, were preferred, in successions, to those who, at the most, could only offer oblations to relations on the mother's side To offer oblations to the latter was all that a maternal uncle could do Under the Mitakshara these considerations might not be of direct weight, as the foundation of the rule of descent was not laid in ceremonial obligations [408] under the system which the Mitakshara enforced But the succession as much as possible in the male line was regarded under both systems as superior to that through the female line Here the appellants could trace through more than one generation before resorting to the ancestress Reference was made to *Bhaiya Ram Singh* v *Bhaiya Jubraj* (2)

In this case, there was another point,—that the uncle, through whom the respondent claimed,—Nagappa (whose mother was Rukmoni) was only half-brother to Muni Ammal, whose mother was Vedammal

Mr *J D. Mayne*, for the respondent, was not heard.

On a subsequent day, 9th May, their Lordships' judgment was delivered by LORD HOBHOUSE

JUDGMENT

The question in this appeal is one of pure law, relating to the inheritance of a Hindu gentleman who died in the year 1879. No facts are in dispute. He had no issue except a daughter who died without issue in

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(1) 16 M 23.

(2) 5 B L R 293—should be *Bhya Ram Sing and Bhya Jubraj* v *Agar Sing*—ED.

1896 MAY 9. — PRIVY COUNCIL. — 10 M. 405 (P.C.) = 23 I. A. 83 = 6 M. L. J. 113 = 7 Sar P.C. J. 45

1883; his widow who became his heir died in 1888; at that time, when his inheritance opened, he had no collateral relatives of the same gotra with himself; both parties claim as bhandus or cognates; two of the plaintiffs are the deceased's first cousins once removed, being sons of his father's father's sister; and the third plaintiff is one degree more remote ; the defendants claim under a half-brother of the deceased's mother.

The text of the Mitakshara which governs the question raised on these facts (Chapter II, Section 6) is, as translated by Colebrooke, as follows:—

" On failure of gotrajas the bhandus are heirs. Bhandus are of three " kinds, related to the person himself (atma-bhandu), to his father (pitri- " bhandu), or to his mother (matri-bhandu) as is declared by the follow- " ing text:—' The sons of his own father's sister, the sons of his own " mother's sister and the sons of his own maternal uncle must be consi- " dered his atma-bhandus. The sons of his father's paternal aunt, the " sons of his father's maternal aunt and the sons of his father's maternal " uncle must be reckoned as his pitri-bhandus. The sons of his mother's " paternal aunt and the sons of his mother's maternal uncle must be " reckoned as his matri-bhandus.' "

The commentator then says in the next verse:

[409] " ' Here by reason of near affinity the bhandus of the deceased " ' himself (his *atma*-bhandus) are his successors in the first instance: *on* " ' *failure of them*, his father's bhandus (pitri-bhandus), or if there be " ' none, his mother's bhandus (matri-bhandus).' "

The plaintiffs, being the sons and grandson of the paternal aunt of the deceased's father, are expressly mentioned as falling within the second kind of bhandus who cannot succeed until after failure of the first kind. They are therefore reduced to contend that the quoted text contains an exhaustive list of bhandu successors, and that as the deceased's maternal uncle is not mentioned in it, he cannot succeed. Both Courts below have decided against that contention.

Their Lordships do not think it necessary to discuss the fanciful suggestion made in the Courts below and refuted there with much care and learning to the effect that the quoted text is addressed to religious ceremonies of purification rather than to positive rules of succession. To whatever extent rules of successions may have been founded on religious observances, or may now be explained by them, it is clear that fixed rules of law for successions have been established for ages, and equally clear that the Mitakshara professes to express such rules in the quoted text. Taking it to mean what it says, the question is whether its omission to mention a maternal uncle signifies that he excluded from the first class of bhandus, or whether the writer is not rather classifying by sample without attempting to specify every member of each class.

Their Lordships are of opinion that, even if the quoted text stood alone, the only admissible construction would be the latter one, for no rational ground can be assigned for excluding the maternal uncle of the deceased while his more remotely allied sons are admitted to succeed. But in fact the text does not stand alone, and whatever difficulty might at one time have been felt in applying, it has now been removed by judicial decision.

In the case *Gridhari Lall Roy* v. *The Bengal Government* (1), the person claiming to be heir was the maternal uncle of the deceased's father. The High Court of Calcutta decided against his claim on the ground that he was omitted from the quoted text. On appeal, this Board

(1) 12 M. I. A. 448.

referred to a passage in the Mitakshara, which is not translated by Colebrooke, but which was translated and used for [410] the purpose of that suit. In that passage, which deals with the property of a trader dying abroad, his maternal uncle is included among bhandus capable of succeeding, though the order of succession is not there stated The Board also referred to a passage of the Viromitrodaya as a work of high authority at Benares and properly receivable to explain things left doubtful by the Mitakshara That passage states that maternal uncles are to be comprehended in the quoted text nothing how objectionable it would be to exclude them while admitting their sons This Board held that a grand-uncle fell within the same reasoning, and upheld the plaintiff's title

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It is true that in that case the dispute was between the person claiming as heir and the Crown claiming as in default of heirs But the grounds of the judgment apply equally to questions between nearer and more remote bhandus The decision is precisely in point, and as it entirely commands the assent of their Lordships, they examine this question no further

The only other question raised is whether a mother's brother by the half-blood stands on the same footing as an uterine brother This point also is decided in the Courts below against the plaintiffs on grounds in which their Lordships entirely concur A half-brother may be postponed to an uterine brother, but there does not appear to be any authority, and certainly there is no reason for holding that he should be postponed to more remote kinsmen In fact the point was not pressed by the appellants' counsel at this bar.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs Appeal dismissed with costs

Solicitors for the appellants Messrs *Pemberton, Garth & Cope*

Solicitors for the respondent Messrs *Lawford, Waterhouse & Lawford*

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19 M. 411=6 M.L J 210

[411] APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt , Chief Justice and Mr Justice Benson

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UDAYANA PILLAI (*Plaintiff*), *Appellant* v SENTHIVELU PILLAI AND ANOTHER (*Defendants Nos* 1 *and* 2), *Respondents* * [17th and 30th July, 1896]

Usufructuary mortgage—Personal covenant to pay—Limitation Act—Act XV of 1877

Where a usufructuary mortgage contains a personal undertaking to pay the **amount secured thereby, the limitation** applicable to a suit brought on the mortgage is governed by Article 147, Limitation Act, XV of 1877, *Sivakami Ammal* v. *Gopala Savundram Ayyan* (1) followed

[R., 21 M. 326 (343) (F.B.).]

SECOND appeal against the decree of J W Dumergue, District Judge of Madura, in appeal suit No 67 of 1894, reversing the decree of S Authinarayana Ayyar in original suit No 1636 of 1892

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* Second Appeal No 664 of 1895

(1) 17 M 131

1896 JULY 30. — APPELLATE CIVIL. — 19 M. 411=6 M.L.J. 210.

The facts of this case were as follows:—

In this case the plaintiff sued on a mortgage deed to recover Rs. 200 being the principal, and Rs. 100 being damages from the defendants and by sale of the mortgaged property.

According to the plaint, the father of the first and second defendants executed a registred mortgage deed in favour of the plaintiff's father on the 8th October 1867. From that time until fasli 1298 (1888-89) the plaintiff's father and then the plaintiff were in possession and enjoyment of the mortgaged land. In fasli 1299 (1889-90) the first and second defendants agreed to cultivate the land themselves and to pay half varam to the plaintiff, but failed to do so from fasli 1299 to fasli 1301. The third and fourth defendants, being the cousins, and the fifth defendant, being the uncle of the first and second defendants' father, were impleaded as members of a joint family and liable for the debt.

The District Munsif exonerated the third, fourth and fifth defendants and their share of the property and found that there had been no such agreement in 1889 with the first and second defendants as alleged by the plaintiff. In the result he gave the [412] plaintiff a decree for the recovery of the mortgage amount from the share of the mortgaged property belonging to the father of the first and second defendants in their hands, and, in case of failure of payment within six months, by sale of that share, but disallowed the plaintiff's claim to damages. The first and second defendants appealed to the District Court and the plaintiff filed a memorandum of objections against such part of the decree as found that plaintiff had no enjoyment of the plaint property within twelve years prior to the suit, and that there was no such letting as is alleged to the first and second defendants in 1889 and refused damages.

On the hearing of the appeal the only point raised had reference to the question of limitation, and it was contended that the District Munsif was wrong in holding that the suit was governed by Article 147 and not by Article 132 of the Limitation Act of 1877, and on this point the Lower Appellate Court reversed the decree of the District Munsif and dismissed the suit with costs.

The plaintiff appealed to the High Court.

Krishnasami Ayyar, for appellant

Sankaran Nayar, for respondents.

JUDGMENT.

Plaintiff sued for recovery of Rs 200, alleged to be due under an instrument of mortgage (Exhibit A) by sale of the mortgaged property.

The District Munsif decreed for plaintiff, but the District Judge reversed the decree and dismissed the suit on the ground that Exhibit A evidenced a usufructuary mortgage, pure and simple, containing no covenant to repay the mortgage money, but with an express contract that plaintiff's only remedy should be to remain in possession if defendants failed to repay the mortgage money.

Against this decree the plaintiff instituted this second appeal on the ground that the District Judge misconstrued Exhibit A.

We think the appeal is well founded. Exhibit A is dated 8th October 1867. By it the defendant's father mortgaged certain lands for Rs. 200 to the plaintiff, and the contract between the parties is expressed as follows:—

1896 JULY 30. APPELLATE CIVIL. 19 M. 411 = 6 M. L. J. 210.

"In lieu of interest on this sum of Rs. 200, you will, for three years "from this year, raise any crops you like, including summer and season "crops, pay Government assessment and enjoy the said lands. On the "expiry of the term, I shall, pay the said Rs. 200 and redeem the lands. "If they are not redeemed in that manner, [413] you will, till payment "of the amount, enjoy them as under mortgage as mentioned above."

We think that these words contain a covenant to repay the mortgage money on a certain date, *viz.*, on the 8th October 1870. If the words "on the expiry of the term, I shall pay the said Rs. 200 and redeem the lands" stood alone, there could be no question as to their meaning and effect, but the District Judge considers that the succeeding words indicate that the only covenant was that, in the event of non-payment, the plaintiff should continue to enjoy the lands. We do not think that this was the intention of the parties or is the true construction of the words. If that were the intention of the parties, it would have been easy to have stated it in appropriate language without the express contract, 'on the expiry of the term I shall pay the said Rs. 200.' This express contract is not, as the District Judge supposes, nullified by the words that follow it.

These latter words, no doubt, contain an agreement that until payment the plaintiff shall remain in enjoyment of the land, but they do not say or imply that this shall be the plaintiff's only remedy in case of non-payment. They, as well as the previous covenant, are for the benefit and protection of the mortgagee (plaintiff), but to give them the meaning suggested by the District Judge would be to nullify the previous express covenant to repay on a certain date and deprive the plaintiff of the benefit intended to be secured to him by those words.

The case is very similar to that decided lately by the Full Bench in *Sivakami Ammal* v. *Gopala Savandram Ayyan* (1). There the agreement was "I shall pay you the said mortgage amount" on a certain date in 1883, and a further clause provided "If I fail to pay you" on the said date, "you shall receive" it on the corresponding date "of whatever year I may pay it." The Full Bench held that the document clearly contained a covenant to pay and that a suit for sale therefore lay.

In the present case we are of opinion that Exhibit A contains not merely a usufructuary mortgage, but such a mortgage with an express covenant to repay the mortgage money on a certain date now long since past.

[414] The contention of the respondents that the suit is barred under Article 132 of Schedule 2 of the Indian Limitation Act is untenable. The article applicable is No. 147, and the time allowed for sale is sixty years.

In the result we must reverse the decree of the District Judge and restore that of the District Munsif. The plaintiff must have his proper costs in all Courts.

(1) 17 M. 131.

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19 M. 414.

19 M. 414.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

BALAJI RAU (*Plaintiff No.* 1), *Appellant v.* SITHABHOY AND OTHERS (*Defendants and Plaintiff No.* 2), *Respondents.** [20th and 21st July, 1896.]

Civil Procedure Code, Section 560—*No application for rehearing—Section* 584 (*c*)—*Power of High Court to interfere.*

Where an appeal was heard *ex parte* by a Lower Appellate Court and the decree of the Court of First Instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served and who was not aware of the proceedings till after the time for applying for a rehearing under Section 560 and Limitation Act, Schedule II, Article 169 had expired:

Held, that the High Court in second appeal had power to interfere under Section 584 (*c*), Civil Procedure Code.

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of North Arcot, in appeal suit No. 278 of 1893, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Arni, in original suit No. 283 of 1892.

The facts of the case were as follows:—

The suit was instituted by plaintiff No. 1 alone against the defendants who are respectively his maternal grandmother, mother, and maternal grandfather's brother for a declaration of his reversionary title to the plaint properties which belonged to his maternal grandfather deceased.

[415] Upon the objection of the third defendant who alone appeared and contested the suit, the second plaintiff, another grandson of his brother by another daughter, was brought on the record.

The substance of plaintiffs' case is that the maternal grandfather having died 20 years ago without male issue, his widow, the first defendant, inherited the properties to the value of Rs. 2,000 left by him, and though possessing only a life interest has conveyed, the lands, &c., in dispute to the third defendant under a deed, dated 21st May 1892, for a nominal consideration of Rs. 832, and that the second defendant is colluding with them.

The Munsif found (*inter alia*) that the sale to defendant No. 3 was not binding on the plaintiff, but that the third defendant is entitled to be recouped by the plaintiff Rs. 135, which had been paid by him to first defendant for her maintenance.

On appeal the Subordinate Judge reversed the decision of the Munsif, the respondent not appearing in person or by pleader, and dismissed the suit with costs.

The plaintiff preferred an appeal to the High Court and filed an affidavit, which was not contradicted, containing the following allegations:—

"That the said appeal was heard and decided *ex parte*, the respond-" ents not appearing in person or by pleader

"That I did not know of the filing of the appeal at all and I was not" serve with any summons or other process of Court in connection with" said appeal.

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* Second Appeal No. 688 of 1895.

"That the endorsement on the summons that the duplicate was "affixed to the outer door of the house in which my family was then "residing at Sathia Vijianagaram, can only mean, if at all, the house in "which either my mother or grandmother was living, and these are "respectively the second and third defendants in the suit brought by me. 1896 JULY 21 APPELLATE CIVIL. 19 M. 414

"That, on the 21st March 1895, for the first time I was told at "Ambur that there was an appeal against the decree in my favour in "original suit 283 of 1892 on the file of the Court of the District Munsif "of Arni, and that the same was decided against me *ex parte*"

Ranga Rau, for appellant

Ramachandra Rau Saheb, for respondent No 3

ORDER

The appellant's remedy under Section 560 of the Code of Civil procedure being barred by limitation through no [**416**] fault of his own we think we have the power to afford him an alternative remedy in second appeal under Clause (c) Section 584 So that we shall call upon the Lower Appellate Court to take evidence and find whether the appellant was or was not duly served with notice of the appeal The report with the notice and return in original and the evidence are to be submitted as early as possible.

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19 M 416.

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr Justice Benson

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RANGAYYA APPA RAU (*Defendant No* 4), *Appellant* v NARASIMHA APPA RAU (*Plaintiff*), *Respondent* * [16th and 30th July, 1896]

Boundary Marks Act (Madras)—Act XXVIII of 1860, *Section* 25—*Boundary Marks Act (Madras)—Act II of* 1884, *Section* 9—*Suit to set aside decision of the Survey Officer—Plea of limitation abandoned*

A suit filed on 21st April 1891 to set aside the decision of the Settlement officer under the Madras Boundary Acts passed on 15th September 1890 was dismissed by the Munsif as being time-barred not having been brought within six months as provided by Section 25 of Act XXVIII of 1860 This decision was reversed by the District Judge, who remanded the suit for disposal on the merits, holding that the production by the plaintiff of a copy of the judgment, dated 25th October 1890, raised a presumption that the suit was in time and shifted the burden of proof to the defendant to show that an earlier copy was granted to plaintiff, or that the decision was pronounced in the plaintiff's presence Against this remand order there was no appeal At the rehearing the question of limitation was not again raised, and the Munsif gave a decree on the merits An appeal was preferred to the District Court, but no mention was made of the question of limitation On appeal to the High Court

Held that the question of limitation had been put aside by the consent of the parties who desired to have the case decided on the merits, and that the appellant could not be allowed to fall back on this plea which he had abandoned in the Lower Courts

SECOND appeal against the decree of E A Elwin, Acting District Judge of Kistna, in appeal suit No 935 of 1892, modifying the decree of C. Rama Rau, District Munsif of Bezwada, in original suit No 181 of 1891

* Second Appeal No 437 of 1895.

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[417] Plaintiff brought this suit alleging that the Survey Department in their survey fixed the boundary stones improperly including 241 acres 92 cents. of land belonging to him in Sunkollu village attached to the Sub-Registry of Nuzvid with Yanamadala village belonging to defendants, and praying for a decree establishing the red line on the marks A, B, C referred to in the plaint plan as the boundary limit and to fix boundary stones in the said site and to remove the stones improperly fixed at a cost of Rs. 10, establishing plaintiff's right to the lands marked from I to R and for possession of the same, and directing defendants to pay costs.

The District Munsif of Bezwada having dismissed this suit on the 19th March 1892 on the ground that it is barred by limitation, inasmuch as it was instituted after the expiration of six months from the date of the decision of the Survey Officer, the plaintiff preferred an appeal. Thereupon the District Court, setting aside the judgment and decree of this Court issued an order, dated 10th February 1893, remanding the suit for retrial.

On the hearing of the retrial the District Munsif passed a decree in favour of the plaintiff, which was confirmed with certain modifications not now material by the District Court on appeal.

The fourth defendant appealed to the High Court and took the objection that the original suit was barred by limitation under Section 25 of Act XXVIII of 1860 (Madras Boundary Marks Act) as amended by Section 9 of Act II of 1884 (Madras) not having been filed within six calendar months after the passing by the Settlement Officer of his decision under the said Act.

Rama Subbayyar and *Subramania Ayyar*, for appellant.

Sadagopa Chariar, for respondent.

JUDGMENT

Plaintiff sued to set aside a decision of the Survey Officer passed under Section 25 of (Madras) Act XXVIII of 1860 in regard to the boundary between two villages, and for a declaration that the boundary was as stated by him in the plaint, and for recovery of certain lands within that boundary alleged to have been taken possession of by defendants after the decision of the Survey Officer.

The defendants pleaded that the suit was time-barred, and denied both the correctness of the boundary proposed by plaintiff and the alleged trespass.

The District Munsif dismissed the suit as time-barred on the ground that, under Section 25 of Act XXVIII of 1860 (Madras) as [418] amended by Section 9 of Act II of 1884, a suit to set aside the decision of a Survey Officer must be brought within six months of the passing of the decision, whereas the present suit was not brought until the 25th April 1891, though the decision was passed on the 15th September 1890.

At the appeal the plaintiff produced before the District Judge a copy of the Survey Officer's decision, which copy was prepared in the Survey Office on the 25th October 1890. The District Judge thought that this raised a presumption that the suit was in time, or at least threw on the other side the burden of showing that an earlier copy was granted to plaintiff, or that the Survey Officer's decision was pronounced in the presence of plaintiff. He therefore remanded the suit for a fresh trial.

We observe that these proceedings of the District Judge were not warranted by law. The Act does not require that the Survey Officer's decision should be pronounced in the presence of the parties, but merely that they should be informed of it after it has been duly recorded.

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Neither can the date on the copy raise any presumption at all that it was on that date that the holder was first made aware of the decision Any number of earlier copies may have been made and given to the plaintiff, and it was not for the defendants to prove that plaintiff had the information earlier, but it was for the plaintiff, when the plea of limitation was raised to show that his suit was in time He took no steps to do this before the District Munsif, and the District Judge should not have admitted the copy before him as proof that plaintiff was first informed of the decision on the date it (the copy) was made Further the District Judge, even on his own view of the effect of the copy, should not have remanded the suit for a fresh trial, but he should have first called for further evidence as to the date on which plaintiff was informed of the order, and he should then have himself decided the issue as to limitation

Having noticed these irregularities, we follow the further progress of the case When it was remanded the District Munsif's successor recorded that neither party pressed the question of limitation before him, and he proceeded to dispose of the suit on the merits

Against that decree the plaintiff appealed to the District Judge, but, though nine grounds of appeal were stated by the appellant and two grounds of objection were notified by the respondents, no [419] reference was made by either side to the question of limitation, and the District Judge gave a decision on the merits The fourth defendant now appeals and the only ground urged before us is that the suit is time-barred for the reasons stated by the District Munsif in the first trial From what has been stated it is manifest that the question of limitation was put aside by the consent of the parties and that they desired to have the case decided, not with reference to any such plea, but on the merits, and it was so decided in both the Courts below This being so, it is impossible to allow the appellant now to fall back on the plea which he abandoned in both the Lower Courts, and, the more so, since it is a plea dependant on a variety of facts on which findings would have to be obtained before a decision could be given on it It would be impossible to deal with the litigation of the country if such procedure were countenanced

We confirm the decree of the Lower Court and dismiss this appeal with costs

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19 M 419

APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt, Chief Justice and Mr Justice Benson.

Appasami Nayakan (*Defendant No 2*), *Appellant* v Varadachari and another (*Plaintiffs*), *Respondents* *
[24th July, 1896]

Civil Procedure Code, Section 375—Power of Court to frame additional issues as to an alleged compromise effected subsequent to the institution of the suit

The Civil Procedure Code, Section 375, was intended to meet cases where the parties having agreed to compromise subsequently fall out The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit

[R., 7 A L J 778 (780)=6 Ind Cas 857, 12 C P L R 56 (58)]

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* Second Appeal No 717 of 1895.

1896 JULY 24. — APPELLATE CIVIL. — 19 M 419.

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 206 of 1893, reversing the decree of M. Visvanatha Aiyar, District Munsif of Conjeeveram, in original suit No. 640 of 1892.

The facts of this case were as follows.—

[420] This is a suit to have the plaintiffs' right established to a certain site and to recover with costs possession thereof from the defendants after getting the thatched shed erected thereon by the first and second defendants removed.

In the plaint presented on 6th October 1892, the plaintiffs allege that the site mentioned at the foot of the plaint belongs to them, a part of it being their ancestral property and the remaining having been acquired by purchase on 16th March 1880 by their deceased undivided brother Narasimha Chari, that it forms part of the backyard of the house, that the said Narasimha Chari first let out the ancestral portion of the site on 14th June 1878 to one Aulai as per rental agreement, and subsequently on 15th July 1880 let out the whole site to the first defendant taking from him also a rent bond that the first plaintiff also allowed the second defendant to live on the site taking a rent bond from him also on 16th May 1885, that the first and second defendants have been accordingly living on it having erected a thatched shed thereon, that the defendants have no right whatever to the site in question, that although the defendants Nos. 1 and 2 had been repeatedly asked, both orally and through writing, to vacate the site and to surrender it to the plaintiffs, they did not do so.

In the written statement presented on 21st November 1892 by the defendants' pleader, it is alleged that the plaintiffs' suit is fraudulent, that the allegation that the first and second defendants executed rent bonds to the plaintiffs is false, that the defendants' family have been living in the thatched shed on the site in dispute for the past sixty years, that the site in dispute has been in their exclusive enjoyment during that period, and that the plaintiffs have brought this false suit because the defendants filed a criminal complaint against them before the Sreeperumadur Magistrate for having tried to remove their thatched shed.

The following issues were recorded on 21st October 1892 —

(1) Are the rent bonds relied upon by the plaintiffs genuine?

(2) How long have the defendants been in occupation of the site sued for and under what title?

The following additional issue was recorded on 21st March 1893 —

Did the plaintiffs sell the site sued for along with an adjacent site for Rs. 80 on 25th October 1892, and [421] execute a sale deed and receive that sum and agree on 21st October 1892 to withdraw this suit?

The Munsif found that the rent bonds relied on by the plaintiffs are genuine and that defendants had been in occupation as the tenants of the plaintiffs, but that the plaintiffs sold the site sued for for Rs. 80 on 25th October 1892, by an unregistered sale deed of that date, that the said sale was accompanied by possession and was valid in law. On these findings the suit was dismissed with costs.

On appeal the District Judge in reversing this decree remarked as follows:—

"The documents, Exhibits A, B, C and D, which have, I think, very "properly been found to be genuine, establish the title of the plaintiffs "beyond any doubt.

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"The defendants also in a manner, admit the title, for their present "case is that they have during the course of the suit purchased from "plaintiffs the site in dispute for Rs 80

"The procedure adopted by the District Munsif in recording the "additional issue is not in accordance with any procedure which has been "pointed out in appeal The third issue is not framed on the pleadings "of the parties.

"The procedure which might have been followed, that, namely, "sanctioned by Section 375, Civil Procedure Code, has not been followed, "so that it appears to me the plaintiff is still at liberty to prosecute his "suit to a conclusion on the merits"

On a consideration of the sale deed of 25th October 1892, the District Judge held that, as it was not registered, it was not valid in law and passed a decree for possession without costs

The defendant No 2 appealed to the High Court

Srirangachariar, for appellant

Rangaramanujachariar, for respondents

ORDER

We do not understand the grounds on which the District Judge objects to the procedure of the District Munsif in framing the third issue When the defendants alleged a compromise for consideration in the course of the suit and the plaintiffs denied it, an issue arose between them, and the District Munsif was right to record it and determine it, so as to enable him to deal with the suit under Section 375, Code of Civil Procedure That Section 375 was intended to meet cases in which the parties, [422] having agreed to compromise subsequently fall out, has been held in *Karuppan* v *Ramasami* (1) and *Appasami* v *Manikam* (2) The District Munsif found that Rs 80 was paid by the defendants as consideration for the promised withdrawal of the suit by plaintiffs, but that plaintiffs failed to fulfil their promise We do not think that there is any necessity to consider the validity of the sale deed which is said to have been executed The only question is whether the defendants paid the plaintiffs Rs 80 on the plaintiffs' promise to withdraw the suit If they did, the compromise ought to be enforced

We must ask the District Judge to return a finding on this issue, on the evidence already recorded, within three weeks of the receipt of this order Seven days will be allowed for filing objections after the finding has been posted up in this Court

(1) 8 M. 482

(2) 9 M 103.

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19 M. 422 = 4 M. L. J. 263.

19 M. 422 = 4 M.L.J. 263.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

Venganayyan and others (*Defendants*), *Appellants v.* Ramasami Ayyan (*Plaintiff*), *Respondent.** [26th August, 1896.]

Civil Procedure Code, Section 588, Clause 28—Appeal against order of remand—Finding of fact—Letters Patent, Section 15.

Where an appeal is preferred against an appellate order under Section 588, Civil Procedure Code, the finding of fact by the Lower Appellate Court is conclusive as between the parties on the proper construction of Sections 584 and 588, Civil Procedure Code.

There is no appeal under the Letters Patent, Section 15 against an order of a single Judge passed under Civil Procedure Code, Section 588, Clause 28.

Appeal under Letters Patents, Section 15, from the judgment of Mr. Justice Muttusami Ayyar, in appeal against order No 96 of 1893.

The facts of this case were as follows:—

The plaintiff, sued as reversioner to recover certain movable and immovable properties, valued at Rs 2,548, said to have [423] belonged to one Sitaramayyan of Sinanipatty in the Sivaganga Zemindari, and last held by Sitaramayyan's widow, Subbalakshmi Ammal, who died at Sinanipatty in November 1881.

The principal fact in dispute was comprised in the first issue, *viz.*, whether the plaintiff is related to Sitaramayyan as alleged by him, and is he the next reversionary heir after Subbalakshmi Ammal? Several other issues were framed by the Subordinate Judge, but he dismissed the suit with costs holding with regard to first issue that the plaintiff failed to prove that he is the dayadee of Sitaramayyan or that there was any common link between him and Sitaramayyan so as to constitute him the next heir after the death of Subbalakshmi Ammal.

On appeal the District Judge reversed the judgment of the Lower Court, and remanded the suit for trial for a fresh decree after findings are recorded on the other issues framed in the suit. Against this order of remand the defendants filed an appeal under Section 588, Clause 28, Civil Procedure Code.

Ramachendra Rau Saheb and *Rangachariar*, for appellants.

Desikachariar, for respondent.

Muttusami Ayyar, J.—The first issue recorded for decision in this case was whether the plaintiff was the next reversionary heir of Sitaramayyan, deceased. The Court of First Instance determined the question against the plaintiff and dismissed the suit without deciding the other issues. On appeal the District Judge found upon the evidence that the plaintiff was Sitaramayyan's reversionary heir and reversing the decree of the first Court, remanded the case under Section 562 of the Code of Civil Procedure for disposal on the other issues. Hence this appeal from the order of remand under Clause 28 of Section 588, Civil Procedure Code. It is conceded that the order of remand satisfies the requirements of Section 562 both in form and in substance. It was held in *Ramachandra Joshi* v. *Hazi Kassim* (1), that it was competent to the Lower Appellate Court to pass an order of remand under Section 562 when the Court of First Instance records evidence

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* Letters Patent Appeal No. 55 of 1894.

(1) 16 M. 207.

on all the issues and at the final hearing dismisses the suit erroneously on some particular point without expressing any opinion on the other issues It is contended, however, that the Judge s finding as to the plaintiff being the reversioner is contrary to the weight of [424] evidence on the record and that this Court is bound to consider whether the Lower Appellate Court's finding is correct The following cases were cited at the hearing—*Badam* v *Imrat* (1), *Bhaubala* v *Bapaji Bapuji* (2), *Ibrahim Khan* v *Faizunessa Bibi* (3), and *Sohan Lal* v *Azizunnissa Begam* (4)

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19 M 422 4 M L. J 263

The question now raised for decision was not decided in any of those cases, the only point decided therein being whether the decision of the Lower Appellate Court on the preliminary point was on the facts found by it open to any legal objection I am of opinion that Section 584 defines the powers of the High Court in second appeals and that no reason can be conceived for larger powers being conferred in appeals from what is termed an order in an appeal, and what is in substance an appellate decree on a particular or preliminary point or issue Sections 588 and 584 ought to be read together and on so reading them, I can discover no legal foundation for holding that in appeals from orders of remand made in regular appeals by District Courts, this Court is not bound by the findings of fact on which the decision of the Lower Appellate Court rests Otherwise in second appeals preferred from appellate decrees, the High Court would be bound to accept the findings of fact recorded by the District Courts whilst in appeals from remand orders which are substantially second appeals from the decision of the District Judge on appeal on a preliminary or particular point, the High Court would not be bound to accept the findings of fact This seems to me to be an anomaly

I dismiss this appeal with costs

The defendant preferred the present appeal under Letters Patent, Section 15

Rangachariar, for appellants

Desikachariar, for respondent

JUDGMENT

No appeal is allowed by law in this case

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19 M 425

[425] APPELLATE CIVIL

Before Mr Justice Shephard and Mr Justice Subramania Ayyar

CURSETJEE PESTONJEE BOTTLIWALLA (*Plaintiff*), *Appellant* v DADABHAI EDULJEE AND ANOTHER (*Defendants*), *Respondents* *

[18th and 24th March, 1896]

Suit for a legacy and share in residue—Limitation Act, Schedule II, Article 123—Time begins to run at the expiration of one year from the death of the testator

A suit was brought in May 1894 by a legatee claiming under the will of a testator, who died in December 1881, against the executors of the will The plaint did not specifically ask for payment of the legacy or for ascertainment of the share in the residue due to the plaintiff, but set forth certain alleged acts of misconduct on the part of the defendants with respect to their dealings with the property, and prayed the Court to call for an account to set aside certain sales

* Appeal No 116 of 1895

(1) 3 A 675 (2) 14 B. 14 (3) 17 C 168 (4) 7 A. 136

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of the property made by the defendants and for damages. The Court of First Instance, without going into the merits, held that the suit was really for an account, and dismissed it as being barred. On appeal to the High Court:

Held, that the plaint should have been amended in order to show clearly that the plaintiff really was trying to recover his legacy from the defendants personally and that, therefore, the suit fell within Article 123, Schedule II, Limitation Act, and that the same being payable one year after the testator's death on 8th December 1881, the suit was in time.

[R., 36 B 111=13 Bom. L R 1025 (1028)=12 Ind. Cas 702]

APPEAL against the decree of T. Weir, District Judge of Coimbatore, in original suit No. 15 of 1894.

The facts of the case appear from the plaint which was as follows:—

" One Pestonjee Nusserwanjee Bottiwala, late of Nilgiris, Parsee, " inhabitant hereinafter called the testator, made his last will in writing in " the English language, dated the tenth day of June one thousand eight- " hundred and eighty, of which copy is hereto annexed, marked A.

" The said testator died at Mysore within the territories of the Maha- " raja on or about the eighth December one thousand eight hundred and " eighty one, without having revoked or altered his said will, leaving consi- " derable immovable and movable estate and [426] effects at (among " other paces) Oottacamund, Wellington, Calicut, Pothanur and Wynaad " within the Presidency of Madras.

" The sad testator at the time of his death, as aforesaid, left two sons, " namely, one Phirozshaw Pestonjee *alias* Phirozshaw Framjee and the " plaintiff, and three daughters, namely, Cursetbai (now widow of the late " Muncherjee Shapurjee Mehta, deceased), Soonabai (widow of the late " Framjee Sorabjee Khambata, deceased) and Ratanbai (wife of Framjee " Maneckjee Mhow) his only next-of-kin him surviving.

" Letters of administration to the estate and effects of the said testator " (with his said will annexed) were, on or about the twenty-sixth day of " August one thousand eight hundred and eighty two, granted by this " Court to the defendants, the attorneys of John William Minchin, the " sole executor of the will, of which copy is herein annexed, marked B.

" Before and after the grant of such letters of administration the " defendants, as such administrators as aforesaid, took upon themselves " the management, collection and administration of the estate and effects " of the said testator, and they now purport to have fully managed, " collected and administered the whole of such estate and effects, save " and except outstandings to the amount of Rs. 6,000, which they allege " they are unable to collect and four pieces of land, namely, one piece of " land at Devala, two pieces of land at Kotagiri and one piece of land at " Pothanur, which they allege for want of title and for other reasons, are " unsaleable."

" The defendants have, as such administrators as aforesaid, made " out an account of their alleged administration of the estate and effects " of the said testator and filed the same in the office of this Court on or " about the second day of July one thousand eight hundred and eighty- " six, but the plaintiff charges that such accounts are vague and incom- " plete and do not account for several of the outstandings due to the " estate of the testator, and moreover that several items specified therein " and hereinafter mentioned or referred to should not be allowed by the " Court as being illegal.

" The said Pestonjee Nusserwanjee Bottliwala by his said will be- " queathed to his daughter Cursetbai the sum of Rs. 8,000 and to each of

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"his two other daughters, the said Soonabai and Ratanbai, the sum of "Rs 2,000, and to each of his two sons, the [427] said Phirozshaw "Pestonjee *alias* Phirozshaw Framjee, and the plaintiff, the sum of "Rs 2,100 And the said testator further declared that after all the "claims and debts on his estate should have been paid off, his said "trustees or trustee should be vested with all the surplus monies, rents, "profits and income of his residuary estate *upon trust* to pay the same "to his children in the following proportions, namely, one-fourth thereof "to each of his two sons, the said Phirozshaw Pestonjee *alias* Phiroz-"shaw Framjee, and the plaintiff, another one-fourth thereof to be "divided equally among his said three daughters, Cursetbai, Soonabai "and Ratanbai, and remaining one-fourth to go towards the fund for "charitable purposes, thereinafter mentioned

"As the plaintiff, however, is informed and verily believes, the "assignee of the said Phirozshaw Pestonjee *alias* Phirozshaw Framjee, "and each of them, the said Cursetbai Soonabai and Ratanbai, have on "or about October or November 1893 for a small pecuniary considera-"tion paid to them respectively by the defendants, executed to the "defendants, releases in full satisfaction of all their respective claims to "the legacies bequeathed to them respectively, and to all other their "respective right, title and interest under the trusts of the said will in "this paragraph referred to

"The plaintiff submits that all the releases so taken by the defend-"ants are for and must inure to the benefit of the said testator to which "the plaintiff now claims to be alone entitled

"Of the outstandings amounting to Rs 6,000 (six thousand) referred "to in paragraph 5 hereof, defendants admitted in their petition (miscel-"laneous petition No 48 of 1885 on the file of the District Court of Coim-"batore) that Rs 3,000 were recoverable, but as far as plaintiff knows "only Rs 500 (a payment made by Mr Chapman) has been collected and "credited to the assets of the estate in March 1886, since which time no "further accounts have been submitted by defendants and no explanation "offered as to whether the balance of the said outstandings have been "collected, or if not, why the defendants have not succeeded in doing so

"Defendants have wrongfully paid to each of themselves a commis-"sion of 2½ per cent, or 5 per cent in the aggregate, upon the amount of "sales realized and collections made on account of the estate of the said "testator, and have charged the said estate [428] with the same "although the said testator by the terms of his will has expressly de-"clared that a sum limited to Rs 250 a year should be paid to the trustees "or trustee managing his affairs The sum so paid to themselves by the "defendants amounted to Rs 11,696, whereas the assets of the testator "as disclosed by the latest accounts amount to only Rs 10,708-3-6 "Plaintiff submits that such payments are illegal and must be repaid to "plaintiff with interest

"Defendants were not justified in paying the solicitors of the estate "such heavy fees Although a wide discretion was allowed them, plaintiff "submits that such discretion should be exercised with a zealous "regard to the interests of the testator's estate Most of the costs of con-"veyancing must have been borne by the purchasers and the other costs "of conducting cases and winding up the affairs of the estate ought not "to have amounted to so large a sum as Rs 14,812-8-8 The accounts "rendered by the solicitors of the estate Messrs Cowdell & Co, as filed "in Court at the time, were of a very general nature, and defendants

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"must have had fuller details (not furnished to the legatees) rendered to "them before approving the same.

"Dinbai, the late widow of the testator, pledged a very valuable "emerald and other gold ornaments with one Soonabai, wife of Dirshaw "Durabjee, maistry at Bombay, on or about November 1875, as security "for the repayment of a loan of Rs. 5,000. Defendants have failed to "recover these valuable jewels on the plea that they are of about the "same value as the claim of the said Soonabai. Plaintiff denies this and "declares the said emerald and jewels are worth considerably more than "double the amount received on them In token of his strong belief "he paid in 1886 on the suggestion of this Court a sum of Rs. 50 to the "defendants for the appraisement of the same, but plaintiff has not been "informed what the said emerald and ornaments were valued at, and "believes that they have never been appraised.

"No attempt has been made to redeem the said emerald and jewels "and the same are at present in the possession of the aforesaid Soonabai. "Plaintiff submits that by their laches in this respect, defendants have "caused heavy loss to the estate of the testator and must be held responsi-"ble for the same.

"First defendant Dadabhai Eduljee took a lease of a shop at "Devala and another shop at Wellington at a monthly rental of [429] "Rs. 25 and 30, respectively, which is much below their proper "value. The goods in these shops belonging to the estate of the testator "were also purchased by the said defendant Dadabhai Eduljee at a depre-"ciated value Plaintiff submits that without the consent of the District "Court, the said Dadabhai Eduljee as a trustee of the testator's estate, "had no right to deal with the property for his own profit.

"The said Dadabhai Eduljee purchased on behalf of his nephew the "premises known 'Charing Cross' situated in Charing Cross Road at "Ootacamund for Rs 6,750, which is much below its value at the time, "the testator a year or two previously having refused Rs 10,000 for the "building. Within six months from the date of such sale, the said "Dadabhai Eduljee purchased for himself the same property from his "nephew

"From the terms of the will it was obviously desired and intended "by the testator that 'Khusroo coffee estate' should not be sold, but that "it should be held in trust, the income thereof to be apportioned annually "among the testator's children and for charitable purposes in the manner "provided for in the said will. Messrs Arbuthnot and Co. held a "mortgage on this estate for over Rs. 40,000, but were willing, after the "testator's decease and at the earnest solicitations of plaintiff, to accept "Rs. 35,000 in full liquidation of their claim, but defendants in spite of "plaintiff's request to the contrary allowed the estate to be sold by public "auction by the mortgagees who took the whole of the amount realised, "which plaintiff is informed was over Rs 40,000 in payment of their "claim. The estate has thereby suffered a loss of Rs. 5,000 or more, in "addition to legal costs amounting to Rs. 3,000 (approximately) in respect "of a redemption suit and a suit for an injunction in connection with "the same estate.

"Plaintiff submits that the charges of office establishment and rent "amounting to Rs. 4,959 is excessive No details of this or even other "large items in the accounts have been furnished. Plaintiff believes that "rent was charged by the first defendant for periods during which the busi-"ness was carried on in his own premises and in premises belonging to

" the estate and at that time not disposed of Plaintiff believes that if " details of the accounts are submitted and scrutinized many items " therein charged will be found to be unnecessary, unjustifiable and " excessive

" [430] The plaintiff assesses his claim for the purposes of stamping " his present plaint at Rs 40,000, but if, upon taking the account herein- " after prayed for, a larger amount is found due to him, the plaintiff offers " to pay the additional stamp duty, sufficient to cover the excess

" Plaintiff, therefore, prays for the following reliefs —

" (i) That the defendants be ordered to refund to plaintiff the amount " of commissions paid to themselves, namely, Rs 11696 with interest at " 9 per cent per annum from date of such payment to themselves to date " of plaint

" (ii) That the sale and purchase by first defendant of the house at " Ootacamund known as ' Charing Cross ' be set aside, with such further " directions as to disposal of the same and as to the rents hitherto collected " in connection therewith, as to the Court may seem just and proper

" (iii) For such loss of rent on shops in Devala and Wellington and " loss incurred by the goods therein having been purchased at a deprecia- " ted value, as may be disclosed in taking an account

" (iv) Damages for losses in connection with Khusroo estate

" (v) To value of emerald and jewels after deducting the debt due to " Soonabai

" (vi) That the defendants be directed to submit detailed accounts of " expenditure and receipts of monies realized on debts due to the estate of " the testator and on sales of the properties both movable and immovable " belonging thereto, as well as of all payments to creditors and disburse- " ments connected with the administration of the estate

" (vii) That the defendants be held liable for any loss to the estate, " which may be shown, on going through the accounts, to be due to laches " and neglect on their part

" (viii) That the defendants or any one of them be ordered to pay the " costs of this suit "

The defendants filed a written statement traversing the main allegations in the plaint and pleaded limitation

The District Judge posted the case for argument on the question of limitation and finding the suit barred dismissed it with costs

The plaintiff appealed to the High Court

Mr *R F Grant*, for appellant

Mr *Johnstone* and *Gurusami Chetty*, for respondent No 1

Mr *Wedderburn*, for respondent No 2

JUDGMENT

[431] The suit having been dismissed on the ground of limitation and without any evidence being taken, it is necessary to see precisely what is the cause of action alleged in the plaint

The defendants are the administrators with the will annexed of one Pestonjee Nusserwanjee who died in 1881 The plaintiff is entitled under the will to a legacy of Rs 2,100 and to a share of the residuary estate In the sixth paragraph of the plaint, the plaintiff takes exception to the account filed by the defendants in July, 1886, and in the eighth and following paragraphs he makes certain charges against the defendants with regard to their administration of the estate He assesses his claim at Rs. 40,000 and asks for relief in respect of the matters charged against the

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defendants. He does not ask for payment of his legacy, nor for the ascertainment of the share of the residue to which he is entitled. The District Judge has treated the suit as one for an account and has held that, assuming time to have run from the date when the account was filed in 1886, the suit is barred by limitation being instituted more than six years after that date. We agree with the District Judge that in a suit for an account the plaintiff is not entitled to go back more than six years (see *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee* (1) followed in *Hemangini Dasi* v. *Nobinchand Ghose* (2)). If, therefore, the administration was closed in 1886 and the functions of the administrators had then ceased, it would follow that the suit could not be maintained. But this does not appear to be the case. The plaint, in connection with one charge, assigns October or November 1893, as the date and it is not admitted by the plaintiff that all the other charges relate to acts done more than six years before the date of the suit. The plaintiff ought to have been asked to give dates in respect of the other charges. At any rate on the ground of limitation the suit ought not to have been dismissed altogether.

But there is another point that requires consideration and that is that the plaint does not explain on what principle the damages for which he asks can be granted to him. Assuming that the allegations are true and that no question of limitation arises the plaintiff can be entitled to no more than the amount of his legacy and his share of the residuary estate. It is only on the defendants pleading that they have no assets that it becomes material to [432] inquire whether the defendants have wasted the assets. On proof of such waste, the plaintiff could recover from the defendants personally, so far as they had or might have had, assets of the deceased.

Breach of duty on the part of the administrators may give a legatee or creditor the right to recover what is payable to him from the pockets of the administrators themselves, but it cannot, otherwise, we think, give him any fresh right of demand against them. It is the debt, and not damages which only the creditor can obtain whether *de bonis testatoris or de bonis proprus* (see Williams on Executors and Administrators, Part V, Book II, Chapter 1).

Without a material amendment of the plaint, we are of opinion that the plaintiff cannot obtain any relief. Leave to amend ought to have been asked for in the Court below where, as it is clear, the frame of the plaint was discussed. Leave cannot therefore be granted except upon the terms of the appellant paying the respondents costs of this appeal and also the costs of the hearing in the District Court. The plaint requires to be amended by stating that the plaintiff seeks to recover the legacies payable under the will from the defendants personally.

The suit was brought within thirteen years of the testator's death and therefore as a legacy is not payable for one year after the testator's death, the law of limitation would not apply (see *In re* Johnson (3)). The one year's rule is recognized in the Succession Act and the decision of the Privy Council in *Mylapore Iyasawmy Vyapoory Moodeliar* v. *Yeo Kay* (4) had reference to a case in which Hindu law and not the Succession Act had to be applied.

It is clear that in answer to a suit for legacy the administrators cannot defend themselves by pleading their own wrong and alleging that more

(1) 5 C. 910. (2) 8 C. 788.
(3) L. R 29 Ch. D. 970. (4) 14 C. 801

than six years before the suit they misappropriated or wasted the assets. In other words, if the suit is regarded as a suit for a legacy or a share of the residue, no question of limitation arises

Subject to the above observations and assuming that the plaintiff is willing to amend, we think the decree ought to be reversed and the suit remanded, otherwise the appeal should be dismissed with costs

1896 MARCH 20.

APPELLATE CIVIL

19 M. 425.

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19 M 433=6 M L J 207.

[433] APPELLATE CIVIL

Before Mr Justice Davis and Mr Justice Boddam

RAMAMIRTHA AYYAN (*Defendant No* 1), *Appellant v* GOPALA AYYAN (*Plaintiff*), *Respondent* *
[15th July 1896]

Transfer of Property Act—Act IV of 1882, Section 123—Registered gift of land—Natural love and affection—Donor retracts consent prior to registration—Compulsory registration—Effect of

Where a donor made a gift of land to the plaintiff, but prior to registration retracted his consent, upon which the District Registrar ordered compulsory registration

Held, that the donor could not be compelled to register contrary to his wishes, and that the registration was void and the gift of no effect

[**Diss.**, 35 A 3 (4)=10 A L J 300=16 Ind Cas 406 (407), **N.F.**, 3 O C 231 (232) **R.**, 9 A L J 300=14 Ind Cas 61 (63), 13 M L J 303 (305), **D**, 13 M L J 364 (367)]

SECOND appeal against the decree of V Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No 12 of 1894, reversing the decree of T M Audinarayana Chetti, District Munsif of Mannargudi, in original suit No 157 of 1892

The plaint set forth that the property under attachment and some other property were owned by plaintiff's maternal uncle Sundrappa Ayyar, that he made a present or gift of the same to plaintiff under a deed, dated 6th January 1890 and plaintiff has been in possession and enjoyment of the same ever since, that the second defendant, who has fraudulently and collusively obtained a decree in a Small Cause suit against the first defendant, his relative, has placed the disputed property under attachment in execution of the said decree and at his (the first defendant's) instance that an application presented by plaintiff to remove the attachment was dimissed for default, and that the first defendant has no manner of title to the property Hence the suit

In his written statement the first defendant admits that the property in dispute and some other property were owned by Sundrappa Ayyar as in the plaint alleged, but he contends that Sundarappa Ayyar conveyed the same to him under a registered sale-deed on the 8th January 1890, and that he has been in possession and enjoyment ever since He further impugns the genuineness of the deed of gift relied on by plaintiff and says that Sundrappa [434] Ayyar, the alleged executant, denied its execution and denounced it as false before the Sub-Registrar of Athichapuram, and he argues that, even granting it be a genuine one, yet it cannot take effect as against the sale-deed which was passed before the gift-deed was registered and the gift was complete.

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* Second Appeal No. 547 of 1895

1896 July 15. — Appellate Civil. — 19 M. 433 = 6 M. L. J 207.

The deed of gift, though a registered document, was registered long after it was executed by order of the District Registrar, owing to the executant's denial of execution and refusal to register.

The District Munsif dismissed the suit. The Lower Appellate Court found that both the deed of gift relied on by the plaintiff and the sale-deed relied on by the first defendant were genuine; but with regard to the third issue which raised the question of the validity of the deed of gift which was registered contrary to the wishes of the donor, proceeded as follows:—

"Was the donor entitled to recall his gift after he did all that he was "entitled to and the donee accepted it? I must of course answer this "question in the negative In regard to a gift which is usually made out "of pure love and affection, all that the donee can do is to indicate his "intention of accepting it, and when a gift is made and accepted, nothing "more is needed to perfect it if the donor complied with all the require-"ments of the law. The statute requires a registered document for it, and "if the donor write and give a deed to the donee and the latter accept it, "whether or not the doner goes to register it voluntarily or not, he having "placed it out of his power afterwards to recall it, he cannot retract or "annul it. For the donee having the deed in his possession, has the power "to enforce its registration under the law when the donor refuse to register "it voluntarily. Having placed himself in such a position, he cannot be "said to have the power to revoke it before it was registered I think "the gift was complete when it was written, signed and delivered to "the plaintiff and plaintiff took it. No more than that is necessary to "perfect it, unless the donor and donee both agree to rescind it and did "not register it That is totally a different case."

Defendant No 1 appealed to the High Court.

Rajagopala Ayyar, for appellant.

Ramachandra Rau Saheb, for respondent

JUDGMENT.

We have no doubt that a deed of gift is not complete until it has been registered as required by Section 123 of the Transfer of Property Act, and that it only operates upon [435] registration. In this case the deed of gift was not registered until the sale had been completed and, therefore, was not effectual as against the deed of sale.

We are further of opinion that a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete To do so, it is necessary, *inter alia*, that it should be registered; but he can be no more compelled to register the deed than to execute it in the first instance. The registration of the present deed contrary to the supposed donor's wishes, which was ordered by the Registrar, was therefore void. We accordingly hold there was no gift, and reverse the decision of the Subordinate Judge and restore that of the Munsif. The appellant's costs in this Court and in the first Appellate Court must be paid by the respondent.

19 M. 435.

1896
AUG. 7.

APPELLATE CIVIL.

19 M. 435.

APPELLATE CIVIL

Before Mr Justice Davies and Mr Justice Boddam

CHINNA SEETAYYA (*Petitioner*), *Appellant v* KRISHNAVANAMMA (*Counter-Petitioner*), *Respondent* * [7th August, 1896.]

Execution—Partition by Collector—Civil Procedure Code, Sections 265, 360—Jurisdiction of Court to hear objections to the division ordered by Collector

Where a decree for partition of an estate has been transmitted by the District Court to the Collector for execution under Section 265, Civil Procedure Code, the Court that made the decree is not deprived of its judicial power to hear and decide objections to the division of the estate made by the Collector

[R., 28 B 238 (239), 5 Bom L R 648 (649), 15 M C C R 139)]

APPEAL against the order of G T Mackenzie, Acting District Judge of Godavari, dated 20th February 1895, passed in miscellaneous petition No 53 of 1895

The petitioner, who was a decree-holder in original suit No 3 of 1867 on the file of the Court of the late Principal Sadr Ameen of Rajahmundry, filed a petition in the District Court, Godavari, praying that the Court would be pleased to order the Collector to complete the sub-division and partition of the village of Timmanagudam as early as practicable and deliver petitioner's share to him

[436] The District Judge passed the following order —

" In 1885 an order was sent to the Collector to make the division " under Section 265 of the Code After correspondence for some years " the Collector divided the village into six shares and reported the matter " to the Board of Revenue

" The Board in its proceedings No 26, dated 17th January 1894, sanc" tioned the division and said that the six sharers might be asked to draw " lots for the shares The sharers object to the shares, protesting that " they are unequal, and refused to cast lots The Collector reports that " he can do nothing in the matter

" Petitioner now asks this Court to order the Collector to make a fresh " division Petitioners state that the division which the Collector has " made is inequitable The tank is given to one share The tank bund " is given to another share The wet land is given to a third share All " the sharers object to the Collector's division and their objections were " placed before the Collector by the Tahsildar's report, but the Collector " refused to modify his decision and reported the division to the Board of " Revenue for confirmation

" I am of opinion that Section 265 of that Code gives to this Court " no power to hear objections to the division made by the Collector or to " direct the Collector to make a fresh division Petitioner's pleader cites " *Debi Singh* v *Sheo Lall Singh* (1), but I think that does not go so far " Section 396 does give this Court such power, but Section 265 does not " I must dismiss this petition

" With reference to the Collector's letter I am of opinion that Section " 265 puts on the Collector the duty to carry out his division without the "consent of the sharers If they refuse to draw lots for the portions

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* Appeal against Order No 133 of 1895

(1) 16 C 203

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"marked out by the Collector, the Collector must assign these portions to "the various sharers and offer to place them in possession."

The petitioner appealed to the High Court.

Srirangachariar, for appellant.

Respondent did not appear.

JUDGMENT.

We agree with the principle laid down in *Mahadaji Karandikar* v. *Hari D. Chikne* (1) that "the Court that has made a decree or judicial order which has then been transmitted [437] for execution to a Collector is not deprived of the judicial powers with respect to it, which may still, at any particular time, be competent to such Court, and which it would have had had the order been placed in the hands of its own ordinary officer the Nazir."

This general power has been curtailed by special legislation so far as regards Section 320 of the Code of Civil Procedure (see Section 30 of Act VII of 1888). The amendments effected thereby are, however, not made applicable to Section 265 of the Code, as they should have been if it had been intended by the legislature to limit the natural jurisdiction of the Court in respect to this section.

We are, therefore, of opinion that the District Judge had power to hear objections to the divisions made by the Collector. His order declining to interfere is, therefore, reversed, and he is directed to replace the petition on his file and dispose of it.

No order is required as to costs.

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19 M. 437.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

ANANTHA BHATTA (*Plaintiff*), *Appellant* v. HOLEYA DEYYU AND ANOTHER (*Defendants*), *Respondents*.*

[16th and 17th April and 14th July, 1896.]

Limitation—Purchase by conditional sale—Vendor remaining in possession as tenant holding over—Possession not shown to be adverse

In 1866 the plaintiff brought the plaint lands by conditional sale-deed repayable in ten years from a third party, who, under the same document, became his tenant of the said lands. Before the expiration of the ten years the vendor died, and his widow sold her right in the lands and gave possession to G, the transferor of the second defendant. On the expiration of ten years the sale to plaintiff became absolute and G contained to hold over after the expiry of the lease, but there was no evidence to show that G's possession ever became hostile to plaintiff:

Held, that the fact that plaintiff's title ripened into full ownership on the expiration of the ten years provided by the sale-deed did not after the character [438] of the tenure of G, that his possession never became hostile to plaintiff, that G acknowledged the plaintiff's title in his sale-deed dated 1881 to the second defendant, and that the suit was not barred

SECOND appeal against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 345 of 1893, confirming the decree of I. P. Fernandes, District Munsif of Puttur, in original suit No. 21 of 1893.

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* Second Appeal No. 319 of 1895.

(1) 7 B. 332.

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APPELLATE CIVIL

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Plaintiff sued to recover possession of a piece of rice land valued at Rs. 321-9-9, with buildings thereon valued at rupee one, forming portion of Muli Warg No 2 of Layila village, and Rs. 172-15-0, being the produce for the three years ending on 30th March 1892.

The facts of the case were as follows —

The plaint land originally belonged to Keshava Hebbara. He sold by Exhibit A the land to the plaintiff conditionally on 5th March 1866, it being agreed that if Keshava Hebbara paid the purchase money within ten years of the date of sale, he was to have the land back In 1875 Keshava Hebbara's widow Ganaga Bai sold her right of repurchase to Gopala Bhatta, and Gopala Bhatta brought original suit No 99 of 1876 on the file of the Buntwal Munsif for the cancellation of Exhibit A on payment of the consideration money The plaint was filed in April 1876 The suit was dismissed In appeal (A. S No 33 of 1878) the Lower Court's decree was confirmed The appeal-judgment is dated 18th July 1879 On 7th February 1881 Gopala Bhatta transferred what rights he had under the sale deed he got from Ganga Bai to the second defendant Venketasha Bhatta The first defendant was the tenant of the second defendant

One of the terms of the conditional sale of the 5th March 1866 was that Keshava Hebbara was to remain in possession and cultivate the land for ten years under the mortgage and pay Rs 27 *minus* the assessment every year After Keshava Hebbara's death his widow Ganga Bai continued in possession as tenant as the plaintiff alleges The chief contention was that by Exhibit A the vendor was created a tenant, and that consequently it should be presumed that the tenancy continued till the contrary was shown

The Lower Court held that the plaintiff had not had constructive possession of the land in suit within the twelve years next [439] preceding the date of suit, that the second defendant had been in constructive possession and that the suit was barred by limitation

Narayana Rau, for appellant

Ramachandra Rau Saheb for respondent No 2

Madhava Rau, for respondent No 1

JUDGMENT

The only question argued before us in this appeal is whether the suit is barred by limitation The respondent's case is that the appellant having become absolute owner in 1876 (on the expiry of the ten years stipulated in Exhibit A), his right to recover possession arose then, and as he was not then or afterwards in possession up to the date of suit, a period of more than twelve years, his right to recover was barred

This argument is defective Under Exhibit A executed in 1866, the plaintiff was the landlord and Keshava Hebbara was his tenant and was in possession of the land as his tenant Before the expiry of the ten years stipulated for in Exhibit A Keshava Hebbara died and Exhibit I was executed by his widow It gave possession of the plaint land to Gopala Bhatta, who thus became a tenant in possession under the plaintiff

The fact that in 1876, on the expiry of the ten years stipulated for in Exhibit A, the plaintiff's title became that of absolute owner instead of merely conditional vendee or mortgagee did not alter the character of the possession held by Gopala Bhatta He continued to be the plaintiff's tenant, holding over after the expiry of the term in the lease (Exhibit A) and his possession was in no sense hostile That this is so is clear from Exhibit IV executed on the 7th February 1881, in which Gopala Bhatta

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recites all the prior transactions and admits the title of the plaintiff as landlord. The second defendant (second respondent) claims under this assignment.

It is clear, then that the tenancy created under Exhibit A has never been determined, and it was acknowledged in February 1881, *i.e.*, within twelve years prior to the suit. For both these reasons, then, the plea of bar by limitation is unsustainable.

We reverse the decree of the Courts below and give judgment for plaintiff as sued for with costs throughout.

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19 M. 440.

[440] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

KUNHI PENNU (*Plaintiff*), *Appellant v.* CHIRUDA (*Defendant*), *Respondent.** [30th January and 7th August, 1896.]

Makkatayam law—Thiyyas of Calicut-Succession

Among the Thiyyas of Calicut governed by the Makkatayam Law, the widow of the deceased owner is a preferential heir to his mother

APPEAL against the decree of A. Venkataramanapai, Subordinate Judge of Calicut, in original suit No. 4 of 1894.

The facts of the case were as follows:—

" Suit for a declaration that plaintiff is entitled to succeed to the " plaint properties left by her deceased son Sankaran in preference to his " widow, the defendant.

" Defendant pleads that the suit is precluded by the provisions of " Section 42 of the Specific Relief Act I of 1877, that plaintiff had been " divorced by her husband Raman, and that she (the defendant) is heir to the plaint property left by her husband Sankaran.

" Issues for determination are—

" (1) Whether the suit for a mere declaration of title is maintainable?

" (2) Whether the plaintiff had been divorced by her husband Raman?

" (3) Whether plaintiff is entitled to succeed to the properties left by her son Sankaran in preference to his widow, the defendant?

" Plaintiff is the widow of one Edathodi Raman and defendant is the " widow of their son Sankaran. The plaint property was acquired by " Raman, on whose death it descended to his son Sankaran, who held it " until his death in July-August 1893. The questions is whether " Sankaran's mother the plaintiff or his widow the defendant is the pre- " ferential heir. The parties are Makkatayam Thiyyas of Calicut."

[441] The Subordinate Judge did not record a finding on the first issue; as to the second issue, he found that the plaintiff had not been divorced by her husband Raman; and as to the third, that the plaintiff was not entitled to succeed to the properties left by her son in preference to his widow, the defendant. He accordingly dismissed the suit with costs.

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* Appeal No. 50 of 1895.

1896 AUG. 7.

APPELLATE CIVIL.

19 M. 440.

Plaintiff appealed.

Govindan Nambiar, for appellant.

Mr *Krishnan*, for respondent.

The Court (COLLINS, C J, and PARKER, J) made the following

ORDER — The Subordinate Judge has decided the suit on the ground that, in the absence of proof of a special custom, the ordinary Hindu law must be followed, and hence that the widow will succeed in preference to the mother

But he holds at the same time that the family property belonging to Raman and Sankaran was impartible on the strength of the decision in *Raman Menon* v *Chathunni* (1) If this be so, a special custom in deviation of the ordinary rule of Hindu law has so far been proved

The question then arises—if the property be held as tarwad property in the marumakkathayam sense—who is to hold it on the death of the last male? Is it the senior surviving female, the property being impartible, or the widow of the last male-holder as in Hindu law? When once the Hindu law has been deviated from as to the nature of the property, it may be that the succession would go as in a tarwad See *Ranchan* v *Perachi* (2)

We think the following issues should be tried —

(1) Was the property held by Raman and Sankaran as impartible tarwad property?

(2) If so, does the succession pass on the death of the survivor to his widow, or to the senior female in the family, or to both?

There should also be a finding on the first issue.

Further evidence may be taken.

The findings will be returned in three months from the date of the receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court

[442] In compliance with the above order, the Subordinate Judge submitted the following.

" FINDING —I am directed to try the following two additional issues " and to submit my findings thereon, and also on the first issue tried at the " original hearing —

" (1) Was the property held by Raman and Sankaran as impartible tarwad property?

" (2) If so, does the succession pass on the death of the survivor to his widow, or to the senior female in the family, or to both?

" Plaintiff sues for a declaration that she is entitled to succeed to the " plaint property left by her late husband Raman and inherited on his " death by their son Sankaran, who died in July-August 1893 Plaintiff " states (and the defendant admits) that the property belonged to Raman " as his self-acquired property (see paragraph 1 of the plaint) It is the " case of neither party that the property was held by Raman and his son " Sankaran jointly whether as impartible tarwad property or otherwise " The son inherited the property on the death of his father, its sole owner

" The argument seems to be that in the hands of Sankaran the pro- " perty was family property, i e, property belonging to the family of his " father Raman, who was its sole owner, and that, as such family " property, it was impartible tarwad property On Raman's death, his " family consisted of his widow, the plaintiff, and his son Sankaran,

(1) 17 M. 184 (2) 15 M 281

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"deceased husband of defendant. The son inherited the estate, subject, "of course, to the interest possessed by the widow in her deceased "husband's property. To this extent the property must be deemed to "have been held by Sankaran as family property.

"It has been held that among Makkatayam Thiyyas of Calicut there "can be no compulsory partition of family property—*Raman Menon* v. "*Chathunni* (1). In the present case the defendant attempts to prove that "partition is enforcible, but there is no satisfactory evidence as to the cus-"tom. Defence witnesses 6, 7 and 8 depose that partition can be enforced, "but the 8th witness gives no instances of such partition, and though "the remaining two witnesses refer to some cases, their evidence can "[443] hardly be accepted as sufficient. The omission to call the parties "to any such partition or their successors is not explained. Defendant "cites three cases in which partition has been decreed by Courts, but these "are inconclusive. One is a case of 1876 (Exhibit XIX) in which an "arbitrator's award was ordered to be passed into a decree of Court. In "the other two cases (of 1887) in which partition was decreed no question "appears to have been raised as to the right to seek compulsory parti-"tion. I am of opinion that the evidence adduced in this case is insuffi-"cient to support a finding, in opposition to the ruling quoted above, that "partition is enforcible in respect of the property in dispute in this case.

"It follows, therefore, that the plaint property which belonged to "Raman as his separate property, and inherited on his death by his son "Sankaran, was held by the latter subject to the interest of his widow "the plaintiff. Now what is the nature of plaintiff's interest in the pro-"perty? It can scarcely be contended that property left by a Makkatayam "Thiyya belongs to his widow and son jointly. The very term makkata-"yam signifies that the 'dayam' or succession belongs to the 'magan' "or son.

"Assuming for the sake of argument that the plaint property was "held by Raman and Sankaran as impartible tarwad property, and that "on the death of the former the latter took it as the survivor, the question "is whether, on the death of the survivor, is descends to his widow, or to "her and to her mother-in-law, or to the senior of them. Is there any "custom governing the succession? Neither party has cited any decision "bearing on the point. The oral evidence in the case is not important. "Plaintiff's witnesses depose that the property left by the son belongs to "the mother in preference to the widow. On the other hand, the defend-"ant's witnesses state that, according to custom, the widow takes the "estate to the exclusion of the mother. Plainiff's witnesses give no "instances of the succession of the mother in preference to the widow. Defendant's witnesses 3, 6 and 7 do refer to some instances, but the parties "concerned have not been called. I am unable to hold that this evidence "is sufficient to prove the custom.

"In these circumstances, it appears to me that the question has to "be decided on general principles assisted by any judicial decision in the "case of communities similarly situated. In [444] Malabar the bulk "of the population (chiefly Nayars) follow the marumakkathayam "law of inheritance under which the tarwad holds the property as im-"partible family property. The Nambudri Brahmans, who are of course "subject to the Hindu law of inheritance, have, since their settlement in "Malabar, adopted special customs modifying the Hindu law rules in

(1) 17 M. 184.

"certain matters They have, for instance, adopted the local rule of "impartibility of family property The makkatayam Thiyyas of Calicut "are also held to have adopted that rule, but the fundamental basis of "the makkatayam or Hindu law of inheritance, *viz*, that the succession "belongs in the first instance to males (magans or sons) to the exclusion "of females, does not appear to have been abandoned by either com-"munity in favour of the marumakkathayam rule, according to which "male and female members have equal rights to family property Thus, "even where a widow was the sole surviving member of a (Nambudri) "family, it was held that she is not at liberty to alienate the family "property at her pleasure, and that it is not at her absolute disposal—"*Vasudevan* v *The Secretary of State for India* (1) This ruling implies "that the widow has no equal rights of property with males I do not "see why the principle upheld in this ruling in the case of Nambudris "should not be held to apply to makkatayam Thiyyas of Calicut, who, "though subject to the Hindu law rule of succession from father to son "(makkatayam), have, like the Nambudris, adopted the marumakkatha-"yam rule of impartibility of family property

"The position of females being thus substantially that of females "under the ordinary Hindu law, and the inheritance being found to belong "to males to the exclusion of females, it is, I think, reasonable, to hold "that the widow takes the inheritance in preference to the mother

"I find, then, that the plaint property was not held by Raman and "Sankaran as their joint tarwad property, though among these people joint "family property would be impartible (first issue), and that, on the death "of Sankaran, the succession passed to his widow the defendant (second "issue)

"I have now to record my finding on the first issue raised at the "original trial, *viz*, whether the suit for a mere declaration of [445] title "is maintainable I find that the suit is not maintainable Plaintiff's "own sixth witness states that the property is held by defendant Defence "first witness, Chathu Kutti, who has been karyastan since Sankaran's "time, deposes that defendant is in possession, and that the taxes due on "the property are paid by, or in behalf of, defendant Defendant's brother "(ninth witness), who manages her affairs, gives evidence to the same "effect This evidence is amply supported by documentary evidence "Immediately after Sankaran's death, the defendant appears to have "paid assessment (see revenue receipts V) and granted leases (see Exhibits "VI to XII) in respect of his properties The patta has also been "transferred to defendant's name (Exhibits XIII to XV) Plaintiff is "thus in a position to seek further relief than a mere declaration, and her "suit is unsustainable"

This appeal coming on again for final hearing on return to the order of this Court dated 30th January 1896, the Court delivered the following

JUDGMENT

There being no memorandum of objections, we accept the findings and dismiss the appeal with costs.

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(1) 11 M 157

1896
AUG. 21.

APPELLATE CIVIL.

19 M. 445.

19 M. 445.
APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

ZAMINDAR OF VALLUR AND GUDUR, *Plaintiff v.* ADINARAYUDU, *Defendant.** [21st August, 1896.]

Civil Procedure Code, Section 649—Provincial Small Cause Court's Act—Act IX of 1887, Section 35 (1)—Withdrawal of powers—Civil Courts Act—Act III of 1873 (Madras), Section 28.

Under Madras Act III of 1873, Section 28, a Munsif was invested with the powers of a Small Cause Court's Judge for the trial of suits cognizable by such Court up to Rs. 200 in value. Subsequent to decree but prior to execution, his powers as Small Cause Court's Judge were withdrawn by notification in the Gazette:

Held, that application for execution must be made to the Court in which the Small Cause Court's jurisdiction vested at the date of the application.

[446] CASE stated under Section 617 of the Code of Civil Procedure by V. L. Narasimham, District Munsif of Musulipatam, in original suit No. 482 of 1889.

The facts of this case appear from the letter of reference, which was as follows:—

"This reference arose in the matter of execution of a decree, and the "decision herein will be a guide to a lot of execution applications of its "kind.

"My extended small cause jurisdiction being withdrawn by the recent "notification No. 472, published at page 1454, part I of the *Fort St. "George Gazette,* dated 17th December last, and the Subordinate Court "here being invested with small cause jurisdiction up to the amount of "Rs. 500 over this Munsif, I consider I am unable to execute the decrees "passed by this Court on all suits of a small cause nature, whether passed "by me under the extended powers or by my predecessors on the ordinary "side for want of such powers. The pending execution applications and "those decree already transferred to the ordinary side, on application, "under Section 223 of the Code being exceptions to the view. The "authority for this opinion is Section 649 of the Code and Section 35 (1) "of the Small Cause Act (IX of 1887)

"The decree-holder's vakil, relying on the opinion of the learned "Chief Justice, expressed in *Latchman Pandeh* v. *Maddan Mohun Shyee* "(1), a case decided under Section 649 of the Code, represents to me that "I have still concurrent jurisdiction to execute all the decrees hitherto "passed by this Court, and that it is optional with the decree-holders to "present execution applications to this or the Subordinate Court, by the "use of the words 'shall be deemed to include' in Section 649 and 'may "be had' in Section 35 (1) of the Small Cause Act. This is also the "general opinion of the Bar, but I do not concur with them.

"It is clear from the notification quoted above that my extended "small cause jurisdiction has ceased, and when there is such cessation "the Subordinate Court which was invested with such jurisdiction must, "I think, be decided hereafter to be the only proper Court empowered to "deal with all execution applications connected with suits of a small cause

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* Referred Case No. 4 of 1896.

(1) 6 C. 513.

"nature, being above Rs. 50 in value. The application under reference "being one of [447] them, I have passed orders thereon, contingent upon "the opinion of the High Court, referring the party to the Subordinate "Court. 1896 AUG 21. APPELLATE CIVIL 19 M. 445.

"It is difficult to reconcile with the context the opinion of the Chief "Justice quoted above, and I do not understand how a Court will be able "to exercise a jurisdiction which is withdrawn, the jurisdiction of the "Judge being that of the Court It is incongruous to construe that two "Courts would have concurrent jurisdiction when that of one Court has "ceased, and in the same reported case Justice Field took a different view, "to wit, that if the jurisdiction of one Court had ceased, the other Court "would have jurisdiction (*vide* last para of page 515 of the same case), "this view being against concurrent jurisdiction

"The facts of that case were different from the present There the "territorial jurisdiction was in question, and in fact there was no "change of Court, excepting a few modifications, such as its removal to "another station, and it was the self-same Munsif and the self-same "Court But here pecuniary jurisdiction is in question, and I believe my "present case may be taken as an example of the cessation of jurisdiction, "the peculiar one given at page 519 of the report not being exhaustive but "permissive

"I would not have referred this case but for the doubt entertained "by me being one of general applicability I could not also find any "Madras reported case on the subject I therefore beg to know the deci-"sion of the Honourable High Court upon the following point —

"Whether this Court's jurisdiction to execute the decrees passed by "it in all suits of small cause nature, whether passed under extended "powers or on the ordinary side, has ceased on account of the establish-"ment of the Subordinate Court with small cause jurisdiction, or whether "this and the Subordinate Court have concurrent jurisdiction in respect "to those decrees?

"My own opinion is that this Court's jurisdiction to deal with such "execution applications has ceased, unless transferred to it under Section "223 of the Code, and that this and the Subordinate Court have no con-"current jurisdiction"

Parties were not represented

JUDGMENT

As regards suits tried by the Munsif under the extended small cause jurisdiction, which is now withdrawn, we [448] are of opinion that execution proceedings in such suits must be had in that Court in which the jurisdiction now vests, that is the Subordinate Judge's Court

1896
JAN. 23.

APPELLATE CIVIL.

19 M. 448 = 16 M. L. J. 19.

19 M. 448=6 M.L.J. 19.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SESHAGIRI RAU AND OTHERS (*Plaintiffs*), *Appellant v.* RAMA RAU AND ANOTHER (*Defendants*), *Respondents*.*
[23rd January, 1896.]

Letters Patent, Clause 12—Jurisdiction of High Court—Immoveable property situated outside—Moveable property situated within the jurisdiction—Leave granted by Registrar

Where the plaintiffs brought a suit for their share of family property consisting of land situated outside the jurisdiction of the High Court and for moveables situated within, leave having been granted by the Registrar·

Held, that the High Court had no jurisdiction as to the lands, and that the suit must be dismissed as to them:

Held, further, that leave to sue had been wrongly granted by the Registrar.

[F., 29 C. 315 (322), R., 22 B 922 (926); 27 M. 157 (160); 28 M. 116 (222).]

APPEAL against the judgment of Shephard, J., sitting on the original side of the High Court in civil suit No. 147 of 1894.

The facts of the case were as follows:—

This suit was brought on the original side of the High Court, Madras, by the first plaintiff and his two sons, plaintiffs Nos. 2 and 3, to recover his share in the ancestral property of his late father Cumbam Narasinga Rau. On the death of his said father, plaintiff's brother Cumbam Subba Rau, since deceased, took possession of and managed the family property until his death. After the death of Cumbam Subba Rau, the property came into the possession of his widow, the second defendant. The first defendant is the son of Cumbam Subba Rau (deceased).

The plaintiffs demanded their share from the defendants on 19th January 1891 of the family property consisting of immove- [449] able property situated in the Godavari and Cuddapah Districts and certain moveable property as specified in the plaint and schedule situated within the jurisdiction of the High Court.

Leave was granted to the plaintiff to sue in the High Court by an order of the Registrar, dated 21st August 1894.

The material portion of Clause 12 of the Letters Patent is as follows:—" And we do further ordain that the said High Court of Judicature " at Madras, in the exercise of its ordinary original civil jurisdiction, shall " be empowered to receive, try and determine suits of every description, " if in the case of suits for land or other immoveable property, such land " or property shall be situated or in all other cases if the cause of action " shall have arisen, either wholly, or, in case the leave of the Court shall " have been first obtained, in part, within the local limits of the ordinary " original jurisdiction of the said High Court or if the defendant at the " time of the commencement of the suit shall dwell, or carry on business " or personally work for gain within such limits."

On the suit coming on for settlement of issues on the 7th March 1894 Seshagiri Aiyar for defendants took the preliminary objection that the

*Appeal No. 48 of 1895.

High Court had no jurisdiction to try the suit under Clause 12 of the Letters Patent as far as immoveable property was concerned, inasmuch as no portion of the immoveable property sued for was situated within the jurisdiction of the High Court He further contended that the leave to sue was improperly granted by the Registrar and ought to be set aside

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APPELLATE CIVIL.

19 M. 448 = 6 M.L.J 19.

S Subramania Ayyar, for the plaintiffs contended that the Court had jurisdiction and that the case was provided for by the words " in all other cases "

SHEPHARD, J.—This suit is brought by the plaintiff against the son and widow of his late brother Subba Rau to recover his share of the family property The defendants are said to reside in Madras and the property consists of cash and other moveables, and also of lands situated in the Godavari District Leave has been obtained under Clause 12 of the Letters Patent to institute the suit in the High Court It is objected on behalf of the defendants that, inasmuch as the only immoveable property concerned is outside the limits of the jurisdiction of the Court, the Court has no jurisdiction in respect of it and leave ought not to have been granted

[450] The question turns upon the construction of Clause 12 of the Letters Patent It is clear upon the decided cases *Prasanna Mayi Dasi* v *Kadambini Dasi* (1) and *Jagadamba Dasi* v *Padmamani Dasi* (2) that the provision as to leave applies as well to the case of land situated not wholly within the local limits as to the case of causes of action not wholly arising within those limits, and that it is not restricted to the former case as it might seem to be at first sight In the present case, there being no immoveable property within the jurisdiction, it is manifest that leave could not properly be granted, and that the Court could not assume jurisdiction, unless there were other property involved as the subject matter of the same cause of action

Now as I read the clause with the aid of the interpretation put upon it by the abovementioned cases, it may be paraphrased as follows —The Court has jurisdiction in respect of land situated wholly or subject to the proviso as to leave in respect of lands situated partly within the local limits, " in all other cases " it has jurisdiction, if the cause of action has arisen wholly or subject to the proviso as to leave, if the cause of action has in part arisen within such limits, I think that the phrase " in all other cases " must be read as excluding the case mentioned in the immediately preceding sentence, that is the case of suits for land—and that, therefore, the provision as to leave when applied to a case in which the cause of action has not wholly arisen within the local limits must relate to cases other than those of suits for land If this be the correct view, leave could not rightly be granted in the present case, because the suit is in part a suit for land Although the cause of action may have arisen in part within the local limits, the case is not within the category of " other cases " and, therefore, the provision as to leave does not apply

This interpretation of the clause is in accordance with the decision of West, J , in *Jairam Narayan Raje* v *Atmaram Narayan Raje* (3)

Accordingly I must hold that leave ought not to have been granted, and that the suit must be dismissed so far as regards the land

Plaintiffs appealed

[451] *Subramania Ayyar*, for appellants

Seshagiri Ayyar, for respondents.

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(1) 3 BLROC 85. (2) 6 BLR 686
(3) 4 B 482

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JUDGMENT.

We agree with the learned Judge in the construction he has placed on Clause 12 of the Letters Patent. No portion of the immoveable property is situated in Madras and therefore leave to sue in the High Court could not be granted. The appeal is dismissed with costs.

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19 M. 451 (P.C.)=23 I.A. 128=6 M.L.J. 149=7 Sar. P.C.J. 83.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey, and Sir R. Couch.
[*On appeal from the High Court at Madras.*]

MUTTUVADUGANADHA TEVER, *Plaintiff* v. PERIASAMI TEVAR, *Defendant*. [17th and 27th June, 1896.]

Mitakshara law of inheritance—Impartible zamindari

Heritage to an impartible zamindari is to be traced according to the ordinary rules of the Hindu law of inheritance, unless some further family custom exists, beyond the custom of impartibility, although the estate will be in the possession of only one heir at a time.

It was contended for the appellant that, in tracing the right heir to the proper stock entitled to the inheritance, a rule was applicable to an impartible estate, different from that applied to a partible one; and that when once the heritage to an impartible estate had become obstructed, on the death of each successive owner the true successor was the heir of the last owner of the originally unobstructed estate, though this did not apply to a partible estate But for such a distinction no authority was cited, nor any principle suggested; and it was not upheld.

The parties to this suit, first cousins once removed, contested the right to inherit an impartible zamindari, which had been acquired by their common ancestor, who had left two daughters by two different wives. The plaintiff was the son of the younger daughter, the defendant's father was the son of the elder. The younger half-sister survived the elder, and in 1863 was judicially declared to have inherited alone the impartible zamindari. On her death the elder daughter's son, in litigation ending in 1881, made good his title to the impartible zamindari, being the descendant in the elder line·

Held, that this son of the elder daughter became, as the last male owner, the stock from which descent had now to be traced, and that the ancestor was no longer that stock. And *held*, that the son of this last male owner had a title to [452] the zamindari on his father's death in consequence of the full and complete ownership of the latter, who had himself become a fresh root of title.

This decision disposed of the only question that was argued on this appeal But the decision of the Courts below that the plaintiff could not claim the inheritance in virtue of survivorship was also affirmed. The judgment below, on this part of the case, was based on this that no family co-parcenary had existed to give rise to survivorship, as the sons of daughters could not form a family co-parcenary, which could only consist of the descendants of a paternal ancestor

APPEAL from a decree (25th April 1892) of the High Court (1), affirming a decree (11th April 1890) of the District Judge of Madura.

This suit was commenced on the 19th August 1889 for the possession by right of inheritance of the impartible zemindari of Shivaganga in the Madura District, the plaintiff claiming the succession after the late zamindar, Dorai Singha Tevar, who died on the 19th July 1883, and whose son held the zamindari after him. The undisputed facts, and the issues framed in the Court of first instance, appear in the report of the

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(1) 16 M. 14.

appeal in this suit (1) to the High Court The judgments concurring in the dismissal of the claim were given by the late Muttusami Ayyar, J, C.I.E, and by Best, J The latter of these Judges stated the material facts, which also fully appear in the judgment on this appeal

1896 JUNE 27 — PRIVY COUNCIL. — 19 M. 451 (P.C.) = 23 I.A. 128 = 6 M.L.J. 149 = 7 Sar. P.C. J. 83.

Since the death of the istemrari zemindar, or grantee of the estate from the Government, the line of the descent of the zemindari had twice been rectified by decisions of the Courts and settled by their Lordships Once in 1863, when in *Kattama Natchiar* v *The Zamindar of Shivaganga* (2), the younger daughter of the istemrari zamindar was declared, by the order of Her Majesty in Council, the true heiress And again in 1881 when Dorai Singha Tevar, son of Vela, the elder sister of Kattama, on the death of the latter in 1887, was declared, by order from the same authority, in *Muthuvaduganadha Tevar* v *Dorai Singha Tevar* (3) to be heir

The principal questions raised on the present appeal were whether under the Mitakshara in force in the Carnatic the heritage, to Shivaganga, was to be traced from the last male owner who was father of the defendant, or from the istemrari zemindar, the ancestor common to the parties, but to whom, the appellant his grandson, tracing to him as maternal grandfather, was one step [453] nearer than was the respondent, who was his great-grandson The appellant was son of the younger of the ancestor's daughters, and the respondent was grandson of the elder daughter A question, not argued upon this appeal, but decided below against the present appellant, was whether upon the death of Kattama Natchiar, the zemindari had devolved upon Dorai Singha Tevar and the appellant, as joint family property, though held only by the former, so that on his death survivorship would have given the zamindari to the appellant The decision by the Courts in India negativing the possibility of their being co-parcenary between Dorai Singha Tevar and the appellant, on which alone the latter's right of survivorship could be founded, was affirmed in the judgment of their Lordships on this appeal

The plaintiff, who had been defendant in the suit which ended in 1881 in favour of his cousin Dorai Singha Tevar, based his claim principally on this,—that he, the plaintiff, being the only surviving grandson of the istemrari zemindar, Gourivallabha Tevar, through the younger daughter Kattama Natchiar (who died in 1877 after having been declared entitled to the zamindari by order in Council in 1863 (3)) was nearer to the common ancestor than was Periasami, son of Dorai Singha Tevar, and only a great-grandson of that ancestor The defendant's written statement was that by the decision in 1881 his father had been declared full owner of the zemindari and that the heir was to be traced to no one but that owner

On an issue whether, on the death of Dorai Singha Tevar, succession should be traced from the maternal grandfather, as alleged by the plaintiff or from Dorai Singha himself, as contended by the defendant, the Subordinate Judge decided that, as a daughter's son inherited the full proprietary right, on his death his heir succeeded to the estate, so that the defendant was entitled On another issue, the Subordinate Judge decided that Dorai Singha Tevar and the present plaintiff could not be considered to have been members of any joint family, possessing the estate in co-parcenary, with a right to possession successively As the sons of different fathers, they were not members of a joint family Therefore, there was no right by survivorship that could be claimed by the plaintiff

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(1) 16 M 11. (2) 9 M I A 539 (3) 8 I. A 99=3 M 290.

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[454] A Divisional Bench of the High Court, composed of the Judges above named, dismissed an appeal from the Subordinate Judge's decision dismissing the suit. The judgments are reported at length in the I.L.R., 16 Mad., 11.

The plaintiff now appealed.

Mr. *H. H. Cozens Hardy*, Q.C., and Mr. *J. H. A. Branson* appeared for the appellant.

Mr. *J. D. Mayne*, for respondent.

The following is an outline of the argument for the appellant:—In the circumstances of this impartible estate, and of this family, it ought to have been held that Dorai Singha Tevar did not constitute the true stock of descent. On his death the appellant became entitled as the nearest heir to the istemrari zamindar, and as belonging to the same class as those claiming under Gourivallabha Tevar, who remained the root of title. Under the Mitkshara, the estate which a daughter took in property inherited by her from her father was only a qualified estate, and on her death the property descended to the heirs of her father, not to her heirs. *Chotay Lal* v. *Chunnoo Lal* (1).

There were grounds for the contention that, when the succession to an impartible estate had once become obstructed by the interposition of a female in the line of heirs, the impartible inheritance remained obstructed, so that on the deaths of successive owners the heir of the obstructed impartible inheritance was to be found by tracing him from the last male owner of the unobstructed inheritance. It was not the argument that this applied to ordinary partible family estates. But it was submitted that, in the case of the impartible inheritance after the succession of a daughter's son, the heritage had to be traced back to the last male owner. Again, daughter's sons taking as a class, it should have been held by the Courts below that all the members, to the last survivor of that class, should be exhausted, before resort could be had to another line. It was not insisted for the appellant on the argument derived from the law of survivorship which had been disposed of below; the strength of the appellant's case being the necessity of tracing back to the istemrari zamindar, as still the stock of descent.

[455] Reference was made to the Mitakshara, Chapter II, Section I, Verse 1, and to Chapter II, Section II, Verse 6, as to estates taken by daughters, and daughters' sons: and to Chapter II, Section III, citing Manu 9,187, to the effect that to the nearest sapinda the inheritance next belongs.

Mr. J. D., Mayne's argument for the respondent was, in effect, as follows:—A daughter's son took exactly the same estate as if he were the son of the last male owner; and on the death of that daughter's son, the heir was ascertained by tracing to him. The defendant as the son Dorai Singha Tevar was therefore entitled. As to the matter of the obstructed inheritance, every one taking after a widow or a daughter took an inheritance to which his right was said to have been obstructed, getting, as he did, no title from her. As one of their Lordships said, his title was neither from, nor through, but after her. The inheritance proceeded from the last male owner, and was to be traced to the limits of his progeny. Heirship under the Mitakshara depended upon corporeal affinity; a female inheriting for only a limited purpose to discharge certain duties to the estate. That text which said that no woman took an inheritance was still

(1) 14 B.L.R. 235=on appeal 6 I.A. 15.

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true in a certain sense, though she represented it for the time being, but a daughter's son took absolutely an estate of inheritance as an heir of the preceding male owner Reference was made to Colebr Dig, 494, and 502, Book V, Chapter IX.

An early case referring to this was reported in Sir Edward Hyde East's notes of cases, *Ramjoy* v. *Tarrachund* (1) decided in 1816 Another decision under the Mitakshara in the North-West Provinces was in *Sibta* v. *Badri Prasad* (2)

Mr H H. Cozans Hardy, Q C, replied only that he relied on the arguments already adduced for the appellant

Their Lordships' judgment was delivered on the 27th June by LORD HOBHOUSE.

JUDGMENT

Her Majesty in Council is called upon to decide yet another dispute arising out of the succession to the zemindari of Shivagangn The nature of the dispute is best stated by reference to the pedigree set out in the case of the respondent, who was the defendant below.—

[456] *Pedigree.*

GOURIVALLBAA TEVAR
Istimrar Zamindar, died 1829

- Married 2nd wife. Rakk
  - Vellai Nachiar died before 1863
    - Dhoraisinga Tevar died 1883 Zamindar by decree of Privy Gouncil in 1881 8 I A 99
      - ˈ eriasami defendant and respondent herein
- Married 3rd wife Velu
  - Katama Nachiar died 1877 Zamindar by decree of Privy Council 1863. 9 M I A 543
    - Mutuvaduganadha Defendent in suit which ended in 1881 Plaintiff and appellant herein

MUTTUVADUGA TEVAR.

- Male line of usurpers, ousted by decree of Privy Council in 1863

The effect of the litigation which ended in the year 1863 was to establish that the zemindari was the self-acquired property of the istimrar zamindar, and that it devolved upon his younger and only surviving daughter Kattama in preference to collateral heirs

Kattama died in 1877, when her son the present appellant, who was plaintiff below, claimed to be entitled in preference to Dhoraisinga, the son of Kattama's sister, who was eldest daughter of the istimarar zamindar In that litigation, which ended in the year 1881, it was established that though the zamindari was impartible, Kattama took it for the ordinary Hindu woman's estate, and that upon her death it devolved not on her heir but on the heir of her father

Dhoraisinga being dead, the plaintiff has preferred a fresh claim to the zamindari. He maintains that the istimrar zemindar is still the root of title, and that he, being a grandson, is entitled to succeed in preference to the defendant who is a great-grandson The defendant maintains, that

(1) 2 Morley's Digest, 79

(2) 3 A 134.

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Dhoraisinga acquired full and complete ownership, and became a fresh root of title, so that the property descended to his son.

Both Courts below have decided that the defendant's contention is right. The plaintiff's claim is founded on the idea that the present question is the same as that which arose on Kattama's death. Then the istimrar zamindar was the root of title, whose heir was to be sought, therefore it is argued he is so now. That [457] argument loses sight of the difference between the imperfect or obstructed heritage of a female, and the full heritage of a male successor. It is not disputed by the appellant's counsel that, if the property were partible, Dhoraisinga would have taken an absolute ownership constituting him a new stock. But it is contended that a different rule is applicable to an impartible estate, and that if the inheritance of such an estate once becomes obstructed, it is always obstructed, so that on the death of each owner the true successor is the heir of the last unobstructed owner. They have not produced any authority, nor suggested any principle for such a distinction. When an estate is impartible it is enjoyed in a different mode from that prescribed by the ordinary Hindu law; but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility.

Their Lordships do not discuss the question of survivorship, because Mr. Cozens Hardy distinctly stated he rests his claim not on survivorship between the plaintiffs and Dhoraisinga, but on the plaintiff's greater proximity to the true root of title. But on both points they express their agreement with the learned Hindu lawyer who presided at the hearing of this case in the High Court, and whose services have recently been lost to that Court.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitors for the respondent: Messrs. *Lawford, Waterhouse & Lawford.*

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19 M. 458.

[458] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

PAKIAM PILLAI (*Petitioner*), *Appellant v.* INNASI FERNAND (*Counter-Petitioner*), *Respondent.**
[12th, 17th March and 14th September, 1896.]

Indian Succession Act—Act X of 1865, *Sections* 246, 261—*Application for letters of administration—Caveator propounding a will—Effect of withdrawal of previous application for probate of same will without leave to apply again—Civil Procedure Code, Section* 373.

Where a person applied for probate of a will but withdrew the application before the proceedings became contentious.

Held, that he was entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased:

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* Appeal against Order No. 166 of 1895.

Held further, that though the provisions of the Civil Procedure Code are applicable to suits under Act X of 1865 Section 261, still in the present case, the application for probate had been withdrawn before the proceedings became contentious and that, therefore Section 373, Civil Procedure Code, was not applicable

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[R., 12 C L J 185 (188)=14 C W N 924=7 Ind Cas 126]

APPEAL against the order of B Macleod, Acting District Judge of Tinnevelly, passed on certificate petition No. 15 of 1895

The facts of this case were as follows.—

The petitioner, the husband of one Santhai Kurusal, who died on 16th December 1893, applied for a grant of letters of administration to her estate under Section 246 of Act X of 1865. The counter-petitioner entered a caveat and claimed probate of a will alleged to have been executed by the deceased on the day of her death Probate of this will had been applied for a month after her death, but the petition was withdrawn without obtaining the leave of the Court to apply again On the present petition, the District Judge ordered that probate of the will do issue to the counter-petitioner with costs

The petitioner appealed

Sundara Ayyar, for appellant

Ramakrishna Ayyar and *Seshachariar*, for respondent

[459] ORDER —The first objection urged on behalf of the appellant was that, as the respondent (caveator) to whom probate of the will propounded by him was granted by the District Court had withdrawn without the leave of the Court to apply again a previous petition for probate of the same will, he was precluded from making the present application That the respondent did apply once before is not disputed, though the application itself has not been put on the record of this case In the order of the District Court, dated the 20th September 1894, allowing that application to be withdrawn, it was described as one for letters of administration, whereas, in the order under appeal, it is referred to as an application for probate However this may be, it is admitted that the application had reference to the will in dispute and taking that it is immaterial whether the application was for probate or for letters of administration, the question is whether the appellant's objection is good Now, Section 261 of the Indian Succession Act lays down that when in proceedings relating to applications for probate or letters of administration contention arises, "the proceeding shall take, as nearly as may be, the form of a regular suit according to the provisions of the Code of Civil Procedure."

This being so, the argument on behalf of the appellant was that Section 373 of that Code, which is based on the rule of public policy that it is the interest of the state that there should be an end to litigation, is as applicable to such proceedings as to other suits In *Trower and Smedley* v *Cox* (1), which is the only case I have been able to find as bearing on the point, Sir John Nicholl, referring to a similar argument urged before him, admitted that "in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the Court, as far as it legally can, will hold them bound" The actual decision there that the executrix was not barred from calling upon the next-of-kin to bring in the administration and re-propounding the alleged will, though her attorney had previously withdrawn from the suit after propounding it and suffered the next-of-kin to take administration, was

(1) 1 Addams, 225

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rested on the peculiar circumstances of the case. The argument on behalf of the appellant would seem, therefore, to be not without authority. But [460] assuming the rule of law to be as stated on his behalf, it is clear that the facts necessary to warrant its application were not shown to have existed here. For it is only when contention arises that proceedings in connection with probate or letters of administration can take the form of suits; but that the proceedings had become contentious when the respondent withdrew his former application, there is nothing to prove. The objection in question must therefore be held to fail.

The second objection urged was that the evidence adduced on behalf of the respondent did not establish the genuineness of the will. But I am unable to accede to it, as I see no reason to differ from the District Judge who believed the testimony adduced on behalf of the respondent to the effect that the will was signed by the deceased when she was of sound and disposing mind. On the one hand the ill-feeling which had existed between the appellant and the deceased, who was his wife, and on the other the friendly terms on which the respondent, who was her grandson, had lived with her tend to show that the probabilities are in favour of the view that the will is true.

The third and last objection was that it did not appear that the attesting witnesses signed the will in the manner required by Section 50 of the Indian Succession Act. As the evidence stands now this contention must prevail; but there is no reason to think that the omission to question the attesting witnesses on the point was wilful and intentional. I, therefore, direct the District Judge to take fresh evidence on the point and submit a finding on it within a month from the receipt of this order and objections may be filed within seven days from the date on which the receipt of such finding is notified in Court.

In compliance with the above order, the District Judge submitted the following.

FINDING:—With reference to the above order of the High Court, " I " have the honour to re-submit the records in the case and to state that, " from the depositions of two of the attesting witnesses now examined " by me, I am of opinion that they attested the will in the presence of the " testatrix, after the latter had put her mark to it in their presence The " provisions of Secion 50 of the Indian Succession Act appear thus to have " been complied with in this case."

[461] On receipt of the above finding the Court delivered the following

JUDGMENT.

Accepting the finding, I dismiss the appeal with costs.

19 M. 461=2 Weir 621.

APPELLATE CRIMINAL

Before Sir Arthur J. H Collins, Kt., Chief Justice, and Mr. Justice Parker

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DEC. 13.

APPELLATE CRIMINAL.

19 M. 461=2 Weir 621.

KARIYADAN POKKAR v KAYAT BEERAN KUTTI *
[13th December, 1895]

Criminal Procedure Code, Section 488—Maintenance of children—Moplahs—Personal law

The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance If the children are legitimate, the question of the mother's right to their custody would depend on the question whether the parties are governed by Muhammadan or Marumakkatayam law, because (1) if they are governed by Muhammadan law, the mother may have the right to custody until the children attain the age of seven years, (2) if by the Marumakkatayam law, it is doubtful if the father could be held to have neglected his duty to maintain his children if they were actually maintained by the karnavan of their mother's tarwad who is bound by law to maintain them

[R., 2 L B R 46]

CRIMINAL revision petition under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of A F Pinhey, Acting Joint Magistrate of Malabar, in maintenance case No 1 of 1895

The facts of this case appear from the Joint Magistrate's order, which was as follows —

" The complainant, Kariyadan Pokkar, claims maintenance for the " three children of his sister aged, respectively, 5, 3½ and 1½ years " Defendant is willing to maintain the mother and children if they live with " him It appears he has married again and is living in the new wife's " house, and complainant urges [462] that the wife under Muhammadan " and Marumakkatayam laws has a right to the custody of the children " till seven years of age The evidence need not be discussed, as there is " a ruling of the High Court on a similar case from this Court It has " been held that an order for separate maintenance cannot be made under " the Criminal Procedure Code if defendant is willing to take the children " An action for maintenance under the Muhammadan law or Marumak- " katayam law will lie in the Civil Court, but not under the Code No " order for maintenance can therefore be made "

The petitioner filed a revision petition against the above order

Mr. *Krishna*, for petitioner

Narayanan Nambiar, for counter-petitioner

ORDER.

It is not denied that the defendant is the father of the three children for whom maintenance is sought The complainant is the karnavan of the mother's tarwad and presumably comes forward as the *de facto* guardian of the children. The Joint Magistrate has dismissed the petition on the ground that there is a ruling of the High Court that an order for separate maintenance cannot be made against a father if he is willing to take the

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* Criminal Revision Case No 453 of 1895

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children. The ruling is not quoted, but apparently it is an order of Best, J., passed in *In re* Kunhammavu* that is referred to. That is an order of a single Judge issued without any hearing in Court and without notice to the parties, and with great respect, we venture to question the soundness of the decision.

In that case, like the present, the parties were Moplahs, and it was alleged that the defendant had divorced his wife. In the present case a divorce is also alleged, but it is not found whether the parties are governed by the Muhammadan or the Marumakkatayam law. The allegation of a divorce would seem to imply the former, whilst the fact that the petition is put in by the karnavan of the mother's tarwad would indicate the latter.

In *Ayyapattar* v. *Kalianiammal* (1) it was held by the Chief Justice and Mr. Justice Shephard that there was no foundation for the suggestion that Section 488 of the Criminal Procedure Code did not apply to Malabar. That was a case from South Malabar, in which the Head Assistant Magistrate had, on the [463] application of a Nair woman, granted an order against a Patter Brahman (with whom she had formerly 'sambandam') for the maintenance of her children, and the High Court upheld the order.

No doubt the expression 'legitimate' or 'illegitimate' in Section 488, Criminal Procedure Code, seems at first sight to refer to issue born of parents subject to a law recognizing marriage of some sort; but the code is of general application, and the expression used may also indicate that the only condition laid down is that the person proceeded against is in fact the father. If the parties are governed by Marumakkatayam law as their personal law, it may be that the father is not in any degree of civil relationship and that the person primarily responsible for the maintenance of the children is the karnavan of their mother's tarwad—in this case, the petitioner; and under Section 1, Criminal Procedure Code, nothing contained in the Act would affect such special law. Such right to be maintained by the karnavan depending upon the personal law of the parties is a right capable of being enforced and would properly form the subject of a suit in a Civil Court. But the right of a wife and of children to be maintained by the husband and by the actual father is a statutory right, and the duty is created by express enactment independent of the personal law. In *Luddun Sahiba in re* (2), a Muhammadan wife not entitled under the Shia law to maintenance was held entitled to it under the Criminal Procedure Code. And in *Rozario* v. *Ingles* (3), a married woman was held entitled under Section 488 to claim maintenance for her illegitimate children from the putative father.

The questions that arise therefore are: (i) are the children the legitimate or illegitimate children of the defendant? and (ii) has he neglected or refused to maintain them? If the children be illegitimate, that is, the offspring of a connection which is not a legal marriage, the refusal of the mother to surrender them to the father is no ground for refusing an allowance for maintenance—see *Lal Das* v. *Nekunjo Bhaishiani*(4). But, if on the other hand, the children be legitimate, though the mother be divorced, it might be unfair to hold that the father had refused to maintain them if he was ready and willing to do so should they live with him. Should, however, Muhammadan law award the guardian-[464] ship of the children to the divorced mother till they attain the age

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* Criminal Revision Case No. 89 of 1893 unreported.

(1) Criminal Revision Case No. 338 of 1893 unreported.
(2) 8 C. 736.
(3) 18 B. 468.
(4) 4 C. 374.

of seven years, the defendant might be bound in any case to pay maintenance for them untill they attain that age

1895 Dec. 13. APPELLATE CRIMINAL 19 M. 461=2 Weir 641.

It is necessary, therefore, that the Joint Magistrate should determine whether the parties follow Muhammadan or Marumakkatayam law. If the former, the question will arise as to the mother's right to retain the children till they are seven years of age If the latter, the question will arise whether the father could be held to have neglected his duty to provide for his children if they were actually being maintained by the karnavan of their mother's tarwad who is bound by law to maintain them. Of course, a karnavan is not at liberty to neglect his own duty in order to make the father pay This application is not made by the mother of the children but by the karnavan, and it may be questioned whether he would have any *locus standi* to make such an application when the law imposed the same duty on himself and when he himself had sufficient means to perform that duty

We set aside the order and direct the Joint Magistrate to re-hear the case

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19 M. 464=6 M.L.J. 181 =1 Weir 144, 247=2 Weir 65.

APPELLATE CRIMINAL

Before Mr Justice Subramania Ayyar and Mr Justice Davies.

QUEEN-EMPRESS v. SAMINADHA PILLAI AND ANOTHER.*

[13th, 14th and 25th August, 1896.]

Indian Penal Code, Sections 188, 290—Public nuisance—Cremation—Disobedience to an order duly promulgated by a public servant—Criminal Procedure Code, Section 143 Illegal order

On the 11th August 1894, the District Magistrate promulgated an order prohibiting the people of the village of Thirukodikaval from using their burning grounds situated on the southern bank of the Cauvery and directing them to use other burning grounds which had been provided On the 11th May 1895 certain persons, in defiance of this order, cremated a corpse at the spot interdicted, and were convicted under Sections 188, 290, Indian Penal Code, but the conviction under Section 188 was reversed on appeal

[465] *Held,* that when persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to

Held, further, that the order of the District Magistrate was not warranted by Section 143, Criminal Procedure Code, or by any other law and must, therefore, be set aside.

[**R.** 25 M 118 (130), **Expl.** 25 C 425 (428)]

APPEALS under Section 417 of the Criminal Procedure Code against the judgment of the Sessions Court of Tanjore in criminal appeals Nos. 42 and 67 of 1895, acquitting the accused Saminadha Pillai and Chokku Pillai, who had been convicted by the First-class Magistrate of Kumbakonam under Sections 188 and 290, Indian Penal Code, and sentenced to undergo five weeks' simple imprisonment and pay a fine of Rs. 25, in so far as it acquits the appellants therein of an offence under Section 188. Indian Penal Code.

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* Criminal Appeals Nos. 554 and 555 of 1895 and Criminal Revision Petitions Nos 226 and 227 of 1895.

1896 AUG. 25.

APPELLATE CRIMINAL

19 M. 464=6 M. L. J. 181=1 Weir 144, 247=2 Weir 65.

Petitions under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Court of Tanjore in the same appeals Nos. 42 and 67 of 1895, in so far as it confirms the convictions of, and sentences passed on, the petitioners Saminadha Pillai and Chokka Pillai under Section 290, Indian Penal Code.

The facts necessary for the purposes of this report appear from the judgment of the Sessions Judge of Tanjore which is as follows:—

" In olden times the Cauvery flowed south of the Thirukodikaval " burning ground, and that ground had the river between it and the bath- " ing ghat of Thiruvaduthorai. A good while ago, however, the Cauvery " shifted its bed, so that the burning ground was on the south bank and " bathing ghaut to be over the river at all was moved further north and " was placed side by side with the burning ground at the river's edge. " A public path or road was made from Thuruvaduthorai to the bathing " ghaut. This state of affairs has continued without objection from the " Thiruvaduthorai people for forty years and more

" Of late, however, for some reason, which is not apparent on the " record, the latter people, headed by the mutt, have taken a strong " objection alleged to be on sanitary grounds to the burning [466] of " corpses close to their bathing ghaut. On the 11th August 1894, the " District Magistrate issued the following notification·—

" 'It is hereby notified for the information and guidance of the people " 'of Thirukodikaval in Kumbakonam taluk and of the people of Thiruva- " 'duthorai village, Mayavaram taluk, that to avoid danger to human " 'health, they are from the date of publication hereof to cease using their " 'burning grounds situated adjoining each other on the southern bank of " 'the Cauvery and to use those otherwise provided and known to them. " 'Disobedience of this order will entail prosecution under Sections 290, " '291 and 188, Indian Penal Code '

" This was published by beat of tom-tom and otherwise in the villages " concerned, and all adults became aware of the prohibition

" On the 11th May, however, in spite of this notification, the Thiru- " kodikaval people burned the corpse of a Sudra on the burning ground. " For doing this the Joint Magistrate has convicted and punished four " people (appellants) under Sections 188 and 290, Indian Penal Code."

The Sessions Judge found that the order above referred to was illegal and set aside the convictions and sentences under Section 188. Indian Penal Code. With regard to the charge under Section 290, Indian Penal Code, he acquitted Govinda Padayachi and Ganapati Dekshitar, two of the appellants before him, but confirmed the conviction and sentence passed against Saminadha Pillai and Chokka Pillai.

The Public Prosecutor on behalf of the Crown appealed under Section 417, Criminal Procedure Code, against the order in so far as it acquitted the two accused now before the Court under Section 188, and the two accused presented a revision petition under Sections 435 and 439, Criminal Procedure Code, against the conviction under Section 290. The appeals and revision petitions were heard and disposed of together.

The Acting Public Prosecutor (Mr. *N. Subramaniam*), for the Crown.

Sankaran Nayar and *Sankaranarayana Sastri*, for the accused in all cases.

Pattabhirama Ayyar and *R. A. Krishnasami Ayyar*, for the complainants in the revision cases.

JUDGMENT.

1896 Aug. 25. — Appellate Criminal. — 19 M. 464=6 M. L. J. 181=1 Weir 144 247=2 Weir 65.

[467] The accused in this case, two of the residents of the village of Thirukodikaval, were convicted by the Magistrate under Sections 188 and 290 of the Indian Penal Code On appeal the Sessions Judge reversed the conviction under the former section, but confirmed that under the latter The act for which they were convicted was the cremation of the corpse of one Vyapuri Pillai, father of the first accused, on a spot close to the ghaut on the Cauvery used by the inhabitants of the adjoining village of Thiruvaduthorai for bathing and other lawful purposes Both the Courts find that the cremation caused substantial annoyance and discomfort to the persons who were at the ghaut and to the passers-by on the occasion The spot where the body was burnt appears to have been used for such purpose by the Thirukodikaval people from time immemorial and to have been originally situated to the north of the river But the place where the ghaut referred to now exists came to be used as a place of public resort only from the time when the river changed its course many years ago

The questions are, whether the conviction under Section 290 is right and whether the acquittal of the accused in respect of the offence under Section 188 should be set aside In determining these questions, it is necessary first to deal with the case independently of the notice of the District Magistrate, dated the 11th August 1894, to be more fully referred to hereafter, and then to examine the bearing of that notice on the alleged guilt of the accused

Now, taking the case apart from the said notice, it is clear that the act of the accused falls under the limited class of cases sometimes designated as nuisances ' legalised ' In other words it seems to be an instance of those compromises belonging to social life [alluded to by Pollock, C B, in *Bamford* v *Turnley* (1)] upon which the peace and comfort of that life mainly depend and in which some apparent natural right is invaded or some enjoyment abridged to provide for the more general convenience or necessities of the whole community In support of the above view, it is hardly necessary to observe that, not only the religious sentiments of all sections of the community, but also the requirements of general health and comfort, absolutely demand that corpses shall be disposed of as early as practicable, so as not to prove hurtful to [468] the living It is this imperative necessity that, as a general rule, casts upon persons having charge of corpses not only as a matter of social, but also of legal obligation, the duty of arranging for the disposal of those corpses in a reasonably speedy, decent and inoffensive way—*c f* the observations of Denman, Chief Justice, in *Queen* v *Stewart* (2) and of Lord Campbell, C J, in *Reg* v *Vann* (3) And to facilitate the discharge of such an important duty, it has been, as is well known, the general and immemorial custom to set apart some spots for use by the public as places of sepulture or cremation The absolute necessity for such common provisions will become apparent on a moment's reflection It is sufficient to refer to but one—not an unimportant—consideration bearing on the matter, *viz*, that the number of persons who are in a position to find for interment or cremation of the bodies of their deceased relations, friends or dependents, places of their own, which, while being convenient to those persons themselves, will not be a nuisance to others, is extremely small when compared with the millions of landless men and women who, if required to do so, would

(1) 31 L J Q B 29 (2) 12 A & E 778 (3) 2 Den 330.

1896 AUG. 25. find it impossible to obtain such spots for similar use by them. Hence the existence of common burial and cremation grounds in almost every inhabited village in this presidency, except portions of the West Coast, where the conditions are somewhat different, owing to human dwellings not being crowded together as they mostly are elsewhere. In cases of this description, it is clear, adopting the language of Sir James Fitz James Stephen (*Digest of Criminal Law*, 5th edition, 140), "the fact that the act complained of facilitates the lawful exercise of their rights by part of the public shows that it is not a nuisance to any of the public." And when persons, like the accused entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, it must be admitted that he does what is perfectly lawful. To hold that an act so properly done, not only in the exercise of a right of which the people of this country are generally so very tenacious, but also in the discharge of a serious duty, amounts, as the prosecution contends, to an offence, would be highly unreasonable and unjust. It follows [469], therefore, that the conviction of the accused cannot be sustained simply on the ground that their acts caused material annoyance and discomfort to the Thiruvaduthorai people, who were near the place on the occasion referred to.

APPELLATE CRIMINAL.

19 M. 464 = 6 M. L. J. 181 = 1 Weir 144, 247 = 2 Weir 65.

The next question for determination is whether the act of the accused was punishable in consequence of the notice issued by the District Magistrate on the 11th August 1894, addressed to the people of Thirukodikaval in general and prohibiting them from cremating any corpses in the place in dispute. If the above notice were valid, there can be no doubt that the conviction of the accused, not only under Section 290, but also under Section 188, would be warranted. But the order appears to be fundamentally invalid. The notice itself does not state under what provision of law it was issued. Our attention was not drawn to any special or local law empowering the District Magistrate to pass such an order. We were, however, referred by the Public Prosecutor to Section 143 of the Criminal Procedure Code as the one under which the Magistrate acted. But under that Section no Magistrate can prohibit what was lawful before the date of his order, and thereby make such an otherwise legal act, committed after the date of the order, punishable as a nuisance under the Indian Penal Code. For he is by that Section empowered to enjoin a person from repeating or continuing only a public nuisance as defind in the Indian Penal Code or any special or local law. Since, however, it has been found, for reasons already stated, that to cremate on the ground in question was not a nuisance before the issue of the order of the 11th August 1894, the section relied on cannot be held to support that order. Nor have we been able to find any other provision of law under which it could have been rightly promulgated. No doubt before the District Magistrate made the order, another place, unobjectionable to the Thiruvaduthorai people, had been provided for the Thirukodikaval people to be used by them as their village cremation ground. Now some observations made by Innes and Muthusami Aiyar, JJ., in criminal revision case No. 86 of 1881 (1) were cited to show that, in circumstances like those which existed here, it was within the powers of the Magistrate to prohibit the Thirukodikaval people from using the old

(1) Weir's Criminal Rulings, 3rd ED. 764.

spot as a place for cremation in future. The observations [470] of the learned Judges, no doubt, support the contention. They are, however, but *obiter dicta*, for which no authority is cited and in which, with all defence to the learned Judges, it is difficult to agree. On the other hand, *Becharam Ghoroore v Boistubnath Bhooyan* (1) seems to be a direct decision in support of the contrary view. There a Magistrate, purporting to act under Section 308 of the Criminal Procedure Code of 1862, had prohibited cremation in a spot originally devoted for such a purpose on the ground that a more suitable place for it had been subsequently provided in another locality. Loch, J., who delivered the judgment of the Court, observed "but here the public were charged with committing a nuisance "by a private individual in the exercise of an admitted right, and we are "not shown under what law the Magistrate proceeded when he prohibited "the public from making use of this right." This appears to be the sound view to adopt, since it is not easy to see how the mere fact that another place has been set apart can empower a Magistrate, acting under the general law, to deprive a party entitled to use the existing cremation ground of his vested right to continue to use such ground for the purpose for which it was originally appropriated. It is obvious that difficulties, like those which have arisen in the present instance, can be met only by the extension of provisions similar to those contained in Section 240 of the District Municipalities Act, to the rural parts of the country. In the absence of such a law applicable to tracts like that in which the villages in question are situated, the prohibitory order relied on on behalf of the Crown must be held to have been made without jurisdiction and void. In this view it is, of course, unnecessary to consider the other objections taken to the validity of the District Magistrate's order.

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The result is the convictions of the accused must be, and are hereby, set aside. The fines, if levied, must be refunded. The appeals against acquittal in respect of the offence alleged to have been committed under Section 188 of the Indian Penal Code are dismissed.

Ordered accordingly.

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19 M. 471=6 M L.J. 115.

[471] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

(IN APPEAL No. 179 OF 1894.)

CHINNARAMANUJA AYYANGAR AND OTHERS (*Defendants Nos. 2 to 5*), *Appellants v.* PADMANABHA PILLAIYAN AND OTHERS (*Plaintiffs Nos. 1 to 3 and Defendant No. 1*), *Respondents.** (IN APPEAL No. 186 OF 1894.)

SORIMUTHU PILLAI AND OTHERS (*Defendants Nos. 19 to 21*), *Appellants v.* PADMANABHA PILLAIYAN AND OTHERS (*Plaintiffs*), *Respondents.** [24th and 27th February, 1896.]

Partnership—Payment to a partner in fraud of his co-partners not a valid discharge—Constructive notice.

The defendants, other than the first defendant, styling themselves the 'agricultural association,' entered into three rental agreements, two of them dated

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* Appeals Nos. 179 and 186 of 1894.

(1) 14 W. R. 177.

1896 FEB. 27.

APPELLATE CIVIL.

19 M. 471=6 M. L. J. 115.

April 23, 1891, and the third dated June 21, 1891, with the plaintiffs and the first defendant for the cultivation of certain lands belonging to an undivided family of which the plaintiffs and first defendant were members and took possession of and cultivated the said lands

On the 17th June 1891 an agreement, of which the second defendant had notice, was entered into between the plaintiffs and first defendant to the effect that the first plaintiff should be the managing member of the family and should be entitled to receive the rent and give receipts for the same. Subsequently disputes arising between plaintiff and first defendant the other defendants made payments of rent to first defendant alone:

Held, that these payments were not a valid discharge as against the claim of the plaintiffs on its being proved that second defendant had notice of the agreement of 17th June and that notice to him must be taken to be notice to his partners, the other defendants.

By an agreement between the defendants any one partner was empowered to take a lease, such lease to be binding on all the partners as if executed by them The leases were not signed by the 13th defendant (now represented by appellants 10, 20 and 21) who was admittedly a partner and took actual part in the management of the affairs of the firm after the leases were executed·

[472] *Held*, that it was intended that the leases should operate as it all the members had executed them and that the representatives of 13th defendant were bound

[Diss., 7 Ind Cas 108 (113)=8 M L.T 253 (258)=(1910) M.W N 325]

APPEALS against the decrees of S Gopalachariar, Subordinate Judge of Tinnevelly, in original suit No. 40 of 1892.

The facts of the case were as follows:—

Suit to recover from defendants 2 to 18 the sum of Rs. 9,180-6-7, being the balance of rent with interest due for kar and pisanam of Andu 1067 (July 1891 to July 1892) in respect of the properties described in Schedules I to III under three separate rent agreements (counterparts of lease) executed by defendants 2 to 5 for themselves and on behalf of the other members of the agricultural association on 23rd April and 17th June 1891, in favour of first plaintiff and first defendant (who are uncle and nephew) Plaintiffs 2 and 3 are the younger brothers of the first defendant, who has been made a party defendant on the ground that he has declined to join plaintiffs in instituting the suit

Defendants 19 to 21 were added as representatives of the 13th defendant upon his death after the institution of the suit.

The plaint sets forth that the family of plaintiffs and first defendant is a joint one, of which first plaintiff is the head and manager.

That the properties described in Schedules I to III belong to the family

That the properties in Schedule I were leased out by first plaintiff and first defendant to defendants 2 to 5 as representing the agricultural association for a term of nine years from Chittirai 1066 (April 1891) under a registered lease deed and counterpart passed between the parties on 23rd April 1892.

That similarly the properties in Schedule II were leased out under similar documents, also dated 23rd April 1891

That similarly the properties in Schedule III were leased out under similar documents, dated 17th June 1891, between first plaintiff and first defendant on the one hand and second defendant on behalf of the said association on the other

That defendants 2 to 18 accordingly took up and held possession of the properties.

That on 17th June 1891, *i.e.*, the date of the third lease, an agreement was executed between first plaintiff and first defendant **[473]** with the

attestation of second defendant and with the knowledge of the other defendants to the effect that first plaintiff was the head and manager of the family and that the said rent should be paid to first plaintiff who should give a receipt therefor

That defendants 2 to 18 have not paid the rent even after repeated demand on the expiry of the due dates, and deducting the amount credited in plaint, which was collected by Government by attachment of paddy towards kist, the remaining portion of the paddy, money and straw due under the agreements is still due and unpaid, and interest is also payable thereon at one per cent since the due dates

Defendant No 1 admitted the claim Defendants 2 to 5 disputed the claim and alleged that the full amount of rent due had been paid

Defendants 6 to 9, 12, 15 and 16 plead that, though they joined the association originally, i e, in March 1889, they disconnected themselves from it with the consent of defendants 2 to 5 and 13 in April 1889 alone and executed a release deed subsequently, i e, on March 1892, that they were not aware of the leases obtained by defendants 2 to 5 and 13, and were not members of the association at the time of the leases, that they never enjoyed the properties and are not liable for the rent, that defendants 2 to 5 have exceeded their authority in getting these leases, which are therefore not binding on them, that as more than the rent due at the time of the said release appears to have been paid up, nothing is due from them, and that plaintiffs have impleaded them while fully knowing of their disconnection from the association

The 13th defendant denies his knowledge of the leases and enjoyment thereunder, charges the association with several irregularities, and states that he had told second defendant that he wanted to disconnect himself from the association, and that he is not bound by the leases and has been unnecessarily made a party

On 13th defendant's death, defendants 19 to 21 were joined as his heirs They have put in a written statement adopting his defence and stating that, in any event, they are not liable after his death

The Subordinate Judge found that with regard to certain payments made by defendants 2 to 5 to defendant No 1, that these payments were binding on the plaintiffs He further found [474] that a sum of Rs 1,700 had not been paid to the plaintiffs, and that defendants were not entitled to a reduction owing to excessive rain if such excessive rain occurred The Subordinate Judge decreed that part of the plaintiffs claim was proved and ordered payment by defendants 2 to 5 of Rs 3,915-2-8 with interest and proportionate costs The Subordinate Judge exonerated defendants 6 to 12 and 14 to 18 on the ground that they had disconnected themselves with the agricultural association previous to the leases which formed the subject matter of the present suit, and held that defendants 19 to 21, the representatives of 13th defendant deceased were liable for the aforesaid amount with interest and costs to the extent of the 13th defendant's share in the assets of the agricultural association, and that the defendants 19 to 21 were liable to the extent of the assets, if any, received from the estate of the 13th defendant deceased

Defendants 2 to 5 appealed in appeal No 179 of 1894 and the respondents 1 to 3 filed a memorandum of objections, contending that defendants 2 to 5 were not justified in making payments to the first defendant without the consent of the first plaintiff

Sundara Ayyar, for appellants

Krishnasami Ayyar, for respondents

1896 FEB. 27. — APPELLATE CIVIL. — 19 M. 471=6 M. L. J. 115.

JUDGMENT.*

The question is whether the appellants are liable on the rental agreements executed by four of the defendants, but not executed by the deceased person whom they represent. The plaint alleges that the documents were executed on behalf of the agricultural association of which the deceased was a member. The 13th issue raises the question "whether the "defendants 2 to 5 executed the lease deeds on behalf of the defendants "6 to 18 also;" but there is no finding on that issue. Admittedly it is not stated in the documents that the executants were acting on behalf of others, nor do they sign in that capacity.

The only questions argued are with reference to the third issue. We see no reason for differing from the Subordinate Judge in his finding as to non-payment of Rs. 1,700, and in the finding that there was no such extraordinary rain as to make the special clauses applicable. The finding with regard to this point is that there was really no payment and no valid discharge. The appeal is dismissed with costs.

JUDGMENT ON MEMORANDUM OF OBJECTIONS.*

It is admitted by the second defendant that a month after the arrangement made [475] between his lessors he became aware of it, and that in February 1892 the defendant had express notice of the same arrangement. The Subordinate Judge also in effect finds that the defendant was aware of it from the outset. But he observes there is no evidence to show that this defendant or his co-lessees assented to the arrangement and agreed to pay the rent to the plaintiff only, and according he holds that payments made to the first defendant are valid notwithstanding the arrangement. The Subordinate Judge is, in our opinion, mistaken in supposing that the assent of the lessees was necessary, that otherwise they were at liberty to disregard the arrangement. A payment made by a debtor to one of two joint-creditors, between whom it has been agreed that the other only shall receive the sum, cannot, when made with notice of the agreement and in defiance of it, be treated as a valid payment in discharge of the debt. (See *Phillips* v. *Clogett* (1)). Such a payment may properly be described as made in fraud of the person who was entitled to receive the money. The lessees, other than the second defendant, were his partners and must be held to be bound by the notice which he had. The plaintiffs have in their memorandum of objections claimed Rs. 4,590. They are entitled to the sum of Rs. 2,965, notwithstanding that on taking accounts between them and the first defendant the latter may prove to be entitled to some part of it. Each party will pay and receive proportionate costs The memorandum of objections is, therefore, allowed.

In appeal No. 186 of 1894, defendants 19 to 21 and heirs of defendant No. 13 deceased appealed against the judgment and decree of the Subordinate Judge in so far as it affected their interest.

Sankara Menon, for appellants.

Krishnasami Ayyar, for respondents.

JUDGMENT.†

The question is whether the appellants are liable on the rental agreements executed by four of the defendants, but not executed by the deceased

* In Appeal No. 179 of 1894. Ed. † In Appeal No. 186 of 1894—ED.

(1) 11 M. & W. 84.

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person whom they represent. It is not denied that the deceased was a partner, nor was it argued in the Court below that the executants had exceeded their powers in taking the leases There is satisfactory evidence that the deceased took part in the management of the affairs of the firm after the leases were taken By the agreement under which the partners [476] worked any one partner was empowered to take a lease and execute any necessary document, such documents being taken to be binding upon all the partners as if executed by them In result, therefore, it must be taken that, although the other members of the firm are not mentioned in the agreements, and did not execute them, it was intended that they should operate as if all the members were parties to them

We are unable to agree with the opinion expressed by Farran, J, in *Ragoonathdas Gopaldas* v *Morarji Jutha* (1) In the case cited by him (*Walters* v *Northern Coal Mining Company* (2)) it was sought to make the *cestui que trust* liable upon a covenant in a lease executed by the trustee There was no remedy at law, because the covenant was contained in a deed, and, according to the rules of English Law, no person who is not a party to a deed can be sued upon the covenant contained in it All that was held was that the landlord could not treat the *cestui que trust* as liable to him in equity on the ground of the relation between him and his trustee There is no relation of that character between the executants of the agreement in the present case and the deceased We know of no authority for the position maintained by Farran, J, that there is an exception in the case of leases from the general rule laid down in *Beckham* v *Drake* (3) The suggestion that in the case of a lease there is a transfer of property is met by the case of mortgage as to which there is no doubt that, although executed by one person, it may be binding upon the partner or others who have authorized the act (see *Juggeewun-das Keeka Shah* v *Ramdas Brijbookundas* (4)) There is nothing to show an intention to make the executants only liable and to exclude the liability of the other partners We must dismiss the appeal with costs.

The memorandum of objections is allowed

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19 M. 477.

[477] APPELLATE CIVIL

Before Sir Arthur J H Collins, Kt., Chief Justice and Mr Justice Benson.

RATNAGIRI PILLAI (*Defendant*), *Petitioner* v SYED VAVA RAVUTHAN (*Plaintiff*), *Respondent* * [11th and 15th September, 1896]

Jurisdiction—Civil Procedure Code, Section 17—Provincial Small Cause Courts Act —Act IX of 1887, Section 16

Where a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the *forum* in which to bring the suit

Where a plaintiff sued in a District Munsif's Court having jurisdiction, at the place where the money due under a contract was to be paid, there being no Small Cause Court having jurisdiction at such place

Held, that the jurisdiction of the District Munsif was not ousted by the fact that there was in existence at the date of suit a Small Cause Court having jurisdiction at the place where the contract was made

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* Civil Revision Petition No 123 of 1896

(1) 16 B 568 (574) (2) 5 De G M & G 6

(3) 9 M & W. 79 (4) 2 M I. A 487

1896 SEP. 15.

APPELLATE CIVIL.

19 M. 477.

PETITION under Section 622 of the Code of Civil Procedure praying the High Court to revise the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 369 of 1895, confirming the decree of T. Sadasiva Ayyar, District Munsif of Dindigul, in original suit No. 23 of 1895.

The facts of this case are fully set forth in the judgment of the High Court.

Krishnasami Ayyar, for petitioner,

Mr. *Subramaniam*, for respondent.

JUDGMENT.

The plaintiff sued the defendant on a promissory note. The parties reside at Palni and the money was to be paid there; but the note was executed at Dindigul, where the parties were on a temporary visit. The Subordinate Judge of Madura (West) has small cause jurisdiction over Dindigul, but not over Palni. One and the same District Munsif has ordinary original jurisdiction over both Palni and Dindigul. The question for decision is whether the suit was triable by the District Munsif, or whether it was triable exclusively by the Small Cause Court. [478] The District Munsif found that it was triable by the District Munsif, and this finding was upheld by the District Judge on appeal. The defendant asks us to revise the proceedings under Section 622 of the Code of Civil Procedure on the ground that under Section 16 of the Small Cause Court Act IX of 1887 the District Munsif had no jurisdiction to entertain the suit.

Section 17 of the Code of Civil Procedure, as amended by Section 7 of Act VII of 1888, provides that, subject to the pecuniary or other limitations prescribed by law, suits such as the present shall be instituted in a Court within the local limits of whose jurisdiction (*a*) the defendant resides (*i.e.*, Palni), or (*b*) the cause of action arises, and in a suit like the present the cause of action, it is explained, arises at any of the following places, namely:—

(i) The place where the contract was made (*i.e*, Dindigul).

(ii) The place where the money due under the contract was to be paid or the contract performed (*i.e.*, Palni)

Thus, so far as the Code goes, the suit may be instituted at Palni if regard is had to the residence of the defendants, and at either Palni or Dindigul if regard is had to the place of origin of the cause of action. When a suit may be instituted in more than one of several Courts, it is a general principle of law that the plaintiff may choose the *forum* in which to bring his suit. In the present case the plaintiff elected to sue on the cause of action as one that arose at Palni and brought his suit accordingly in the District Munsif's Court, which alone has jurisdiction at Palni. The question, then, is whether Section 16 of the Small Cause Court Act IX of 1887 deprives him of the right given by the Code of selecting the place in which to lay the origin of the cause of action and renders it obligatory on him to file his suit in the Small Cause Court, having jurisdiction at Dindigul. We are of opinion that it does not do so. The section runs as follows:—

"Save as expressly provided by this Act or by any other enactment "for the time being in force, a suit cognizable by a Court of Small Causes "shall not be tried by any other Court having jurisdiction with in the local "limits of the jurisdiction of the Court of Small Causes by which the "suit is triable."

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Now, if the Small Cause Court had jurisdiction at Palni, there could be no question but that the suit must be tried by the Small Cause Court, and by that Court alone. But, as a fact, the Small [[479] Cause Court has no jurisdiction at Palni. In other words, it cannot try, or take cognizance of, any suit founded on a cause of action arising at Palni, but we have seen that, in the present case, the plaintiff founded his suit on a cause of action that arose at Palni. That suit, as founded by plaintiff, was not cognizable by the Small Cause Court, since it has no jurisdiction over Palni, and Section 16 of the Act is, therefore, no bar to the suit.

This conclusion, founded on the construction of the Acts, is, we may observe, in accordance with the dictates of public convenience in the present case. The fact that the small cause jurisdiction of the Subordinate Judge's Court of Madura (West), though extended by Government to the Dindigul taluk, has not been extended to the Palni taluk, is, no doubt, due to the fact that the latter is much further than the former from the Court of the Subordinate Judge, and there would be undue hardship in compelling suitors with small claims to go a long journey to Madura instead of the Court close at hand to enforce them. To oblige the plaintiff in the present case to file his suit in Madura rather than in Palni, would be to inflict on him a hardship which the Government desired to guard against. With these remarks we dismiss this revision petition with costs.

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19 M. 479.

APPELLATE CIVIL

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

MALLIKARJUNA AND OTHERS (*Defendants*), *Appellants* v. PATHANENI (*Plaintiff*), *Respondent* * [28th August, 1896]

Civil Procedure Code, Sections 562, 569, 578—Order of Remand—Irregularity affecting the merits.

Where a District Court reversed the District Munsif's decree and remanded the case for a revised finding on the merits.

Held, that this procedure was *ultra vires* and illegal.

[480] *Held further*, that as the irregularity might have affected the merits of the case, Section 578, Civil Procedure Code, was inapplicable.

[R., 28 C 324 (332) = 5 C W N 509, 28 M 437 (440) = 15 M L J 236, 32 M 83 (84) = 4 M L T 479; 12 C P L.R 119 (123); 14 Ind Cas 394 (395) = 11 M L T 69; 21 M L J 1063 (1071) = 10 M L T 437 = 12 Ind Cas 665.]

SECOND appeal against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 120 of 1894, reversing the decree of B. Rajalingam, District Munsif of Amalapuram, in original suit No. 128 of 1893.

This was a suit for the recovery of a dwelling site with past profits Rs. 2 and subsequent profits at Rs. 2 per annum and ground. The plaint alleged that the defendants Nos. 1 and 2 executed a mortgage of the suit property to the plaintiff's uncle Bapirazu in 1860 and gave him possession, that in 1867 the defendants sold the same to Bapirazu and that the lands

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* Second Appeal No. 646 of 1895.

1896 Aug. 28. — Appellate Civil. — 19 M. 479.

had been in his possession and in the possession of the plaintiff down to the year 1891 when they were usurped by defendants. The defendants denied the mortgage and sale and pleaded that they had always been in possession.

The District Munsif dismissed the suit holding Exhibit B, the mortgage of 1860 not proved and refusing to admit in evidence a certain decree on the ground that it was produced too late.

The District Judge remanded the case for a revised finding with a direction that the decree should be admitted. Thereupon the District Munsif admitted the document and passed a decree in favour of the plaintiff.

On appeal the judgment of the District Court was as follows:—

"Defendant's pleader states he has no instructions and no objection "has been filed by defendants to the Lower Court's finding.

On these findings the Lower Court's decree must be reversed and "plaintiff given a decree for the recovery of the suit property with costs "throughout. There was no evidence for plaintiff as to mesne profits."

The defendants appealed.

Mr. *J. G. Smith,* for appellants.

The lower appellate Court had no power to remand the case as the suit had not been decided on a preliminary point *Subba Sastri* v. *Bala, chandra Sastri* (1) and *Kelu Mulacheri Nayar* v. *Chendu* (2). The District Judge ought to have weighed the evidence himself. The effect of the Judge's procedure was to throw on the respondent the onus of supporting the Munsif's original judgment instead [**481**] of making the appellant show good cause for revising it. Section 578, Civil Procedure Code, cannot apply, as the appellants have been seriously prejudiced.

Sriramulu Sastriar, for respondent.

JUDGMENT.

We are of opinion that the order of remand was *ultra vires* and illegal, since the District Munsif had decided the case on the merits, not on a preliminary point. The proper course was for the District Judge to have himself admitted Exhibit B and to have considered its effect along with the other evidence in the case and to have then arrived at findings on the material issues. If further evidence was required, he might have called on the District Munsif to record it and certify it, or he might have himself admitted it, and he might then have considered it also before arriving at a finding on the issues (*Subba Sastri* v. *Balachandra Sastri* (1)).

We have considered how far the provisions of Section 578, Civil Procedure Code, should affect our procedure in this case. If we were satisfied that the District Judge did himself consider the evidence and did himself arrive at findings thereon, we should be inclined to hold that, under Section 578, Civil Procedure Code, the order of remand and the call for revised findings was merely an irregularity of procedure not affecting the merits and not, therefore, such as to require or to justify us in now remanding the case.

We, however, observe that in the present case the District Judge does not appear to have brought his mind to bear on the question whether the evidence did or did not justify the findings. He did not even state that he accepted them. He merely observed that no objection was taken to them, and that on those findings the decree of the Lower Court must be

(1) 18 M. 421. (2) 19 M. 157.

reversed. It may, perhaps, be that, if the District Judge had himself considered the evidence, he would have arrived at a different conclusion. The irregularity was, therefore, one which may perhaps have affected the merits of the case.

This being so, we shall follow the procedure adopted in the authority already referred to, and, setting aside the decree of the District Judge, we remand the suit to him for disposal according to law.

Costs of this appeal will abide and follow the result.

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19 M. 482 = 2 Weir 746.

[482] APPELLATE CRIMINAL

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS v. RARU NAYAR AND ANOTHER.*

[12th August, 1896.]

Confessions of co-accused—Corroboration—Material particulars—Evidence Act, Section 30—Abetment—Penal Code, Section 109.

Where the only evidence against two prisoners accused of murder directly implicating them in the commission of the crime consisted of confessional statements made by them before the committing magistrate, which were subsequently retracted, and the statements in such confessions were corroborated in material particulars by other evidence on the record.

Held, that the evidence was sufficient to support a conviction.

[R., 13 C.P.L.R. 107 (109).]

CASE referred by H. H. O'Farrell, Sessions Judge of South Malabar, for confirmation of the sentence of death passed on the prisoners in sessions case No. 28 of 1896.

The facts necessary for the purposes of this report appear sufficiently from the judgment of the High Court.

The Acting Public Prosecutor (Mr. *Subramania*), for the Crown.

Sivasami Ayyar, for the accused.

JUDGMENT.

Independently of the confessions, the evidence for the prosecution is admittedly not sufficient to warrant the conviction of either of the accused. But, if the confessions can be acted on as true, they do, if taken together (one prisoner's with the other's) conclusively prove the guilt of both. We see no reason to believe they were not true for the chief reason that they were not coerced, for, even when the prisoners retracted them, they did not allege that the confessions had been extorted from them by the police nor is there any allegation that they were obtained by inducement. In withdrawing their confessions the prisoners still admitted that they obtained a gun on the night of the murder from the boy Velu Kutti, who, as sixth witness confirms their statements, thereby corroborating their confessions in a most material particular. The fifth witness also corroborates the two prisoners in stating that they were in company together on the [483] night of the murder and proceeded together to get the gun from the sixth witness. The prisoners have given no evidence of what they wanted the gun for, and what they did with it—if they did not want it, and did not use it for killing the deceased. This is a strong circumstance against

* Referred Trial No. 44 of 1896.

1896 AUG. 12. — APPELLATE CRIMINAL. — 19 M. 182 = 2 Weir 745.

them which they have failed to explain. As to motive, it is shown that the deceased was at enmity with the first prisoner, who was also the person most interested in his death, circumstances going to confirm the truth of his confession that he was desirous of injuring the deceased. The second prisoner had no personal interest in the murder of the deceased, but both he and the first prisoner, in their confessions explain how he came to be hired to commit the offence for a pecuniary consideration. We have not overlooked the fact that only one of the two prisoners could have fired the fatal shot, and that which of the two did it cannot be determined upon the mere confessions. But there is no doubt they were both present at the commission of the crime, aiding and abetting each other; consequently both are liable to be convicted for the substantive offence of murder. We therefore agree with the Sessions Judge and confirm the conviction and sentence of both prisoners.

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19 M. 483 = 1 Weir 29, 298.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS *v.* DUMA BAIDYA AND OTHERS.*
[4th September, 1896.]

Penal Code, Sections 34, 56, 302—*Murder—Sentence of penal servitude.*

Where three prisoners assaulted the deceased and gave him a beating in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death:

Held, that in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder.

The punishment of penal servitude is only applicable to Europeans and Americans

[**Diss.**, 1 L.B.R. 232 (236); **F.**, 29 A. 282 = 4 A.L.J. 207 = A.W.N. (1907) 51 = 5 Cr. L.J., 130; U.B.R. 1907, 3rd. Qr. Penal Code, p. 5 = 14 Bur. L.R. 264; **Rel.**, 14 Cr. L.J. 241 (244) = 19 Ind. Cas. 497 = 16 O.C. 19.]

APPEAL against the conviction and sentence of H. G. Joseph, Sessions Judge of South Canara, in sessions case No. 8 of 1896.

[484] In this case the prisoners were charged with having on 10th February 1896 at Mangalore lain in wait for one Koraga (with whom the first accused had a quarrel two days before) and assulted him. They left him in a state of unconsciousness, from which he never recovered, dying in hospital two days later.

The evidence of two witnesses (prosecution second and third witnesses) who were with the deceased at the time of assault proved that first accused first struck deceased a heavy blow on the head with a bludgeon; that second accused struck him across the chest with a lighter cane; and that when he fell under these blows, third accused put his foot on him and pummelled him.

The medical evidence showed that the cause of death was the blow on the head which fractured the skull and ruptured one of the meningeal arteries.

The Sessions Judge, in finding all three prisoners guilty of murder, remarked as follows:—

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* Criminal Appeal No. 253 of 1896.

"There is no ground for making any distinction between the three "persons concerned in the commission of the offence, and since the blow "struck by the first accused was one which must have in all human pro- "bability smashed the head of the deceased man, the three must be held "to have acted with the knowledge that death was likely to result from "their action."

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He therefore convicted the three prisoners and sentenced them to penal servitude for life.

Narayana Rau, for appellants.

The Acting Public Prosecutor (Mr *Subramaniam*), for the Crown.

JUDGMENT

We have no reason to doubt that the three appellants made an attack on the deceased Koraga in the manner described by the first and third prosecution witnesses The effect of the blow given by the first appellant on the head of the deceased with a thick or 'bludgeon' was to cause his death, and we consider the first appellant was rightly convicted of murder. But the conviction of the second and third appellants for the same offence we cannot uphold There is nothing to show that there was a common intention on the part of all the three accused to inflict such injury as would cause death; and no such intention as regards the second and third accused can be gathered from the particular acts of violence proved against them which in no way [485] contributed to the death of the deceased. Though the object of all was no doubt to give the deceased a beating, the second and third accused neither instigated nor participated in the fatal blow dealt by the first accused They cannot, therefore, be held responsible for the consequences of such act, and it is not easy to follow the reasons given by the Judge for holding these two persons also guilty of murder. We therefore alter the conviction of the second and third accused into one of voluntarily causing hurt under Section 323 of the Penal Code and convert the sentence passed upon them to one of four months' rigorous imprisonment The sentence passed by the Judge of 'penal servitude' for life on all the three accused was in itself illegal, as the punishment of 'penal servitude' is applicable only to Europeans and Americans, so that we must also alter the sentence passed on the first prisoner In lieu of the sentence of the Judge we sentence the first appellant to transportation for life and dismiss his appeal

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19 M. 485=6 M.L.J. 247.

APPELLATE CIVIL.

Before Sir Arthur J H Collins, Kt, Chief Justice, and Mr Justice Benson

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CHOCKALINGAM PILLAI AND OTHERS (*Defendants* 2 *to* 10, 13 AND 27 *to* 31), *Appellants*, v MAYANDI CHETTIAR (*Plaintiff*), *Respondents* [23rd and 24th July and 13th August, 1896.]*

Landlord and tenant—Ulavadai Mirasidars—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Civil Procedure Code, Section 584—Inference to be drawn from documents, question of law

In 1813 the manager of a temple gave a permanent lease of one-half of certain lands to C, the ancestor of the defendants 1 to 14, and the others half to N

* Second Appeal No 639 of 1895

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APPELLATE CIVIL.
19 M. 485 = 6 M.L.J. 247.

In 1820 N transferred his half share to V, the son of C. In 1831 V and S, the ancestor of the other defendants, addressed a petition to the Collector, the then manager of the temple. In 1832 V and S executed a fresh lease and a security bond in favour of the temple, in both of which documents V and S were described as Ulavadai mirasidars, that is, persons with an hereditary right to cultivate. There was no evidence adduced to prove for what purpose the lease [486] of 1832 was executed, but the defendants held possession as tenants from 1832 to date of suit:

Held, that the words 'Ulavadi mirasidars' used in the deeds of 1832 as describing the tenants denoted that they were persons with hereditary right to cultivate, and that the lease was therefore of a permanent nature:

Held also, that after the lapse of so great a period of time, the Court would presume under the circumstances, that the original grants were made for necessary purposes and were binding on the temple:

Held further, that the proper inference to be drawn from the terms of a document is a question of law within the meaning of Section 584, Civil Procedure Code and can be considered in second appeal.

[**Rev.,** 27 M. 291 (**P.C.**)=31 I.A. 83=14 M.L.J. 200=8 Sar. P.C.J. 587; **Rel.,** 4 Ind. Cas. 626 (629)=86 P.W.R. 1909; 9 Ind. Cas. 41 =9 M.L.T. 191=(1911) 1 M. W.N. 6 (11); **R.,** 22 M. 264 (267).]

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 82 of 1894, confirming the decree of T. Ramasawmi Ayyangar, Subordinate Judge of Negapatam, in original suit No. 1 of 1893.

The facts of this case were as follows:—

The plaintiff, as trustee of the temple of Kayarohanaswami at Negapatam, has brought this suit to eject the defendants from the possession of certain land in the village of Vadagudi, belonging to the temple and for mesne profits from date of plaint to date of delivery.

The lands in dispute belong to the temple referred to in the plaint. On the 10th January 1832, when the management of the affairs of the temple was exercised by the Government, Viddhachala Pillai, the ancestor of the defendants 1 to 14, and Subbayyan, the ancestor of the defendants 15 to 26, executed a muchilika (Exhibit A, a translation of which appears, in the judgment of the High Court) in favour of the then Collector of Tanjore undertaking to cultivate the lands from fasli 1241 and to pay annually to the temple Rs. 520-7-9½.

Plaintiff's case was that Vriddhachala Pillai and Subbayan and after their death, their descendants continued to pay the rent as reserved in the muchilika until fasli 1279, and from faslis 1280 to 1283, 205 kalams of paddy were paid every year in addition to the rent, and from faslis 1284 to 1292 the additional rent was raised to 350 kalams per annum, and it was paid together with the prescribed rent and subsequently the defendants allowed it to fall into arrears; that the lands are now capable of fetching an annual net profit of Rs. 1,500 to the temple; that on the 6th November 1889 a notice was given by the plaintiffs to the defendants demanding the payment of arrears in full and execution of a fresh lease-[487] deed at an enhanced rate of rent, and intimating that, if the defendants did not agree to his proposal, they were to quit the lands at the end of the fasli, but they sent no reply, though bound to give up the lands on demand, and that plaintiff is not willing to leave the lands any longer in their possession. Defendants 27 to 37 are impleaded as being in possession of a portion of the lands sought to be recovered.

The principal defence was that the entire lands set out in the plaint had belonged to the defendants' ancestors, who had given their mirasi right to the temple of Kayarohanaswami two hundred years ago, but

retained the permanent right of cultivation, which they and the defendants had enjoyed for a period of two hundred years, paying the Ayan and the Svamibogham rent to the temple, and they were not therefore liable to be ejected It was further contended that the muchilika contains no stipulation for eviction, and they are not in arrears, having paid away the rent until the end of the last fasli, that no additional rent was ever paid by them, and that the notice given by the plaintiff is not a proper notice to quit It is also contended that the revenue and the proprietary dues have been fixed in perpetuity

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APPELLATE CIVIL.

19 M. 485 = 6 M. L. J. 247.

The following issues, *inter alia*, were framed —

Whether under the terms of the muchilika of the 10th January 1832 Virddachala Pillai and Subbayyan were tenants from year to year or acquired a right of permanent occupancy

Whether defendants 1 to 26 allowed the rent to fall into arrears as alleged in paragraph 4 of the plaint

Whether the defendants aforesaid are liable to be ejected for nonpayment of the rent

Is the plaintiff entitled to enhance the rate of rent

Whether the notice to quit given by the plaintiff is a proper and legal notice

To what relief is plaintiff entitled

The Subordinate Judge held with regard to the first issue that the defendants had failed to prove that they had any title higher than that of cultivating tenants from year to year

As to the second and third issues he held that there was no proof that the rent was allowed to fall into arrears by the defendants Even supposing they were in arrears, they are not liable to [488] be ejected, there being no stipulation in the muchilika that non-payment of rent should work a forfeiture of the lease

As to the fourth issue he held that defendant's tenure being one from year to year, plaintiff was at liberty to enhance the rent (*Chockalinga Pillai* v *Vythealinga Pundara Sunady* (1) and *Thiagaraja* v *Giyana Sambandha Pandara Sannadhi* (2), and as to the fifth issue he said " that " the notice given by the plaintiff contained an intimation that defendants " should pay the enhanced rate of rent or quit the land at the end of the " fasli It is argued for the defendants that notice to quit should not " contain a demand for enhanced rate of rent, and in support of the argu- " ment the ruling in *Mohumaya Goopta* v *Nilmadhab Rai* (3) was cited " In that case it was merely doubted if such a notice was a good notice " and the question was not authoritatively settled in one way or the " other. But such a notice was held to be valid in *Bokronath Mundul* " v *Binodh Rum Sein* (4) and *Janoo Mundur* v *Brijo Singh* (5) The " issue must, therefore, be found in favour of the plaintiff " He accordingly decreed that plaintiff was entitled to eject the defendants and recover the land sued for

On appeal the District Judge agreed with the Lower Court, and with regard to the first issue he held that the trustee of the temple in 1813 and 1820 had no power to grant a permanent lease of the temple lands His judgment on this point is as follows · —

" Even assuming that Vriddhachala Pillai had been given a per- " manent right under Exhibits I and II and that his petition (Exhibit

(1) 6 M.H.C.R. 164 (171) (2) 11 M. 77. (3) 11 C 533 (535).
(4) 10 W.R.F.B. 33 (5) 22 WR 548

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"H) could be explained away, and it was in consequence of that permanent right that he was granted the lease A, the question arises whether the trustee of the temple for the time being in 1813 and 1820 could have made a permanent alienation of the rights of cultivation. In a Privy Council case *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (1), it has been held (p. 275) 'that to create a new and fixed rent for all time, though adequate at the time in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in' the trustee. That ruling as pointed out in *Tayubunnissa Bibi* v. *Kuwar Sham Kishore Roy* (2), is of course subject to the modification that such a permanent [489] "alienation might be made by a trustee under special circumstances of necessity Now in this case the consideration stated for the grant of the permanent lease (Exhibit I) is that the lessees should make the village prosperous by building houses in the said village and living therein and apparently effecting improvements on the land demised. These considerations would no doubt be good ground for the grant of a lease for a long term, but they are not adequate for granting a lease for all time. I must, therefore, hold that even if Vriddhachala Pillai had had a permanent right granted to him previous to the lease (Exhibit A) and that Exhibit A recognized that right and continued it it was not a valid grant. If the previous permanent leases (Exhibits I and (II) are invalid, as I find them to be, the Collector also in the position of trustee had no power to create a permanent tenancy himself for the same reason which I have given in regard to the previous leases."

The appeal was accordingly dismissed with costs.

Sankaran Nayar, for appellants.

Notice to quit was necessary before ejecting the defendants. *Adbulla Rawutan* v. *Subbarayyar* (3), *Subba* v. *Nagappa* (4), *Unhamma Devi* v. *Vaikunta Hegde* (5), *Mohamaya Goopta* v. *Nilmadhab Rai* (6). Transfer of Property Act, Section 111 (*h*). As to the power of the trustees to grant Exhibits I, II and Exhibit A, raised by the District Judge in the appeal, the question is barred by limitation under Article 144, Limitation Act. *Sankaran* v. *Periasami* (7), *Nilmony Singh* v. *Jagabandhu Roy* (8), the question is also barred under Article 134, Limitation Act. *Yesu Ramji Kalinath* v. *Balkrishna Lakshman* (9), and second appeal 613 of 1878 of this Court.

Ramachandra Rau Saheb, for respondent.

Permanent tenancy under Exhibits I and II was abandoned. Exhibit A is merely a tenancy from year to year. It is similar to the document in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (10), which was held not to create a permanent tenancy. The onus of proof that the tenancy is more than a tenancy from year to year is on the appellants and they have not discharged it. [490] *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (11), *Ranganasary* v. *Shappani Asary* (12), is distinguishable. All the pagodas in Tanjore were taken possession of by Government in 1812. *Ramiengar* v. *G. Pandarasannada* (13).

Sankaran Nayar in reply—If Exhibits I and II were not surrendered under H, there is nothing in A to take away the perpetual tenure. *Chunibati Koeri* v. *Harrington* (14). The inference to be drawn from the

(1) 13 M.I.A. 270. (2) 7 B.L.R. 621. (3) 2 M. 346.
(4) 12 M. 353. (5) 17 M. 218. (6) 11 C. 533.
(7) 13 M. 467. (8) 23 C. 536 (545). (9) 15 B. 583.
(10) 6 M.H.C.R. 164. (11) 11 M. 77. (12) 5 M.H.C.R. 375.
(13) 5 M.H.C.R. 52 (14) 18 I.A. 27.

construction of a document is a question of law and the High Court in second appeal can therefore interfere with the construction put upon it by the Lower Courts. *Ram Gopal* v. *Shamskhaton* (1) It is essential as part of the plaintiff's case to prove that proper notice to quit has been given, so the plaintiff cannot plead he has been misled by the defence Exhibit A was executed because a money rent was not fixed under Exhibits I and II.

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JUDGMENT

The plaintiff, as trustee of a certain temple at Negapatam, sued to recover from defendants certain lands which the plaintiff alleged they held under the temple as tenants, from year to year, under a lease (Exhibit A) The defendants claimed to have a right of permanent occupancy in the lands, subject only to payment of rent to the temple

Both the Lower Courts have decreed for plaintiff

Against those decrees the defendants now appeal

The defendants claimed to have had permanent occupancy rights for the past two hundred years, but of this no proof was given It is, however, clear from Exhibit I that, so long ago as 1813, the then manager of the temple gave a permanent lease of one-half of the lands to Chokkanatha Pillai, an ancestor of the defendants 1 to 14, and of the other half of the lands to Nalla Pillai It is also clear from Exhibit II that in 1820 Nalla Pillai transferred his half share to Vriddhachala Pillai (the son of Chokkanatha Pillai), and that the manager of the temple then confirmed him as permanent lessee of the whole of the lands On the 4th December 1831, this Vriddhachala Pillai and one Subbayyan, the ancestor of defendants 15 to 26, addressed a petition, (Exhibit H), to the Collector of Tanjore, who was then the manager of the temple It runs as follows:—

[491] "To N W Kindersely, Esquire, Principal Collector of Tanjore "—*Darkhast* presented by Vriddhachala Pillai and Subbayyan of Vadagudi, who are Purakudies of the Tarap land situated in that village "belonging to Kayarohanaswami of Negapatam attached to the Mahanam "of Anthanapettai, Kivalur taluk We offer to cultivate for fasli 1241 "the 20 velis 5 mahs and 40¾ kulies of nanja land and 6 mahs and 81 "kulies of punja land situated in the aforesaid village and to pay the Sircar "kist and 51 kalams of paddy as Syamibhogam to the temple for one year, "and also to furnish cash security for the payment We pray that "darkhast izara may be granted to us for one year" No reply to this petition is on record, but on the 10th January 1832 Exhibit A was executed by Vridhachala Pillai and Subbayyan It is an agreement by them to cultivate the plaint lands, and is in the following terms:—"We, "Vriddhachala Pillai and Subbayyan, Ulavadai (act of ploughing or right "to cultivate lands) mirasidars of Vadagudi, having agreed to cultivate "the said village Vadagudi according to the taram faisal (classification of "the lands) thereof, do hereby execute this taram muchilika to N. W. "Kindersley, Esquire, Principal Collector of Tanjore, under date 10th "January 1832. We have taken up for cultivation the following lands:— "Nanja lands yielding one crop a year, consisting of 107 numbers, "comprising 134 acres, 4964 kulies, equivalent to 20 velis, 5 mahs and 40¾ "kulies, and punja lands consisting of six numbers, comprising 2 acres "and 10 kulies equivalent to 6 mahs and 81 kulies, the total of nanja

(1) 19 I A 228 (229, 233).

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"and punja lands being 20 velis, 12 mahs and 21¼ kulies. According to "the pymash settlement made in fasli 1288, we bind ourselves to pay "Sircar in the presence of the pattadar the sum of Rs. 520-7-9¼ on account "of Ayan and Syamibhogam. If there should fall any arrears in so pay "ing, you shall realize the same by attaching and selling our private "property according to law. We shall never pay to any one even a cash "in excess of the said triva fixed for the lands mentioned in this muchilika. "If the pattadar, the village karnam and others should demand or collect "from us any sum in excess, we shall then and there lodge a complaint "to the huzur. If in any year we should plant betel, plantain trees, "sugar-cane or raise any garden products, such as tobacco, onion, garlic, "&c., with the Sircar water in the said village, we shall furnish the Sircar "with a true account of the same, and not only [492] pay the taram tirva "fixed for so much of the land as is cultivated with the said crops, but also "pay tirvajasti in those years. If we should cultivate waste and poram-"boke lands, &c., in addition to those mentioned in the muchilika, we "shall pay the taram tirva fixed on such lands during the years in which "they may be cultivated."

(Here follow covenants to pay servants, execute repairs, &c.)

"If we should raise a second crop of the taladi in excess of the second "crop lands mentioned in this muchilika, we shall pay the tirva thereof "according to the rules of taladi. If perchance loss should be occasioned "in any fasli by drought or inundation through accident, the Sircar should "inspect the same and grant a reasonable remission according to mamul. "We shall pay the melvaram of the nanja lands of the said village accord-"ing to the permanent taram tirva which has been fixed at $8\frac{1}{16}$ fanams per "kalam. If this price should either rise or fall, the gain or loss thereby "accruing is ours and the Sircar shall have nothing to do with it. As the "permanent tirva has been fixed, and as we have assented thereto as stated "above from fasli 1241, we shall pay to the Sircar the taram tirva fixed "on each numberwar field. Thus do we execute this taram muchilika."

It is to be observed that in this document the executants are described as 'the cultivating mirasidars' of the village. On the day after Exhibit A was executed, the executants executed a security bond (Exhibit VII) in which they are again described as 'the cultivating mirasidars' of the village, and it is recited that they have taken the land permanently on 'Darkhast izara.' The rights of the parties admittedly depend upon the construction of these documents and the inferences that are to be drawn from them. The Courts below have held that Exhibit H shows that for some reason or other, not now known, the defendants' ancestors had lost, or had abandoned their rights under Exhibits I and II, and that their rights now must be held to have originated with, and to depend solely on the lease of 1882 (Exhibit A). They held, on the authority of the decision in *Chockalinga Pillai's case* (1) that Exhibit A was merely a lease from year to year, and might be terminated at the end of any fasli. The learned Judge of the Lower Appellate Court further held that, even if Exhibit H could [493] be explained away, and if Exhibit A were executed in consequence of the defendants' ancestors having the rights granted under Exhibits I and II, still the latter would be invalid on the ground that a manager of a temple could not alienate temple lands by permanent lease in the absence of proved necessity for such alienation.

(1) 6 M.H.C.R. 164.

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We are unable to accept these conclusions; but, before discussing the documents, it is necessary to notice a contention that was strongly pressed upon us by the respondent's vakil. That contention is that both Courts have found that Exhibit H shows that when it was written the defendants' ancestors had lost or abandoned their permanent rights under Exhibits I and II, that that finding is one of fact, and that it is not open to this Court in second appeal to consider whether that finding is right or wrong. If the inference to be drawn from the document were, in truth, a finding of fact, we should consider ourselves bound in this second appeal by the finding of the lower appellate Court, however unsatisfactory it might be *Ramratan Sukal* v. *Mussumat Nandu* (1), but the finding as to the inference to be drawn from Exhibit H is one of law, not of fact. It is not any fact that is in question, but the soundness of the conclusion drawn from the terms of the document. This is a matter of law, and, as such, it is a proper subject for consideration in second appeal *Ram Gopal* v *Shamskhaton* (2).

The learned District Judge has pointed out that Exhibit A in the present case is (with one important exception to be presently noticed) in exactly the same words as the document which this Court in *Chokkalinga Pillai's* case (3) held to be a lease from year to year. That case has been repeatedly followed by this Court, and we do not question its authority, but in our opinion it is inapplicable to the facts of the present case. In *Chokkalinga Pillai's* case (3) the tenancy began under the lease, and all that that case decided was that, when a tenancy rests on contract only, the duration of the tenancy is regulated by the terms of the contract, express or implied, and that neither the Rent Act nor the Regulations operate to extend its duration, *Krishnasami* v *Varadaraja* (4). In the present case we think there are sufficient grounds for finding that the tenancy began not under Exhibit A, but under Exhibit [494] I, that Exhibit H is not sufficient to prove that the tenancy under Exhibits I and II was ever determined, and, finally, that the transaction evidenced by Exhibit A was not a new lease, but a confirmation of the lease under Exhibits I and II, with a modification as to the mode of paying the rent.

We have already referred to the fact that Exhibit A in the present case differs in an important particular from the corresponding document in *Chokkalinga Pillai's* case (3). The difference is this, *viz*, that in Exhibit A the executants are described as 'Ullavadai mirasidars,' that is, as persons with an hereditary right to cultivate. The Courts below have said that this description is inapplicable to Subbayyan, as he was not a lessee under Exhibits I and II, and they, therefore, treat the description as of little importance; but it seems to us that the description is applied to both the executants, because all the land dealt with in the lease was the subject of permanent rights of cultivation under Exhibits I and II and when Vriddhachala Pillai who had those rights under Exhibits I and II allowed Subbayyan to join him in executing Exhibit A, the description was applied to him also in order to mark the character of the tenure on which the land was held. Turning now to Exhibits I and II, it is to be observed that the very same description of the tenure occurs in the operative words of those documents by which the permanent tenure was created, "you, your sons and grandsons shall, for all time to come, enjoy "the land from generation to generation by 'right of Ulavadi

(1) 19 I.A. 1. (2) 19 I A. 228 (231) (3) 6 M.H.C.R., 164. (4) M. 354

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" Kani.' " This right of ' Ulavadi Kani ' originated in the grants evidenced by Exhibits I and II, for prior to Exhibit I, Chokkanatha Pillai was a resident in another village, but under Exhibit I he was brought with a following of cultivators to the village of Vadagudi belonging to the temple to build houses there and cultivate the temple lands. When, then, we find that the right of ' Ulavadi Kani ' was created under Exhibits I and II, and that the grantees under those documents are, a few years afterwards, when executing Exhibit A in regard to the very same lands, described as ' Ulavadi mirasidars,' the inference is strong that the tenure under Exhibit A was intended to be the same as under Exhibits I and II. Nor is this all. In the security bond (Exhibit VII) executed the next day the same description [495] of the executants as ' Ulavadai Mirasidars ' is given and the transaction evidenceed by Exhibit A is recited as a taking of the land ' permanently on darkhast lease from fasli 1241.' Lastly, we find that for the next sixty years the defendants and their ancestors enjoyed the lands on the strength of those documents. The question then naturally suggests itself, what was the occasion for Exhibits H and A if there was already an existing permanent tenancy under Exhibits I and II. The answer is, we think, to be found in the fact that under Exhibits I and II the rent was to be a share of the produce paid in kind, *viz.*, 35 kalams in every 100 kalams nett, whereas in Exhibit H an offer is made to pay not a percentage share of the crop, but a fixed quantity, *viz.*, 51 kalams, and in Exhibit A it is agreed that the rent shall be fixed permanently in money at Rs. 520 each year. It is well known that the English Revenue authorities always preferred a fixed rent to a share of the produce, and constantly aimed at obtaining a fixed rent paid, if possible, in money, rather than in kind. Exhibit H stands by itself, and we have not before us either the order passed upon it, or any correspondence which took place prior to it; but in Exhibit VIII, dated the 14th February 1832, the Collector, in writing to the Tahsildar regarding this land, refers to a report of the Tahsildar, dated the 18th January 1832, in which that officer reported that Venkatachala Pillai and Subbayyan had ' according to order ' applied to cultivate the plaint land for one year at a fixed rent of 51 kalams of paddy. It would appear from this that when the temple came under the Collector's management, he issued some order requiring or urging the tenants to agree to fix the rent on their lands instead of letting it depend on the varying outturn from year to year. Exhibit H appears to have been the proposal made by Vriddhachala Pillai and Subbayyan in reply to this order, but they carefully restricted their offer to one fasli, and wished still to pay in kind as they had been accustomed to do. What negotiations took place after this we do not know, but that some negotiations took place seems to be clear, for Exhibit A cannot have been executed as a compliance with the proposal in Exhibit H. All the expressions used in Exhibit A indicate that the parties intended the arrangement to last for many years, whereas Exhibit H contains a proposal for one year only, and the rent offered in Exhibit H is in kind, while that finally agreed to [496] in Exhibit A, six weeks later, is a sum permanently fixed in money. Thus Exhibits H and A do not indicate that the rights under Exhibits I and II had been lost or abandoned, but rather that they had been confirmed with a modification by the substitution of a fixed money rent for percentage share of the crop. That the original grants remained in force is rendered almost certain from the fact that the original documents evidencing the grants

have remained in the hands of the grantees, and there is not before us a trace of any evidence in the temple or revenue accounts or otherwise to suggest that the land has ever been in the possession of any one but the grantees during the eighty years which have elapsed since the date of the first grant The Lower Appellate Court has, however, held that, even on the above finding as to the documents and the transactions evidenced by them, the defence must fail, inasmuch as the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation That no doubt is the ordinary rule, but in the present case there are special circumstances from which the propriety of the alienation may rightly be presumed There is no suggestion that the grant under Exhibit I was tainted with any fraud It was made not to a member of the grantor's family, but to a stranger of different caste and from a different village In consideration of the grant being permanent, the grantee was to come with a following of cultivators and build-houses and cultivate the lands of the temple. It is well known that at the time when the grant was made the country was but slowly recovering from the depopulation and impoverishment resulting from centuries of internecine war, and the difficulty generally was not to provide land for the cultivators, but cultivators for the land To cultivate wet lands, as these were, requires capital as well as labour, and these the grantees were to supply. It may well be that the trustee of th temple could not arrange for the cultivation of the temple lands on less onerous terms than those agreed to That the terms were fair may be presumed from the fact that they were confirmed in 1820 (Exhibit II) and again in 1832 (Exhibit A) by the Collector, and have remained in force now for eighty years In these circumstances, we do not think it is reasonable or equitable to throw on the defendants the onus of shewing that the original grants were for a necessity binding on the temple. We think that, after so [497] great a lapse of time and under the circumstances which we find in this case, such necessity may rightly be presumed

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19 M. 485 = 6 M. L. J. 247.

The result of our findings, then, is that the grants under Exhibits I and II are valid and still in force, and that the plaint land is still held under those grants as modified by Exhibit A

On these findings the plaintiff's suit must fail, and it is unnecessary for us to discuss the pleas of limitation and want of notice raised by the appellants.

we reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout

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19 M. 497 = 6 M.L.J. 90.

APPELLATE CIVIL.

Before Mr Justice Subramania Ayyar.

NARAYANASAMI (*Petitioner*), *Appellant* v KUPPUSAMI (*Counter-Petitioner*), *Respondent* * [30th March, 1896]

Succession Certificate Act—Act VII of 1889, Section 7—Joint certificate legal

It is not illegal to grant a joint certificate to two persons who claim adversely to each other to be entitled to collect the debts due to the estate of the deceased under Succession Certificate Act VII of 1889

[R., U B R Civil, 1897—1901, 563.]

* Appeal against Order No. 175 of 1895.

1896 MARCH 10. — APPELLATE CIVIL. — 19 M. 497 = 6 M.L.J. 90.

APPEAL against the order of T. M. Harsfall, District Judge of Tanjore, in civil miscellaneous petition No. 299 of 1895.

A petition was presented under the Succession Certificate Act (Act VII of 1889) by one Narayanasami Pillai, praying that a certificate might be granted to him to collect the debts due to one E. R. Sattaya Pillai, deceased, the adoptive father of petitioner.

The petition was opposed by one Kuppusami, the alleged adopted son of one Nagalinga Pillai, deceased, who was the undivided brother of E. R. Sattaya Pillai.

The District Judge ordered a joint certificate to issue in the name of both.

Petitioner appealed.

Sundara Ayyar, for appellant.

Krishnasami Ayyar, for respondent

JUDGMENT.

[498] The first contention on behalf of the appellant was that the debt mentioned in the appellant's application for the certificate was the property of the appellant's father Sattaya Pillai. But, as Sattaya Pillai, the appellant, and the respondent were members of an undivided family, the presumption is that the debt was one due to the joint family, and there is nothing on the record to rebut this presumption.

The next contention was that the Judge should not have directed the grant of the certificate in the joint names of the appellant and the respondent. No doubt the cases in *Shitab Dei* v. *Debi Prasad* (1) and *Lonachand Gangaram Marwadi.* v. *Uttamchand Gangaram Marwadi* (2) show that ordinarily certificates should not be granted to rival claimants jointly. But in the present case it is clear that the real object of the application for certificate was to raise questions as to the validity of the adoption of the respondent, a matter which was the subject of litigation for many years *Narayansami* v. *Kuppusami* (3) and which the appellant's vakil states is now also the subject of a suit brought to set aside the adjudications made in favour of the respondent. In these circumstances I do not think it proper to interfere with the order of the District Judge.

I reject the appeal with costs.

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19 M. 498.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

PERUMAL NAIK (*Defendant No.* 2), *Petitioner v.* SAMINATHA PILLAI AND OTHERS (*Plaintiffs Nos.* 1, 2, 4 *and* 5), *Respondents.** [13th and 17th March, 1896.]

Suit for dismissal of members of devastanam committee—Act XX of 1863, Section 16—Reference to arbitration—Powers of arbitrators.

Where a suit for dismissal of the members of a devastanam committee and damages was referred under Act XX of 1863, Section 16, to arbitrators who passed an award dismissing them as prayed and decreeing a portion of the damages claimed with interest:

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* Civil Revision Petition No. 136 of 1895.

(1) 15 A. 21. (2) 15 B. 684. (3) 11 M. 43.

[499] *Held*, that the Court had power to refer the matter to the arbitrators and award damages with interest provided the amount, inclusive of interest, did not exceed the amount claimed in the plaint 1896 MARCH 17.

[F., 11 M.L.J. 337=12 M.L.J. 431 (432).]

PETITION under Section 622 of the Code of Civil Procedure praying the High Court to revise the decree of W. Dumergue, District Judge of Madura, in original suit No. 26 of 1891. APPELLATE CIVIL.

This was a suit under Act XX of 1863 in which the plaintiffs sued for the dismissal of the members of the Palni devastanam committee 19 M. 498. from office, together with damages assessed at over Rs. 6,000 for losses incurred and alleged misappropriation by the defendants Under Section 16 of the Act the suit was referred for decision to arbitrators, with the following issues:—

(1) Whether there has been any misfeasance, breach of trust, or neglect of duty on the part of the committee members or of any of them in relation to the items severally set out in the schedule attached to the plaint?

(2) To what reliefs, if any, are the plaintiffs entitled?

The award passed by the arbitrators was that the defendants should be dismissed from office, that the first and second defendants should be directed to pay to devastanam Rs 3,212-4-0 as damages with interest thereon at the rate of 6 per cent. per annum from the date of the plaint to the date of realization, the same being made recoverable from them personally and also from their moveable and immoveable properties, and that all the three defendants should be directed to pay to the first, fourth and fifth plaintiffs the full costs of the suit with interest thereon at 6 per cent. per annum from date of decree to date of realization and bear their own costs

The District Court passed a decree in accordance with the terms of the award.

Defendant No 2 appealed

Ramachandra Rau Saheb, for petitioner

Subramania Ayyar, for respondent.

JUDGMENT

The learned vakil for the petitioner (second defendant) urged that the award of the arbitrators and the decree thereon were illegal in so far as they related to (*i*) the dismissal of the petitioner from his office as a member of the committee and (*ii*) the award of interest prior to the date of the plaint.

[500] Whether, if the contention were sound, the petitioner's remedy was not by appeal I refrain from determining, as I have come to the conclusion that the contention is unsound. Now with reference to the first point mentioned, *viz*, the dismissal from office, it was argued that it was not competent for the Judge to refer the point to the arbitrators, as it involved virtually a question of criminal punishment, which was for the Judge and not the arbitrators to deal with I however fail to see how the jurisdiction to remove a trustee exercised by the Civil Courts has any reference to crimes or their punishment In the first place it is a purely civil jurisdiction exercised by the Courts as ancillary to its principal duty to see that the trusts are properly executed (*Letterstedt* v. *Broers* (1)). Nor is it true that removal from office is decreed always as punishment

(1) L R 9 App Cases, 386.

1896 MARCH 17. — APPELLATE CIVIL. — 19 M. 498.

No doubt such relief is often granted when misconduct is proved. But, as pointed out by the Judicial Committee in the case above cited, a trustee may be removed even when no misconduct is established if the Court is satisfied that the continuance of the trustee would prevent the due execution of the trusts.

As to the second point the argument was that, inasmuch as the plaintiffs had not claimed interest prior to the date of the suit, neither the arbitrators nor the Judge had authority to award such interest. It is quite true that in the plaint schedule interest prior to the date of the suit is not specified as one of the items making up the amount claimed as damages sustained by the temple in consequence of the malversation committed by the petitioner and the other trustees. But, the sum awarded, including the interest in dispute, does not exceed that claimed as damages. And, except as fixing a limit beyond which recovery cannot be had, the averment of the amount of damages is not a material one (Sedgwick on Damages, Vol. III, Section 1260, 8th edition). I am therefore of opinion that it was quite competent to the arbitrators and the District Jndge to award to the temple the interest in question as part of the compensation due to it with reference to the amounts found to have been misappropriated. The petition fails and is dismissed with costs.

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19 M. 501.

[501] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

LAKSHMAKKA (*Defendant No. 1*), *Appellant v.* BOGGARAMANNA (*Plaintiff*), *Respondent.** [1st April, 1896.]

Hindu Law—Deed containing restrictions on inheritance invalid

A deed which attempts to create a new line of inheritance by excluding all heirs other than direct male heirs is contrary to Hindu Law and invalid

SECOND appeal, against the decree of W. H. Welsh, District Judge of Cuddapah, in appeal suit No. 6 of 1893, modifying the decree of T. Ethiraja Mudaliar, District Munsif of Proddatur, in original suit No 643 of 1891.

The plaint property orig'nally belonged to one Bachu Lakshmakka, who conveyed all her property to Lingana Ramanna, plaintiff's predecessor in title by Exhibit A, dated 25th September 1854, and died four days afterwards. On the occurence of her death Devisetti Subbarayadu, brother of the donor, took possession of all the moveable property belonging to the deceased and conveyed by her to Lingana Ramanna under Exhibit A. In order to induce Subbarayadu to give up the moveables Lingana Ramanna conveyed the plaint lands to Subbarayadu by Exhibit I, dated 9th November 1854, in which Lingana Ramanna, after giving a list of the property of Lakshmakka, sets forth a definite arrangement as to how the lands belonging to deceased should be divided between them and as to how her debts should be paid By this arrangement it was agreed that in consideration of Subbarayadu having given up certain property to Lingana Ramanna and agreeing to pay Lakshmakka's debts, he should always enjoy certain lands in Koilkuntla and Jammalamadugu taluks. Subsequently, on 5th December 1854, Subbarayadu executed another document

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* Second Appeal No. 407 of 1895.

B in Lingana Ramanna's favour by which he (Subbarayadu) agreed to hold the plaint lands for his life and his male heirs' lives, subject to Lingana Ramanna's right to succession and without right of alienation. The plaintiff claimed under Exhibit B, the [502] cause of action being that Subbarayadu's daughter-in-law, the first defendant, executed a deed of gift to the second defendant in 1890 and that her possession then became adverse.

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The District Munsif dismissed the suit, holding that Exhibit B, the basis of the plaintiff's title, was a forgery, but the District Judge, finding it to be genuine, gave a decree for the plaintiff with costs

Defendant No 1 appealed

Rama Rau, for appellant

Seshagiri Ayyar, for respondent

JUDGMENT

The plaintiff can only recover on the strength of his title-deed (Exhibit B) By that instrument Subbarayadu, the then owner, agrees to hold the property only so long as there is male issue in his family On failure of such issue he agrees to hand it over to Boggaramanna under whom the plaintiff claims. The document is somewhat obscure, but the meaning appears to be that Boggaramanna should take on failure of male issue at any time, however remote It is in fact an attempt to create a new line of inheritance by excluding all heirs other than direct male heirs This being so, the instrument is invalid The plaintiff must, therefore, fail We must reverse the decree of the District Judge and restore that of the District Munsif. Respondent must pay appellant's costs in this Court only.

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Abetment.

See CONFESSION, 19 M. 482

Acquiescence.

See CONTRACT, 17 M 275; 18 M 126

I.—Imperial Acts

Act XXXII of 1839 (Interest).

Transfer of Property Act—Act IV *of* 1882, *s* 88—*Mortgage—Interest* 'post diem'—The plaintiff sued in December 1891 upon a registered mortgage dated 1875, in which it was provided that interest should be paid at the rate therein mentioned, and that the principal should be repaid on 10th April 1880, but in which there was no provision for payment of interest *post diem* —*Held,* that interest *post diem* should be awarded under the Interest Act, 1839, at a reasonable rate *Semble* the amount so awarded would constitute a charge on the mortgage premises RAMA REDDI v APPAJI REDDI, 18 M 248=4 M L J 265 . 522

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(1) See CIV PRO CODE (ACT XIV of 1882), 19M 219

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(1) *Ss* 10 *and* 44—*Departmental punishment and prosecution under the Act* — In the absence of any rules framed by Government under s 10 of the Madras Police Act, a departmental punishment inflicted under that section is no bar to a prosecution under s 44 of that Act QUEEN-EMPRESS v FAKRUDEEN, 17 M 278=1 Weir 839 192

(2) *Ss* 21, 49—*Procession likely to cause breach of the peace—Powers of police—Removal of banners from persons in the procession* —A procession of Hindus carried certain, banners and the Superintendent of Police was of opinion that a breach of the peace would be occasioned if these banners continued to be displayed, and in good faith, for the purpose of preventing such breach of the peace, he took away the banners from certain persons in the procession —*Held,* that the action of the Superintendent of Police was not justified by Madras Police Act, 1859, ss 21, 49, and that he was accordingly liable for the trespass RANGANAYAKULU v PRENDERGAST, 17 M 37=3 M L J 276 25

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S 25—*Boundary Marks Act (Madras)—Act* II *of* 1884, *s* 9—*Suit to set aside decision of the Survey officer—Plea of limitation abandoned* —A suit filed on 21st April 1891 to set aside the decision of the Settlement officer under the Madras Boundary Acts passed on 15th September 1890 was dismissed by the Munsif as being time barred not having been brought within six months as provided by s 25 of Act XXVIII of 1860 This decision was reversed by the District Judge, who remanded the suit for disposal on the merits, holding that the production by the plaintiff of a copy of the judgment, dated 25th October 1890, raised a presumption that the suit was in time and shifted the burden of proof to the defendant to show that an earlier copy was granted to plaintiff or that the decision was pronounced in the plaintiff's presence Against this remand order there was no appeal At the re-hearing the question of limitation was not again raised, and the Munsif gave a decree on the merits An appeal was preferred to the District Court, but no mention was made of the question of limitation On appeal to the High Court *Held,* that the question of limitation had been put aside by the consent of the parties who desired to have the case decided on the merits, and that the appellant could not be allowed to fall back on this plea of limitation which he had abandoned in the Lower Courts R RANGAYYA APPA RAU v NARASIMHA APPA RAU, 19 M. 416 995

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Act XX of 1863 (Religious Endowments).

(1) *Regulation* VII *of* 1817, *s* 13—*Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary*—*Trusts Act*—*Act* II *of* 1882, *s.* 49.—A temple committed appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary must be exercised reasonably and in good faith, and, according to the principle, which is applicable to public trusts, embodied in s 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction SHEIK DAVUD SAIBA v HUSSEIN SAIBA, 17 M. 212=4 M. L. J. 48 .. 146

(2) *Ss* 3, 11—*Suit by manager for rent*—*Muchalkas granted by the committee*—Where the committee of a religious institution governed by Act XX of 1863 obtained muchalkas in its own name from the tenants of land belonging to the institution instead of in the name of its manager: —*Held,* that this fact constituted a mere irregularity and that a suit brought by the manager on such muchalkas is maintainable. KALYANARAMAYYAR v. MUSTAK SHAH SAHEB, 19 M 395 .. 980

(3) *S* 5—Where a hereditary trustee of a temple died and application was made by the Collector as Agent of the Court of Wards, in whom the management of deceased's estates, during the minority of the sons of the deceased had vested, to be appointed trustee on behalf of the said sons:—*Held,* that the case fell within s 5 of Act XX of 1863, and that the Court had jurisdiction to make the appointment. SOMASUNDARA MUDALIAR v. VYTHILINGA MUDALIAR, 19 M 285=6 M. L. J. 92 .. 904

(4) *S.* 12—*Suit by the Dharmakarta of a temple to recover possession of temple property*—The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution, unless he is precluded by any special law from exercising it There is nothing in the Religious Endowments Act to take away such powers. S 12 relates only to the rents of property transferred by Government to the committees of such institutions SANKARAMURTI MUDALIAR v CHIDAMBARA NADAN, 17 M. 143 .. 98

(5) *S.* 14—*Applicability of the Act*—In a suit, brought with the leave of the District Court under Act XX of 1863, to remove the trustees of a Hindu temple, it did not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer: —*Held,* that Act XX of 1863 was not applicable to the temple unless it was admitted or proved by evidence that the endowment was one which would have fallen under the provisions of Regulation VII of 1817 MUTHU v. GANGATHARA, 17 M. 95 .. 65

(6) S. 16—Suit for dismissal of members of Devastanam Committee—Reference to arbitration—Powers of arbitrators—See ARBITRATORS, 19 M. 498

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Railways Act—*Act* IX *of* 1890, *ss.* 72, 76—*Contract Act*—*Act* IX *of* 1872, *ss.* 151, 152, 161—*Liability of Railway Companies as bailees*—Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act. In a suit for damages occasioned by such a loss the plaintiff need not prove how the loss occurred. but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee. SESHAM PATTER v L. S. MOSS, 17 M. 445 .. 300

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Ss 22, 25—*No appeal*—*Crim. Pro Code, s.* 404.—There being no appeal from a conviction under Cattle Trepass Act, the High Court refused to revise the proceedings of the Lower Court ,under ss. 435, 438, Crim. Pro. Code, since there being evidence to support the conviction to adopt such a course would be to substantially allow an appeal. Imprisonment cannot be inflicted in default of payment of the compen-

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(1) S 4—'Civil Court'—Forest Act (Madras)—Act V of 1882, ss 2, 4, 10, 14—Claim to percentage of forest income—Jurisdiction of Forest Settlement Officer—Jurisdiction of Appellate Court—See ACT V OF 1882 (FOREST, MADRAS), 17 M 193

(2) *Ss* 4, 6—*Suit for malikana without certificate of Collector*—In a suit against the Rajah of Palghat and other members of his family for a declaration of the plaintiff's status as the third Rajah, and to recover a sum of money payable to him as such on account of his share of malkana, it appeared that the plaintiff had obtained no certificate under Pensions Act, 1871, s 6 —*Held,* that the suit was not maintainable ANDI ACHEN v KOMBI ACHEN, 18 M 187 479

Act XV of 1872 (Christian Marriage).

(1) *Ss* 3, 68—*Unauthorized marriage of a Christian child—Persons professing Christian religion*—The accused who was charged with having committed an offence under Indian Christian Marriage Act, S 68, was acquitted its appearing that the Christian whose marriage he purported to solemnize was a child of the age of three years The child had been baptized and her father was a Christian —*Held,* that the child was a person professing the Christian religion within the meaning of s 3 of the Indian Christian Marriage Act, and that the acquittal was wrong QUEEN-EMPRESS v VEERADU, 18 M 230=1 Weir 813 510

(2) *Ss* 5, 10, 12, 13, 38, 68, 70, 73—S, an Episcopally-ordained Priest of the Syrian Church, under the jurisdiction of the Patriarch of Antioch, solemnized two marriages according to Roman ritual without publishing or causing to be affixed the notices of such marriages required by Part S III of the Act. It was proved that S used the Roman ritual with the sanction of his Bishop who was appointed by the patriarch —*Held,* that having received episcopal ordination, was authorized to solemnize the marriages according to the rules, rites, ceremonies and customs of his church, and that it was not shown that a marriage solemnized with the Roman ritual under the sanction of the Bishop of the Syrian Church was not solemnized according to the rules, rites, ceremonies and customs of the Syrian Church —*Held,* further that Part III of the Act only applies to ministers of religion licensed under the Act and not to Episcopally-ordained persons CAUSSAAEI v SAUREZ, 19 M 273= 1 Weir 814 895

(3) *S* 68—*Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under s 5 of the Act*—A person who performs a ceremony of marriage according to Hindu form between a Native Christian and a Hindu commits an offence under s 68 of Act XV of 1872, unless he is authorized to solemnize marriages under s 5 of the Act QUEEN-EMPRESS v YOHAN, 17 M. 391=1 Weir 813 271

Act III of 1873 (Civil Court, Madras).

(1) *S.* 12—*Jurisdiction of Munsif's Court—Execution of decree of superior Court—Civ Pro Code—Act XIV of* 1882, *ss* 25, 223—As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by s 12 of the Civil Courts Act, but in the five cases mentioned in s 223 of the Civ Pro Code, special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure judgment-creditors in certain cases a special facility or convenience The condition as to the jurisdiction of Subordinate Court to which a suit can be transferred under s 25 of the Code of Civil Procedure is not laid down in s 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein, SHANMUGA PILLAI v. RAMANATHAN CHETTI, 17 M 309=4 M L J 91 214

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S. 12—*Suits Valuation Act—Act* VII *of* 1887, *s.* 8—*Suit for share of undivided property*—Persons entitled to a share in certain lands of a village only part of which was held in severalty, executed a mortgage of part of the lands due to their share. The mortgage contained a description of the land comprised therein by paimash numbers and admeasurement. The mortgaged property was brought to sale in execution of a mortgage decree and was purchased by the present plaintiff. The plaintiff now sued for the apportionment and possession of the share to which he was entitled, and stated the value of the suit to be the value of the share claimed by him *viz.*, Rs. 1,870, and not that of the entire property. The defendants were the mortgagors and the other persons interested in the land, their respective shares not having been ascertained and demarcated. *Held,* that the suit was within the jurisdiction of a District Munsif. CHAKRAPANI ASARI v. NARASINGA RAU, 19 M. 56 .. 744

(3) *S.* 28—*Civ. Pro. Code, s* 649—*Provincial Small Cause Courts Act—Act IX of* 1887, *s* 35 (1)—*Withdrawal of powers*—Under Madras Act III of 1879, s 28, a Munsif was invested with the powers of a Small Cause Court's Judge for the trial of suits cognizable by such Court up to Rs. 200 in value Subsequent to decree but prior to execution, his powers as Small Cause Court's Judge were withdrawn by notification in the Gazette:—*Held,* that application for execution must be made to the Court in which the Small Cause Court's jurisdiction vested at the date of the application ZEMINDAR OF VALLUR AND GUDUR v ADINARAYUDU, 19 M 445 .. 1016

Act III of 1874 (Married Women's Property).

S. 8—Insolvent Act (11 and 12, Vic., cap 21), s. 63—Insolvency of married woman—Property settled on her for seperate use without power of anticipation—Whether comprised in the vesting order or not—See INSOLVENT ACT, (11 AND 12, VIC., CAP. 21), 18 M. 19.

Act XIV of 1874 (Scheduled Districts).

Guardian and Wards Act—Act VIII of 1890, s 1, cl (2)—Scheduled District—Agency Tracts—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 18 M. 227.

Act XVIII of 1879 (Legal Practitioners).

Ss. 28, 29—*Remuneration by promissory note for past professional services rendered under oral agreements—Guardian and ward—Services necessary or manifestly beneficial*—A guardian executed a promissory note in favour of a vakil (the plaintiff) as remuneration for his past professional services rendered under oral agreements with him:—*Held,* that a suit upon the note was barred by ss. 28 and 29 of Act XVIII of 1879, and that, as there was no such necessity for the proceedings in question as to render the contract binding on the minors, no suit would lie against them. SUNDARARAJA AYYANGAR v. PATTANATHUSAMI TEVAR, 17 M. 306 .. 212

Act V of 1881 (Probate).

Succession Certificate Act—Act VII of 1889, *ss* 4, 17—*Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India*—A suit in British India by the executors of the will of a native of Cutch was dismissed, on its appearing that the plaintiffs were furnished only with probate issued from a Native Court, of which they produced a copy certified by the Political Agent of Cutch, and since stamped in accordance with the Court Fees Act, 1870:—*Held,* that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India under Act V of 1881 or a certificate under Act VII of 1889, but instead of dismissing the suit, the Court should have allowed time for the plaintiffs to have so completed their title to sue. MANASING v AMAD KUNHI, 17 M. 14 .. 10

Act XV of 1882 (Presidency Small Cause Courts).

(1) Ss. 6, 13, 33—See HIGH COURT, 18 M. 236.

(2) *Ss.* 22, 41—*Transfer of Property Act—Act IV of* 1882, s. 114.—The plaintiff, a landlord, relying on a provision in a lease, gave the

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defendants, his tenants, notice to quit Within seven days the defendants tendered rent, interest and costs The plaintiff, nevertheless, filed this suit to eject the defendants The defendants subsequently paid the full amount due into Court *Held,* that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under Chap VII, s 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under s 22 of that Act *Held,* on appeal, (1) that there having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under s 114 of the Transfer of Property Act, (2) that the suit not being cognizable by the Small Cause Court, s 22 of Act XV of 1882 did not apply, an application under chap VII of that Act not being a suit under s 22 thereof KRISHNASAMI CHETTI v THE NATAL EMIGRATION BOARD, 17 M 216=4 M L J 70

(3) *S 37—Powers of Full Bench of Presidency Small Cause Court—Question of fact*—One of the Judges of the Presidency Small Cause Court in a suit tried by him delivered judgment for the plaintiff The defendant made an application to the Full Bench under the Presidency Small Cause Courts Act, s 37, and the Court arrived at the conclusion that the judgment proceeded on a misappreciation of the evidence and reversed the decree —*Held,* by *Collins, C J,* and *Shephard, J* (*Best, J,* dissenting), that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the jurisdiction conferred by Act XV of 1882, s 37, as the case was one on which different minds might not unreasonably have come to different conclusions. SADASOOK GAMBIR CHUND v KANNAYYA, 19 M 96 772

(4) *S 69—Jurisdiction—Divisible contract*—Where a contract provided for delivery of goods in two monthly shipments by the plaintiffs and the defendants refused to take delivery or pay for either of the shipments of the goods in accordance therewith and it appeared that the total amount of the damages sustained by reason of the two breaches alleged, if added together, exceeded Rs 2,000, whereas if taken separately they were respectively less than that amount The contract provided that each shipment was to be treated as a separate contract —*Held,* that the plaintiff was entitled to bring two separate suits for the damages sustained in respect of each shipment, and that therefore the Presidency Small Cause Court had jurisdiction. VOLKART v SABJU SAHEB, 19 M 304 . .

Act VII of 1887 (Suits Valuation).

(1) S 8—Suit for share of undivided property—Civil Courts Act (Madras) —Act III of 1873, s 12—See ACT III OF 1873 (CIVIL COURTS, MADRAS), 19 M. 56

(2) S 11—Hindu Law—Property excluded from partition—Limitation—See HINDU LAW (PARTITION), 18 M 418

Act IX of 1887 (Provincial Small Cause Courts)

(1) Ss 25, 27—Letters Patent of the High Court, s 15—Appeal—District Municipalities Act (Madras)—Act IV of 1884, ss 53, 59, 60—Profession tax—Trader—See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 17 M 100

(2) S 35 (1)—Civ Pro Code, s 649—Withdrawal of powers—Civil Courts Act—Act III of 1872 (Madras), s 28—See ACT III OF 1873 (CIVIL COURTS, MADRAS, 19 M 445

(3) Sch. II, art 3—*Karnam in a zemindari—Officer of Government*—The plaintiffs being the lessees of a settled zemindari brought a suit in a Small Cause Court against a karnam in the zemindari to recover damages sustained by reason of the defendant's default in keeping certain accounts, &c —*Held,* that the karnam was not an officer of Government, and that the suit was maintainable under the Provincial Small Cause Courts Act ORR v NEELAMEGAM PILLAI, 18 M 395 . . 624

(4) *Art 13—Suit for kattubadi and karnam's emoluments—Civ Pro Code —Act* XIV *of* 1882, *s* 586*—No second appeal.*—Where plaintiff sued for

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arrears of kattubadi and karnam's emoluments, the value of the suit being less than Rs. 500:—*Held,* that kattubadi and karnam's emoluments are neither a charge on or interest in immoveable property, and that no second appeal lay. MULLAPUDI BALAKRISHNAYYA v VENKATANARASIMA APPA RAU, 19 M. 329 .. 935

(5) *Art.* 18—Suit relating to a trust—Hindu Law—Stridhanam—Gift, construction of—See HINDU LAW (STRIDHANAM), 18 M. 252.

(6) *Cl.* 35 (*i*)—*Jurisdiction—Whether obstruction of a water course amounts to 'diversion' within the meaning of cl* 35 (*i*).—If by obstruction the flow of water is diverted from a plaintiff's lands, such obstruction amounts to diversion within the meaning of cl. 35 (i) of sch. II of Act IX of 1887. PERIAKARUPPAN v. PALANIANDI, 18 M 28 .. 369

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(1) S. 4—Contract Act—Act IX of 1872, ss. 45, 263—Suit by surviving member of firm alone—Suit by surviving partner and heir of deceased partner—See CONTRACT ACT (IX OF 1872), 17 M. 108.

(2) *S* 4, *sub-s* (2)—*Debt—Unliquidated claim*—X, a Hindu, left some sheep with Y, who failed to return them. X having died, his widow applied for a succession certificate to enable her to sue Y for damages for wrongful detention of the sheep:—*Held,* that no debt was owing by Y to X within the meaning of the Succession Certificate Act, s. 4, sub-s (2) SUBBANNA v. MUNEKKA, 18 M 457=5 M.L J. 61 .. 668

(3) Ss. 4, 17—Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India—See ACT V OF 1881 (PROBATE), 17 M. 14.

(4) *Ss* 6, 19—*Appeal.*—Where a minor petitioner represented by the Court of Wards applied for a succession certificate under Act VII of 1889, and the District Court granted the certificate, but ordered security to be given by the Court of Wards:—*Held,* that no appeal lay from the order requiring security RAMA REDDI v. PAPI REDDI, 19 M 199 .. 843

(5) *S.* 7—*Joint certificate, legal*—It is not illegal to grant a joint certificate to two persons who claim adversely to each other to be entitled to collect the debts due to the estate of the deceased under Succession Certificate Act VII of 1889 NARAYANASAMI v KUPPUSAMI, 19 M. 497=6 M.L J. 90 .. 1051

(6) *S* 7 (3)—*Power to grant certificate to applicant if he has the best* prima facie *title thereto—Necessity for some inquiry prior to such a grant*—The intention of sub-cl. (3) to s. 7 of the Succession Certificate Act is not to save the Court the trouble of making any inquiry at all where the applicant is not heir to the deceased, but it is to allow the *prima facie* title to the certificate to prevail when a question of law or fact arises on enquiry too difficult to be determined in a summary proceeding. SIVAMMA v SUBBAMMA, 17 M. 477 .. 331

(7) *Ss.* 19 *and* 26—*Appeal from an order of a District Court under s.* 26.—S. 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by s. 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case. SUBBA RAU v. PALANIANDI PILLAI, 17 M. 167=4 M.L.J. 71 .. 114

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(1) *S* 6—*Local Government's rules thereunder—Boats plying and not plying for hire*—Ultra vires.—It is only with regard to boats plying for hire that s. 6 of Act X of 1889 gives the Local Government authority to make rules. Rules purporting to make it obligatory on boat owners

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to ply for the hire are *ultra vires* QUEEN-EMPRESS v THOMMAYYA CHETTI, 17 M 397=1 Weir 859 275

(2) *Ss.* 6, 8—*Order purporting to be made under the Act by Conservator of Port—Public body authorized by Legislature to make rules, powers of*—The Conservator of the Port of Negapatam, purporting to act under the Indian Ports Act, s 8, made and published an order that when a certain flag was flying at the signal station, all boats returning from the sea should cast anchor and not come inside the river The Local Government had made a rule with reference to s 6 (*k*) of the above Act requiring boat owners to "carry out at all times all orders issued "by the Conservator in connection with the plying of their boats and "which are not inconsistent with the regulations issued by Government" A charge was brought against two persons, being the owners and tindals of licensed cargo boats for neglecting to obey aforesaid order, and they were convicted under Indian Ports Act, s 8 (2), by the Conservator in his capacity as Special First-class Magistrate — *Held*, that the order was *ultra vires* and the conviction was accordingly illegal *Per Cur*—A public body, whether the Executive Government or a corporation, being entrusted by the Legislature with the duty of making rules, cannot relieve itself of the responsibility and depute other agencies to discharge the duty QUEEN-EMPRESS v MARIAN CHETTI, 17 M 118=4 M L J 38=1 Weir 857 81

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S 1, *Cl* (2)—*Scheduled Districts Act—Act of* 1874—*Scheduled District —Agency Tracts*—A petition of appeal was presented to the Governor in Council against an *ex-parte* order made under the Guardian and Wards Act, 1890, by the Agent to the Governor in the scheduled district of Vizagapatam, the ground of the petition being that the petitioner's vakil had not been heard The appeal was referred to the High Court — *Held*, (1) that the Guardian and Wards Act, 1890, is in force in the Agency Tracts, although no notification to that effect had been made under the Scheduled District's Act, (2) that the High Court had jurisdiction to set aside the *ex-parte* order CHAKRAPANI v VARAHALAMMA, 18 M 227 .. 507

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(1) Ss 72 and 76—Carrier's Act—Act III of 1865—Contract Act—Act IX of 1872, ss 151, 152 and 161—Liability of Railway Companies as bailees—See Act III of 1865 (CARRIER'S), 17 M. 445

(2) *S* 125—*Permitting a cattle to stray upon a railway—Discretion of Magistrate*—When the owner of cattle which has been allowed to stray upon a railway, is prosecuted under Railways Act, 1890, s 125 (1) the Magistrate is bound to ascertain whether the person charged was himself guilty QUEEN-EMPRESS v ANDI, 18 M 228=1 Weir 874 .. 508

II.—Madras Acts.

Act II of 1864 (Revenue Recovery, Madras).

(1) *Liability of purchaser at a sale, who enters into possession of the purchased property, to account for mesne profits to the person in whose favour the decree is subsequently reversed.*—A purchaser of property at a sale under the Revenue Recovery Act, who enters into possession thereof, is in rightful possession until the decree is set aside He is not, therefore, a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession, but he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property. PERUMAL UDAYAR v. KRISHNAMA CHETTYAR, 17 M 251 .. 173

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Act II of 1864 (Revenue Recovery, Madras)—*(Concluded)*.

(2) *S. 11—Whether gathered products belonging to a tenant can be distrained by Government on account of the landlord's arrears of revenue.*—Government can attach for arrears of revenue under s. 11 of Madras Act II of 1864 the gathered products belonging to a tenant, provided that the products are of the land on account of which the arrears of revenue have accrued. KRISHNA CHADAGA v. GOVINDA ADIGA, 17 M. 404 .. 280

(3) *S. 35—Payment of arrears of village revenue by the assignee of a mortgagee of part of the village property—'Defaulter'—Registered and real owners.*—The plaintiff was assignee of a mortgagee of 38⅛th pangus in a village consisting of 5⅛th pangus. Having sued the executants of the mortgagee and obtained a decree in 1885, he in 1887 and 1888, paid certain arrears of revenue due from the village, in order to prevent its sale. In 1888. the plaintiff's 38⅛th pangus were sold in execution of the decree of 1885 to the 85th defendant subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos. 1 to 84 personally the amount of these arrears:—*Held*, that the 85th defendant, as also the 38⅛th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under s. 35 of the Revenue Recovery Act; that not only registered proprietors but real owners and their holdings may be treated as defaulters within the meaning of s. 35 of that Act. SRINIVASA THATHACHAR v. RAMA AYYAN, 17 M. 247=4 M. L. J. 73 .. 170

(4) S 36, cl. 2 and s. 59—Sale of land for arrears of revenue—Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale—Limitation Act—Act XV of 1877, s. 8—See LIMITATION ACT (XV OF 1877), 17 M. 189.

(5) *S 38—Revenue Recovery Amendment Act (Madras)—Act* III *of* 1884, *s* 1 (5)*—Revenue sale—Benami purchaser—Suit by benamidar to eject tenants*—Land forming part of the endowment of a chattram was brought to sale for arrears of revenue and was purchased by the plaintiffs who now sued to eject the tenants who were in occupation of the land:—*Held*, (1) that the defendants were entitled to plead that the plaintiffs had purchased *benami* for the managers of the chattram; (2) that the above plea having been substantiated, the plaintiffs were not entitled to maintain the suit. TIRUMALAYYAPPA PILLAI v. SWAMI NAIKAR, 18 M. 469 .. 677

(6) Ss. 38, 59—Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Limitation—Admissibility of horoscope—Evidence Act—Act I of 1872, ss. 17, 18—See EVIDENCE ACT (I OF 1872), 17 M. 134.

Act VII of 1865 (Irrigation-cess, Madras).

Lands irrigated under Kistna anicut—Water-cess—Optional or compulsory use of water.—A raiyat occupying land in the Kistna delta made no application for the supply of water, but water from the irrigation channels flowed from time to time on to his land from irrigated lands of a higher level, and he had no option as to whether to accept or refuse the supply. No increased benefit was derived from the water by the raiyat. A sum having been levied from him on account of water-cess, he now sued to recover the amount:—*Held*, that the plaintiff was entitled to recover. KRISHNAYYA v. SECRETARY OF STATE FOR INDIA, 19 M. 24 .. 721

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Act VIII of 1865 (Rent Recovery, Madras)

(1) Civ Pro Code—Act XIV of 1882, s 13—*Res judicata*—Decision of a Revenue Court—Second suit in Civil Court—Question of title—See Civ Pro Code (Act XIV of 1882), 17 M 106

(2) *Ss* 1, 11—*Sanction granted by Head Assistant Collector—Procedure—Customary rent—Restraint on building*—A Head Assistant Collector is competent to grant a sanction for the enhancement of rent under Rent Recovery Act, s 11 The granting of such sanction is a judicial and not a merely administrative act and such sanction should not be granted without first giving notice to both the landlord and the tenant, and hearing, and considering the contentions of both parties In a suit by the landlord to enforce the exchange of a patta and muchalka, the tenant objected to the rate of rent imposed on part of the land, which was dry land converted into wet —*Held*, that the finding of the Lower Appellate Court that there was an implied contract to pay rent at such rate was not open to any legal objection It appeared that the patta tendered contained a stipulation for the payment of rent at a special rate for garden (jarip) lands watered by wells which had been constructed by the raiyat at his own costs, and also comprised a stipulation that the raiyat should not build on his holding The Court of first appeal held that the special rate of rent above referred to was customary and had been followed for many years —*Held*, that there was no ground for interference on second appeal with the Lower Appellate Court's decision regarding the former of the stipulations above referred to, but that the latter should be so modified as to prevent the raiyat only from raising any building incompatible with an agricultural holding Bhupati v Rajah Rangayya Appa Rau, 17 M 54 37

(3) *Ss* 4, 7, 11—*Enhanced rent on irrigated land—Customary contribution to a temple—Implied Contract*—A zemindar tendered to raiyats on his estate pattas providing (*inter alia*) for the payment of (1) certain fees to a Hindu temple, (2) rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut There was nothing to show that the former of these items constituted a charge on the land and the latter had not been sanctioned by the Collector under Rent Recovery Act, s 11, but it was found that both had been paid by the raiyats for many years The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay both items —*Held*, (1) that the temple-fee was *prima facie* voluntary and should not be treated as a payment which the zemindar could compel a raiyat to make and consequently that the patta red to him was an improper patta, (2) that the finding as to the ence of an implied contract to pay the second of the above items finding of fact and must, therefore, be accepted on second appeal; was a correct finding, in accordance with the ruling in (7 M 365) first proviso to Rent Recovery Acts, s 11, is not restricted in its cation to rates of original rent as contradistinguished from its en- ement on account of improvements. Siriparapu Ramanna v. Mallikarjuna Prasada Nayudd, 17 M 43=3 M L J 207 29

(4) Ss 7, 9, 10—Suit to recover arrears of rent—Proceedings in Revenue Court to enforce acceptance of patta tendered—Time from which period of limitation is computed—Limitation Act—Act XV of 1877, sch II, art 110 See Limitation act (XV of 1877), 19 M 21

(5) *Ss* 9, 10—*Suit to enforce acceptance of patta*—Bona fide *denial by defendant of plaintiff's title—Jurisdiction of Revenue Court*—The plaintiff obtained a permanent lease of inam lands attached to a mosque from the four owners thereof The defendant was a cultivating tenant on the lands and the plaintiff duly offered the defendant a patta The defendant refused to execute corresponding muchalka on the ground

Act VIII of 1865 (Rent Recovery, Madras)—*(Continued).*

that the plaintiff was not his landlord, since the first of the aforesaid owners had granted a lease for 35 years to a person who had sublet the land to the defendant. The plaintiff thereupon brought a suit to enforce acceptance of patta under s. 9 of Madras Act VIII of 1865. The Deputy Collector having decided the case in the plaintiff's favour, the defendant appealed and the District Judge dismissed the suit on the ground that the defendant's contention raised a *bona fide* question of title which ousted the jurisdiction of the Deputy Collector:—*Held,* that there is no provision in Madras Act VIII of 1865, that a *bona fide* denial of the relationship of landlord and tenant ousts the jurisdiction of the Revenue Courts, and, with regard to s. 10 of the Act, that "whenever a Court is invested with jurisdiction to determine the existence "of a particular legal relation, the intention must be taken to be to "authorize it to adjudicate on every matter of fact or of law incidental "to such adjudication" ABDUL RAHIMAN SAHBI v. ANNA PILLAI, 17 M. 140=4 M.L.J. 26 .. 96

(6) *Ss* 9, 11—*Enforceable terms of patta—Established rates of rent*—The Zamindar of Vallur sued certain raiyats in his pargana of Gudur to enforce the acceptance of pattas providing, among other conditions, that the raiyats should relinquish their holdings at the end of the term unless fresh pattas were tendered to them, that they should pay half the cost of repairs by a cess proportioned to the wet rate, that if they irrigated dry land they should pay a wet rate to the Zamindar, as well as the water rate due to Government, that they should not cut crops without permission and should supply grass and vegetables to the Zamindar's servants. It appeared that in 1853 the pargana in question was surrendered to Government who restored it subject to the payment of a newly assessed peishcush in 1862, a date when the present defendants were already in occupation of their respective holdings In the interval, Government collected village rents in money. The pargana was not surveyed and a money assessment fixed prior to 1859 The District Judge expunged the conditions in the patta above referred to, and held that the Zamindar was entitled to collect by way of rent from the raiyats respectively the quota of the village rents which each raiyat paid in 1861. He found, however, that there was no contract express or implied as to the rent to be paid; and that prior to 1851 the raiyats held their lands under the Zamindar on the sharing system, and that for the first year after the restoration of the pargana the arrangement enforced by Government had remained in force, but that from 1863 to 1870 the sharing system was in force and varam was paid by the raiyats, after which for five years individual money rents were collected, and then there were two leases with money rents each for a period of five years:—*Held,* (1) that the conditions in the patta above referred to were unenforceable and had been rightly expunged; (2) that the plaintiff's rights were not limited by the rates of rent paid to Government in 1861, but that the rent should be discharged in kind according to the established rate of varam in the village; (3) that the plaintiff was entitled to recover from the raiyats half the water-tax payable on the poramboke lands irrigated from the Kistna anicut. VENKATA NARASIMHA NAIDU v. RAMASAMI, 18 M. 216 .. 50

(7) *Ss* 9, 11—*Sanction by Collector of enhanced rates of rent—Implied contract to pay rent at a certain rate.*—In a suit brought by the Collector of a district, as receiver of a zamindari, against a tenant on the estate to enforce the exchange of patta and muchalka, it appeared that the rent demanded was assessed at an enhanced rate, and comprised a consolidated wet rate imposed on account of irrigation. To the enhancement of the rent by the addition of the water rate the sanction of

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Act VIII of 1865 (Rent Recovery, Madras)—(*Concluded*)

the Collector required by the Rent Recovery Act, s 11, first proviso, had not been obtained —*Held,* that such sanction could not be implied from the fact that the Collector, as such receiver, had caused the provision in question to be inserted in the patta, and now sought to enforce it by suit. Upon the question whether from the fact that the tenant had paid the water rate in question for some years previously an implied contract to pay it for the future could be inferred —*Held,* upon the facts of the present case that no such contract could be inferred With reference to the Full Bench decision in 7 M 365, the Court stated what was the principle to be kept in view in considering whether an implied contract to pay enhanced rent could be inferred. MALLIKARJUNA PRASADA NAYUDU v LAKSHMINARAYANA, 17 M 50=3 M L J 247 34

(8) *S 10—Suit in Civil Court for enforcement of patta and other relief—Jurisdiction—Declaration as to enforceable stipulations—Rates of rent—Dry land converted into wet land*—In a suit brought in the Court of a District Munsif by a zamindar and his lessee against a cultivating tenant to enforce the exchange of patta and muchalka and for further and other relief —*Held,* (1) following (14 M 441), that the Civil Court had jurisdiction, and that a decree should be passed containing a declaration as to the terms which the patta should contain, (2) that a patta is enforceable which contains a stipulation that "if nanja cultivation "be made on punja land permanently converted into nunja with or "without water of the landlord's tank, nunja tirva according to the "rate fixed for such cultivation shall be paid" when such stipulation is in accordance with local custom SATTAPPA PILLAI v RAMAN CHETTI, 17 M 1

(9) S 10—Suit to recover arrears of rent due under a decree given under s 10—Limitation Act—Act XV of 1877, sched, II, art 110—Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable—See LIMITATION ACT (XV OF 1877), 17 M 225

(10) *S 11—Implied contract as to rates of rent—Customary fees—Prohibition of buildings*—In order to support the inference of a contract under the Rent Recovery Act, Madras, s 11, from payment of the same rent for a given number of years, the intention that the same rent is payable in future years must be clear and unequivocal · it is unsafe to imply such a contract from a single lease for five years A patta is not unforceable by reason of its providing for the payment of fees to village artisans in a case when such fees are customary, or by reason of its prohibiting the tenant from erecting buildings on his holding, if such prohibition is limited to erections not compatible with the agricultural character of the holding LAKSHMAN v APPA RAU, 17 M 73 50

(11) *S 39—Service by affixing notice of intention to sell on some conspicuous part of the tenant's land—Residence of tenant in foreign territory*—The provision of s 39 of the Rent Recovery Act, that the notice of an intention to sell the land should be served 'at his usual place of abode' denotes some place in the neighbourhood of the land in respect of which the patta was tendered, and does not apply when the tenant resides in foreign territory OLIVER v ANANTHARAMAYYAN, 18 M 30 . 371

(12) S. 76—Civ Pro Code, ss 4, 622—See CIV PRO CODE, (ACT XIV OF 1882, 17 M 298

Act I of 1876 (Land-revenue Assessment, Madras).

(1) *S 2—"Concur in applying"—Specific Relief Act—Act* I *of* 1877, *s* 42 —*Suit for declaration*—A suit was brought by F against the Secretary of State for India in Council for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of a village in the Sivaganga Zamindari in

Act I of 1876 (Land-revenue Assessment, Madras)—(*Continued*).

his name was *ultra vires* and illegal. The plaintiff's claim to be separately registered as the holder of the said village depended upon the proper construction to be put on a grant of the village contained in two documents, the one dated 13th December 1872 and the other being a document, dated 14th May 1877, executed by the Rani and her children. Subsequent to the grant referred to, an application was preferred by the Rani and addressed to the Collector requesting him to separately assess the village and register it in the name of F. This application was never presented owing to the death of the Rani, who was succeeded by the father of the present Zamindar who executed on 22nd February 1883, a deed of release in favour of F ratifying the grant abovementioned in the following terms.—"Whereas the village of Kondagai ' . . . of my Zamindari . . . has been granted to you in perpetuity "by the late Rani Kattama Nachiyar and others and has been in your "possession according to the terms of the documents executed by them "to you therefor on the 13th December 1872 and on the 14th May 1877, "and whereas I have received from you Rs 2,000 as the consideration "for my ratifying your rights in accordance with the terms of the said "documents and for relinquishing whatever rights I possess therein, I "hereby ratify your rights of every description in the said village and "relinquish all my rights therein in your favour Wherefore as per the "terms of the said documents, dated 13th December 1872 and 14th May "1877, you and your heirs and assigns shall hold and enjoy the said "Kondagai village . in perpetuity . . . with full powers of alienation "by sale, gift or otherwise. You shall pay to my Zamindari the sum "of Rs. 3,500, the *poruppu* fixed on the said village, as well as road-cess, "*magamai, &c.*, according to custom," and he applied to the Collector for separate assessment and registration of the village in the name of F on 25th March 1883 On 29th March 1883 F also made a similar application but pending disposal, the present Zamindar's father died, and was succeeded by his son the present Zamindar who raised objections and the application was not granted. On 23rd May 1887 the present Zamindar granted a lease of the Zamindari to O, S and R, who executed are lease guaranteeing F undisturbed possession and enjoyment of the village and accepted his position such as it may have been at or prior to the date of the execution of the lease. On 23rd January 1890 the Zamindar executed in favour of F a deed of release which after reciting the grant from the Rani, the deed executed by the Zamindar's deceased father, dated 22nd February 1883, and a further payment of Rs. 3,500 by F contained the following covenant:—"Therefore I forfeit and relinquish the "right I profess to have in me to question the said permanent lease "or the terms of the said lease deeds, and I hereby ratify your right. "You and your heirs shall hold and enjoy the said villages absolutely "according to the terms of the aforesaid permanent lease deeds" F then applied by petition, dated 13th March 1890, to the Collector for separate registration and assessment of the said village, but on notices being sent to the Zemindar and the lessees, the filed objections which after due enquiry were overruled by the Collector who ordered separate registration and fixed the assessment. On appeal, the Board of Revenue supported the action of the Collector. Whereupon the lessees appealed to the Government of Madras on 21st September 1891, and the Government of Madras on 14th November 1891 cancelled both the separate registration and the separate assessment. Under the circumstances F claiming to be the duly registered holder of the said village sued the Secretary of State for a declaration that the order of the Madras Government dated 14th November, 1891, directing the Collector to cancel the separate registration and assessment of the said village *ultra vires* and illegal—and the lessees sued F for the balance of *poruppu, magamai*, and road cess with interest alleged to be due on the said village for fasli 1,300:—*Held*, that F was bound to pay the lessees Rs. 3,500 poruppu

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Act I of 1876 (Land-revenue Assessment, Madras)—(*Concluded*).

with magamai and road cess whether his village was separately registered and assessed or not —*Held,* that the suit by F for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of the village previously made by him was illegal and *ultra vires* could not be maintained with reference to s 42, Specific Relief Act, inasmuch as the order had been already carried out —*Held,* also that if the general words of the prayer "for such other relief as the circumstances of the case may require" were to be taken as including a prayer for consequential relief, then the suit was bad for nonjoinder, inasmuch as the Zamindar and the lessees who were interested parties were, not joined —*Held,* also that not only the person applying under Act I of 1876, s 2, for separate assessment and registration must be entitled thereto, but also that the parties to the alienation must concur in the application PISCHER v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 19 M 292 . 909

(2) Ss 2, 6—See REGULATION XXV OF 1802, 19 M 308

Act V of 1882 (Forest, Madras).

(1) *Burder of proof—Shifting of burden of proof—Limitation Act—Act* XV *of* 1877, *art* 149—Portions of certain land, which had been taken up by Government as forest reserve, were claimed by one who had admittedly been in possession and enjoyment of them for thirty years The Government failed to establish any subsisting title of its own —*Held,* (1) that the burden of proof had been shifted on to the Government and had not been discharged and accordingly that the claim should be allowed, (2) Art 149 of the Limitation Act applies only to suits brought by, or on behalf of, the Secretary of State SECRETARY OF STATE FOR INDIA v KOTA BAPANAMMA GARU 19 M 165 820

(2) *Ss* 2, 4, 10 *and* 14—*Claim to percentage of forest income—Pensions Act —Act* XXIII *of* 1871, *s* 4—*'Civil Court'—Jurisdiction of Forest Settlement Officer—Jurisdiction of Appellate Court*—A claim to a percentage of forest income is not a claim to forest produce under Madras Act V of 1882, nor is it a claim to a right specified in s 4 of that Act A Forest Settlement Officer has no jurisdiction to entertain a suit in which such a claim is made, and such a suit brought by discharged forest karnams is barred by s 4 of the Pensions Act A Forest Settlement officer s a 'Civil Court,' for the purposes of the Pensions Act If a Court of imited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, the Court (if any) which exercises appellate jurisdiction over it is bound to entertain an appeal preferred against the lower Court's decision and to correct the error A Court of competent appellate jurisdiction in such a case is not bound by an order made without jurisdiction by a Collector on an appeal to him in the same suit Submission by the parties to his jurisdiction cannot give a Forest Settlement officer jurisdiction in a case where he has no inherent jurisdiction SECRETARY OF STATE FOR INDIA v VYDIA PILLAI, 17 M 193 132

Act I of 1884 (City of Madras, Municipal).

(1) *S.* 433—*Notice of action*—In a suit against the President of the Municipal Commission, Madras, to recover damages for the demolition of a house which had been built by the plaintiff without previous notice given by him under Madras Municipal Act, 1884, s 265, the plaintiff proved, by way of notice of action, the delivery of a letter signed by him and dated from his place of residence, which did not state where the house in question had stood, nor the date of its demolition, nor state positively that an action would be brought —*Held,* that the letter was not a sufficient notice of action DEVALJI RAU v PRESIDENT, MUNICIPAL COMMISSION, MADRAS, 18 M 503

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Act I of 1884 (City of Madras, Municipal)—(*Concluded.*)

(2) *Sch. B. Vehicle tax—Bicycles.*—A bicycle with pneumatic tyres, having two metal springs under the saddle, is liable to taxation as a vehicle with springs under the City of Madras Municipal Act, 1884. WILLSON v. THE MADRAS MUNICIPALITY, 19 M. 83=5 M.L.J. 293 .. 762

Act II of 1884 (Boundary Marks, Madras).

S. 9—See ACT XXVIII OF 1860 (MADRAS, BOUNDARY MARKS), 19 M. 416.

Act III of 1884 (Revenue Recovery Amendment).

S. 1, cl. (5)—See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 18 M. 469.

Act IV of 1884 (District Municipalities, Madras).

(1) *Ss* 47, 63—*Land tax—Land unappropriated to buildings.*—A Municipal Council under the Madras District Municipalities Act has no power to levy a tax on any land exceeding seven and-a-half per cent., on the annual value of such land. The meaning of the term "lands unappro-"priated to any buildgings" in Madras District Municipalities Act, s. 63, cl (2) considered. EDWARD CLARKE v. CHAIRMAN, OOTACAMUND MUNICIPAL COUNCIL, 18 M. 310 .. 565

(2) *S.* 53, *sched.* (*a*)—*Profession tax—District Court pleader—Court situated outside municipal limits*—The plaintiff, who was a pleader, lived and had his office and occasionally practised in Courts within the limits of the Municipality of Salem, but he claimed to be entitled to the refund of a sum levied on him for profession tax under the District Municipalities Act for the reasons that he practised as a District Court pleader and that the District Court was situated outside the municipal limits:—*Held,* that the plaintiff was liable to pay profession tax to the Municipality of Salem. RAMASAMI AYYAR v. MUNICIPAL COUNCIL OF SALEM, 18 M. 183 477

(3) *Ss* 53, 59, 60—*Letters Patent of the High Court, s.* 15—*Appeal—Profession tax—Trader—Provincial Small Cause Courts Act—Act* IX *of* 1887, *ss* 25, 27.—A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under s. 13 of the Charter Act The petitioner preferred an appeal under Letters Patent, s. 15:—*Held,* that the appeal was not barred under Provincial Small Cause Courts Act, s 27, and was maintainable. One who makes it his business to sell the produce of his own land for profits is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business:—*Held by* PARKER, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras VENKAIA REDDI v. TAYLOR, 17 M. 100=3 M.L J. 259 .. 69

(4) *S* 55—*Profession tax—What amounts to an exercise of profession or the holding of office under the section*—An officer, whose head-quarters are within a Municipality, does not *ipso facto* exercise his profession or hold such office or appointment within the Municipality so as to render himself liable for the payment for profession tax under Madras Act IV of 1884. Accordingly an officer who is not personally present at his head-quarters in the course of duty for a period of sixty days in the half-year is not liable for the tax under s. 55 of the Act. CHAIRMAN, ONGOLE MUNICIPALITY v. MOUNSEY, 17 M. 453 .. 314

(5) *Ss.* 72, 97, 262.—The plaintiff built a house at Nellore, the construction of which was completed on the 15th of August 1893. The municipal authorities of that place, being governed by Madras District Municipalities Act, gave notice of assessment on the 11th of September, levied the tax as assessed, and credited it as the tax due for the half-year

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Act IV of 1884 (District Municipalities, Madras)—(*Concluded*).

ending on the 30th of September 1893. The plaintiff now sued to recover the amount paid by him as having been illegally levied —*Held,* that under the provisions of District Municipalities Act, s 262, the suit was not maintainable MUNICIPAL COUNCIL, NELLORE v. RANGAYYA, 19 M. 10 711

(6) S 179—Crim Pro Code, s 433—See CRIM. PRO CODE (ACT X OF 1882), 19 M 241

Act I of 1886 (Abkari, Madras).

(1) *Ss* 31, 36—*Penal Code, Ss* 99, 147 *and* 353—A sub-Inspector of Salt and Abkari attempted, without a search warrant, to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act and was obstructed and resisted —*Held,* that having regard to s 99 of the Penal Code, even though the Sub-Inspector was not strictly justified in searching a house without a warrant, the persons obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of their obstruction, as it was not shown that that officer was acting otherwise than in good fair and without malice QUEEN-EMPRESS v PUKOT KOTU, 19 M. 349=1 Weir 45 & 631 948

(2) *S* 43—*Default by persons bailed to appear before the Abkari Inspector —Procedure of Magistrate*—When an Abkari Inspector under Abkari Act, s 43, forwards a bail bond to a Magistrate in order that payment may be compelled of the penalty mentioned therein, the Magistrate should call upon the person liable to appear and show cause against such order being made, and should otherwise observe the procedure prescribed in Crim. Pro Code, s 514 QUEEN-EMPRESS v PALAYATHAN, 18 M 48=4 M L J 242=1 Weir 631=2 Weir 664 383

Act II of 1886 (Harbour Trust, Madras)

Bill of Lading—Cargo unclaimed on arrival of ship—Rights of shipowner to land goods—Damages by rain—See BILL OF LADING, 19 M 169

Act I of 1887 (Malabar Compensation for Tenant's Improvements, Madras)

(1) *S* 3—*Suit to redeem Kanom*—The sum to be allowed for tenants' compensation for improvements under Act I of 1887 (Madras) is to be calculated in proportion to the extent to which the estate has been permanently improved The improvement for which compensation is payable as defined in s 3 of the Act is not the tree itself, but the work of planting, protecting and maintaining it The calculation must not be based on the future produce of the tree KUNHI CHANDU NAMBIAR v KUNKAN NAMBIAR, 19 M 384 973

(2) *Ss* 3, 6—*Cocoanut trees—Valuation of improvements*—In a suit to redeem a kanom in Malabar, it appeared that the plaintiff paid into Court the kanom amount together with a sum on account of the defendant's improvements, but subsequently withdrew the money, which the defendants had not taken out of Court The defendant claimed that he was entitled to receive under the head of compensation for improvements the capitalized value of the produce of cocoanut trees planted by him computed with reference to the probable productive life of the trees —*Held,* that the plaintiff was entitled to redeem, and that the defendant was not entitled to have the whole of the future annual produce of the trees taken into consideration in computing the value of improvements under the Malabar Compensation for Tenants' Improvements Act, 1887 SHANGUNNIMENON v VEERAPPAN PILLAI, 18 M 407=5 M L J 84 633

Act III of 1888 (Madras, City Police).

Ss 42, 45, 47—Where a Magistrate has recorded that an accused person has pleaded guilty, on affidavit to the contrary sworn to by the accused is not

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Act III of 1888 (Madras City Police)—(*Concluded.*)
admissible in evidence on revision by the High Court. In Madras City Police Act III of 1888, s. 47, the words "all or any of the other articles seized" include money or securities for money seized by the police under s. 42. The Magistrate is not bound to hold any enquiry as to whether the money and other things seized were used or intended to be used for the purpose of gaming. QUEEN-EMPRESS v. BHASHYAM CHETTI, 19 M. 209=1 Weir 850 .. 850

Act III of 1889 (Madras Town Nuisances).
(1) See CRIM. PRO. CODE (ACT X OF 1882), 18 M. 394.
(2) *S.* 3—*Common gaming house—Vacant unenclosed site.*—The accused were found gaming on a vacant site, the property of the seventh accused. The seventh accused was convicted under Town Nuisances Act (Madras), ss. 6 and 7, and the other accused under s. 7:—*Held,* that the site in question was not a common gaming house, and that the convictions were accordingly wrong. QUEEN-EMPRESS v. JAGANNAYAKULU, 18 M. 46=1 Weir 919 .. 382
(3) Ss. 3, 11—Penal Code—Act XLV of 1860, ss. 40, 64—Imprisonment in default of payment of a fine—See PENAL CODE (ACT XLV OF 1860), 18 M. 490.

Act IV of 1889 (Madras, Salt).
Ss 46, 67—*Penal Code, s* 224—*Escape from lawful custody.*—The Madras Salt Act, 1889, only authorises searches for contraband salt and arrests of the parties concerned in the keeping of such salt to be made by officers of the Salt department without search warrant in cases where the delay in obtaining such search warrant will prevent the discovery of such contraband salt:—*Held,* that where the circumstances did not justify the officer in believing that the delay in obtaining a search warrant would prevent the discovery of contraband salt, he had no power to search or arrest persons without such warrant and the escape by the persons so arrested from custody was no offence within the meaning of s 224, Indian Penal Code. QUEEN-EMPRESS v. KALLIAN, 19 M 310=6 M L.J. 173=1 Weir 206=1 Weir 893 .. 922

Adjustment.
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1—GENERAL.
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(3) See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 67, 273, 377, 394; 18 M. 439, 496; 19 M. 422
(4) See CONTRACT ACT (IX OF 1872), 18 M. 374.
(5) See COURT FEES ACT (VII OF 1870), 19 M. 350.

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(1) See CRIM PRO CODE (ACT X OF 1882), 18 M. 487; 19 M. 354.
(2) See LETTERS PATENT, 17 M. 100, 105.

————**3.—Second Appeal.**
(1) See ACT VII OF 1889 (SUCCESSION CERTIFICATE), 17 M. 167.
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(3) See CIV PRO. CODE (ACT XIV OF 1882), 18 M 421, 480, 19 M. 29, 151, 414.
(4) See HINDU LAW (PARTITION), 18 M 418.
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(1) *Suit for dismissal of Members of Devastanam Committee—Act XX of 1863, s 16—Reference to arbitration—Power of arbitrators*—Where a suit for dismissal of the members of a devastanam committee and damages was referred under Act XX of 1863, s 16, to arbitrators who passed an award dismissing them as prayed and decreeing a portion of the damages claimed with interest —*Held,* that the Court had power to refer the matter to arbitrators and award damages with interest, provided the amount, inclusive of interest, did not exceed the amount claimed in the plaint PERUMAL NAIK v SAMINATHA PILLAI, 19 M 498 . 1052
(2) *Suit for partition—Prior arbitration and award, effect of*—Disputes having arisen in a joint Hindu family, the parties submitted the question of partition to arbitrators, who passed an award thereon. Both parties objected to the award, and it was never carried into effect On a suit for partition being filed —*Held,* that such an award is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agree that the former state of things should be restored and that therefore the present suit for partition could not be maintained KRISHNA PANDA v BALARAM PANDA, 19 M 290 907
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(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 19 M 306
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(1) *Before judgment—Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship*—Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution RAMANAYYA v RANGAPPAYYA, 17 M 144 . 99
(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 17 M 58, 180; 18 M 265, 437
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Bicycle.
See ACT I OF 1884 (CITY OF MADRAS, MUNICIPAL), 19 M. 83.

Bill of Lading.
Cargo unclaimed on arrival of ship—Rights of ship-owner to land goods—Damages by rain—Harbour Trust Act (Madras)—Act II *of* 1886.—The defendant's steam-ship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs who on that date were not authorised to receive them. The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but, as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trusts for storage pending delivery to the consignees. On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier. When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain for which they now sued the defendants:—*Held,* (1) that where the consignees are unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and warehousing the goods, and that delivery to the Harbour Trust for custody was not wrongful; (2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed. BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM SULAIMAN, 19 M. 169 .. 823

Board of Revenue.
See PATTA, 19 M. 324.

Breach of Contract.
(1) See BUILDING CONTRACT, 19 M. 178.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 391.
(3) See CONTRACT, 17 M. 168.
(4) See REGISTRATION ACT (III OF 1877), 17 M. 456.

Breach of the Peace.
See ACT XXIV OF 1859 (MADRAS, POLICE), 17 M. 37.

Building Contract.
Breach—Power of re-entry—Certificate of architect, how far conclusive.—By a building contract entered into between plaintiff and defendants, it was agreed that plaintiff should erect certain premises for the defendants at the rates specified in the bill of quantities annexed. The agreement provided that defendants should pay the plaintiff at the rate of 90 per cent. upon the value of work executed and materials laid down as certified by the architect, and that should defendants make default in so doing for a period beyond fourteen days after the amount thereof should have been certified, plaintiff should be at liberty to suspend the works and require payment of all works executed and materials laid down. The agreement further provided that, if the contractor should suspend or delay the performance of his part of the contract, the defendants might, through their architect, give notice requiring the works to be proceeded with, and in case of default on the part of the contractor for a period of twenty-eight days might enter upon and take possession of the premises. It was further provided that the decision of the architect with respect to the amount, state, and condition of the works actually executed or in respect to any questions that may arise shall be final. During the continuance of the works, disputes arose as to the amount due to the plaintiff, although certified by the architect as agreed which the defendants did not pay and in consequence plaintiff refused to continue the work. Whereupon defendants after giving due notice entered upon the premises. Plaintiff sued for damages in consequence of the defendants having taken possession and for the balance due on the accounts:—*Held,* (1) that the defendants committed a breach of the contract by refusing to pay the full amount due under the architect's certificate; (2) that the plaintiff having thereupon rescinded the contract which he was not entitled to do, the defendants were entitled after due notice to enter and take possession; (3) that in the absence of proof of collusion between the architect and

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Building Contract—(*Concluded*)
the plaintiff, the defendants were bound by the architect's certificate as to the amount due to the plaintiff. KUPPUSAMI NAIDU v SMITH AND COMPANY, 19 M 178 . 829

Burden of Proof.

(1) *Civ Pro Code—Act* XIV *of* 1882, *ss* 13, 43—Res judicata—*Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principle—Second suit for principal and interest subsequently accrued—Limitation Act—Act* XV *of* 1877, *sch.* II, *art* 116—*Mortgage—Interest* post diem *in absence of covenant—Muhammadan Law—Shares of males and females in subject of* altumga *grant—Hypothecation by gosha women—Rule as to proof of* bona fides—Certain Muhammadans hypothecated to the plaintiff to secure repayment of a debt, their interest in lands, which had been enfranchised as a personal inam—a claim that the lands constituted the endowment of certain mosques having been rejected at the inam enquiry The hypothecation deed was executed in 1875 and registered; and it contained the following terms with regard to interest and the repayment of the debt —"We (the obligors) "shall pay interest at 7 per cent per annum before the 30th October "of each year, we shall pay in full the principal amount on 30th October "1878 after clearing off the interest and redeem this deed, should we fail "to pay the interest regularly according to the instalments, we shall at "once pay the principal together with the amount of interest" Default was made in the payment of interest in 1876, and in 1877 the plaintiff sued in a District Munsif's Court for the interest then due, expressly stating in the plaint that he agreed to accept payment of the principal and the subsequent years' interest at the times fixed in the deed, and he obtained a decree as prayed The plaintiff in 1888 now sued the executants of the above instrument or their heirs and representatives to recover the principal, together with interest up to date The Court of First Instance held that the claim for a personal decree was barred by limitation, but passed a decree directing the sale of the hypothecated land in default of payment of the principal, together with interest up to date On appeal —*Held,* (1) that this suit was not barred by Civ Pro Code, s 43, although the creditor's election not to seek a decree for the full amount in the suit of 1877, had not been communicated to the debtors before that suit; (2) that since the instrument did not provide for interest *post diem* any claim in the nature of a claim for such interest could be allowed by way of damages only and was not a charge on the land, and in the present case such claim was barred by limitation, (3) that under the circumstances of the case the rule as to the equality of the shares of males and females in the subject of an *altumga* grant was inapplicable, (4) that those of the defendants, against whom the District Munsif had wrongly passed a decree in 1877, were not precluded from the right to have their shares in the land exonerated in the present suit, (5) that two gosha women, who had executed the instrument in conjunction with their son and brother, respectively, were not, under the circumstances, entitled to have their shares exonerated, for want of proof that the transaction had been explained to them BADI BIBI SAHIBAL v SAMI PILLAI, 18 M 257 529

(2) See ACT V OF 1882 (MADRAS, FOREST), 19 M 165

Champerty.
See CONTRACT ACT (IX OF 1872), 18 M 374

Charitable Trust.
See CIV PRO CODE (ACT XIV OF 1882), 17 M 462

Civil Procedure Code (Act XIV of 1882).

(1) *Ss* 2, 215, 540—*Hindu law—Sale of a co-parcener's share—Claim of co-parceners on proceeds—Remuneration for management—Evidence Act—Act* I *of* 1872, *s* 35—*Judgments and private documents—Provisional decree—Admission made* arguendo—In a suit for partition of family property it became necessary for the plaintiff to prove that his grandfather had been adopted by A, and he tendered in evidence judgments

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Civil Procedure Code (Act XIV of 1882)—(*Continued*).

from which it appeared that A's brother, who was the grandfather of defendant No. 1, had sued to recover moneys due to A, alleging that the adopted son was an infant living under his protection. An adoption of the father of the defendant No. 1 by D was also put in issue, and to prove it defendant No. 1 tendered in evidence decrees in which the alleged adopted son was so described and also other documents (to which neither defendant No. 5 who denied the adoption nor his father was a party) where the same description was used. It appeared that one of the deceased co-parceners had sold to a stranger his undivided share in almost all the immoveable property of the family, and with part of the proceeds had discharged some debts and with the rest had purchased certain lands, now claimed by his widow as his separate property. One of the defendants claimed to be credited with a sum payable to him as the managing co-parcener under a deed of management to which the plaintiff was not a party. A decree was passed declaring the share to which the plaintiff and some of the defendants were entitled in the family property, but reserving all other questions involved in the suit:—*Held*, (1) that the decree was a provisional decree and was subject to appeal, but that it was irregular in form in that it should have contained declaration as to all the rights and liabilities which had been adjudicated on and directions as to the accounts and enquiries remaining to be taken and made; (2) that the documents tendered in evidence of the two adoptions above mentioned respectively were admissible in evidence; (3) that the proceeds of the sale of the co-parcener's share so far as they were in excess of the requirements of his creditor's equity were not divested of the character of co-parcenary property, and the lands purchased therewith were consequently property subject to partition and not separate property as contended by his widow; (4) that the claim under the deed of management was not valid against the plaintiff. *Per Curiam*:—The opinion expressed by a vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client. KRISHNASAMI AYYANGAR v. RAJAGOPALA AYYANGAR, 18 M. 73=4 M.L.T. 212 .. 400

(2) *Ss.* 2, 244, 311, 588—*Order refusing to set aside a Court sale—Second appeal*—A judgment-debtor, whose property had been sold in execution of a decree and purchased by the decree-holder, applied that the sale be set aside on the ground that the person, at whose instance execution had proceeded, had been improperly brought on to the record. The appplication was rejected by the Court of First Instance and an appeal by the applicant was dismissed:—*Held*, that no second appeal lay to the High Court. DAIVANAYAGAM PILLAL v. RANGASAMI AYYAR, 19 M. 29=5 M.L.J. 153 .. 725

(3) *Ss.* 4, 622—*Rent Recovery Act—Act* VIII *of* 1865, *s.* 76.—Orders passed by a Collector under the Rent Recovery Act are not open to revision under s. 622 of the Civ. Pro Code. VENKATANARASIMHA NAIDU v. SURANNA, 17 M. 298 .. 206

(4) *S.* 11—*Right to hereditary office of guru.*—The plaintiff as Anagundi Raja guru claimed to be entitled, and now sued for a declaration of his title, to the hereditary office of priest of Samayacharam. The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office. The office was not connected with any particular temple; no specific pecuniary benefit was attached to it, and the alleged duties of the office were to exercise spiritual and moral supervision over persons wearing a certain caste mark in a certain tract of country:—*Held*, that the suit was not cognizable by a Civil Court. THOLAPPALA CHARLU v. VENKATA CHARLU, 19 M. 62=5 M.L.J. 209 .. 748

(5) *S.* 13—'*Court of competent jurisdiction.*'—The term 'competent jurisdiction,' in s. 13 of the Civ. Pro. Code, has regard to the pecuniary limit as well as to the subject-matter. There is no authority for the general proposition that the competency of one Court as compared with another

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Civil Procedure Code (Act XIV of 1882)—(*Continued*)

is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court SUBBAMMAL v HUDDLESTON, 17 M. 273 .. 189

(6) *S* 13—'Res judicata'—Where all the conditions prescribed by s 13 of the Code of Civil Procedure as necessary to bar the trial in a subsequent suit of an issue adjudicated upon in a previous suit exist, the fact that in the first suit the defendant was an execution creditor and in the second he is a purchaser at an execution sale makes no difference as to the second suit being *res judicata* A privity exists between an execution creditor and a purchaser at a Court-sale, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree Thus when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale, as his representative or as one claiming under him KRISHNABHUPATI DEVU v VIKRAMA DEVU, 18 M 13 359

(7) *S* 13—Res judicata—*Decree in suit of Small Cause nature—Subsequent suit for declaration—Contract Act—Act* IX *of* 1872, *s* 23—*Consideration in part illegal—Stifling a prosecution—Limitation Act—Act* XV *of* 1877, *s* 22, *sch* II, *arts* 91, 120—The plaintiff, claiming to be entitled together with two of the defendants to the office of archaka of a temple, sued in 1889 for a declaration of his title, and for a declaration that an agreement entered into by them in 1886 with the other defendants was void as having been executed under coercion, and because part of the consideration was the withdrawal of a pending criminal charge of trespass and theft against them These averments were proved The first-named defendants were made plaintiffs in the suit more than three years after the execution of the agreement The remaining defendants pleaded that the validity of the agreement was *res judicata* for the reason that they had brought a previous action upon it against the plaintiffs and had obtained a decree for Rs 75 —*Held,* (1) that the validity of the agreement was not *res judicata,* because the previous suit was of a Small Cause nature, (2) that the agreement was void although the withdrawal of the criminal proceedings formed part only of the consideration for it, (3) that the first plaintiff was entitled to a declaration of the invalidity of the agreement, but not the others who had been joined as plaintiffs more than three years from its date SRIRANGACHARIAR v RAMASAMI AYYANGAR, 18 M 189=4 M L.J 106 481

(8) *S* 13—Res judicata—*Limitation Act—Act* XV *of* 1877, *sch* II, *art* 179, *cl* (6)—*Application for execution of maintenance decree—Previous applications held to be barred by limitation*—On an application made in 1891 for the execution of a decree passed in 1870, it appeared that the decree directed the payment of maintenance to the plaintiff annually on a specified date, and the present application related to the period of three years from 1888 to 1891 There had been an application for execution in 1873 The next application was made in 1879, and it was dismissed as being barred by limitation· *Held,* (1) that the question whether the application was barred by limitation was not *res judicata,* (2) that the application was not barred by limitation KUPPU AMMAL v SAMINATHA AYYAR, 18 M 482 680

(9) *S.* 13—'Res judicata'—*Rent Recovery Act* (*Madras*)—*Act* VIII *of* 1865—*Decision of a Revenue Court—Second suit in Civil Court—Question of title.*—In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed The present plaintiff did not appear when the above orders were made The defendant relied on these proceedings as constituting a bar to the present suit· *Held,* following 7 M 61, that the decision of the Revenue Court was no bar to the suit. GANGARAJU v. KONDIREDDISWAMI, 17 M. 106=4 M L.J. 24 .. 73

(10) *S.* 13—*Sivaganga Sanad of* 1803—*Failure of suit alleging fraud—Possession known and acquiesced in prior to adjudication*—The High Court of Madras dismissed on the facts a suit brought in 1886, grounded on

Civil Procedure Code (Act XIV of 1882)—(*Continued*).

fraud attributed to the lineal ancestor of the principal defendant, in obtaining, in 1803, the grant of the sanad of the Sivaganga Zamindari, to which the plaintiff claimed title. The plaintiff's case was that the defendant's ancestor, the younger of two brothers, had fraudulently caused the sanad to be made out in his own name, whereas it was intended to be, and ought to have been, a grant to the elder brother, who was the plaintiff's lineal ancestor. Those through whom the plaintiff claimed had not made any such charge, although they had knowledge of all the facts connected with the grant of the sanad of 1803 to the younger brother, and with the long possession by him and his descendants, among whom there had been litigation, resulting in a decision as to the ownership: *Held*, that this suit not be maintained to re-open the question. BALA GAURI VALLABA TEVAR v. PERIASAMI UDAYAR TEVAR, 17 M. 384 (P.C.)=21 I.A. 93=4 M.L.J. 139=6 Sar. P.C.J. 466 .. 266

(11) *S*. 13, *expl*. 2, *s*. 43—*Ground of defence not raised in previous suit—Relief not asked for in previous suit—Circumstances giving right to such relief not known at date of previous suit.*—The plaintiffs, who were the junior members of a Malabar edom of which defendants Nos. 3 to 5 were the senior members, sued to recover with mesne profits possession of certain property offering to pay the amount of a kanom advanced by defendant No. 1. It appeared that the land had been the subject of a kanom demise in 1865, that defendant No. 3, the then karnavan, had obtained in 1878 a decree for its redemption the right to execute which he assigned to a stranger, who executed it, and took possession of the property, taking from the karnavan a new kanun deed. Subsequently defendants Nos. 4 and 5 obtained a decree for possession and the cancellation of both the assignment and the kanam deed; but this decree was attached in execution proceedings in another suit and purchased by defendant No. 1, who executed it, purchased the property, deposited the kanam amount and took possession on 8th March 1884. The plaintiffs, who had meanwhile taken abortive proceedings to defeat the first defendant's title, instituted a suit in August 1884, praying for a decree that the sale to him be set aside without praying for pessession. It was now found that the plaintiffs at that time were not aware that defendant No. 1 was in possession and he did not plead that fact as a defence to the suit for a declaration merely:—*Held* (1) that the plaintiffs were not affected by constructive notice of the defendant's possession in 1884 by reason of the fact that their karnavan, witth whom they were not acting, was aware of the defendant's previous application for execution, and that the suit was not barred by Civ. Pro. Code, s. 43; (2) that defendant No. 1 was not a trespasser merely, and the plaintiffs were entitled to a deduction of the profits for the whole period during which he was in possession in computing the amount payable by them before they recovered the land. *Semble*, that, apart from the question of the plaintiffs' notice of the first defendant's possession, since he had not pleaded possession in the suit of 1884, he could not fall back upon the fact that his possession dated from March 1884 as a ground of defence to the present action. SANKARAN v. PARVATI, 19 M. 145 .. 806

(12) *S*. 13, *expl*. 5—Res judicata *between defendants*—In a suit to recover the plaintiff's share of lands appertaining to an agraharam the defendants pleaded that the lands in question were their own and were not subject to partition. It appeared that in a previous suit brought by a third party against the present plaintiff and defendants and others to recover his share of the agraharam lands, it was held that the lands now in question formed part of the lands of the agraharam, and that they were divided in execution of the decree in that suit. The present plaintiff and defendants were then *ex parte*:—*Held*, that the defendants were precluded under Civ. Pro. Code, s. 13, from raising the above plea. LATCHANNA v. SARAVAYYA, 18 M. 164 .. 464

(13) *Ss* 13, 30—'Res judicata'—*Representation.*—Although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad in a suit, the decree therein does not raise an

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absolute estoppel against members not actually brought on the record KOMAPPAN NAMBIAR v UKKARAN NAMBIAR, 17 M 214=4 M L J 3 147

(14) Ss 13, 43—Res judicata—Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principal—Second suit for principal and interest subsequently accrued—Limitation Act—Act XV of 1877, sch II, art 116—Mortgage—Interest *post diem* in absence of covenant—Muhammadan Law—Shares of males and females in subject of *altumga* grant—Hypothecation by gosha women—Rule as to proof of *bona fides*—See BURDEN OF PROOF, 18 M 257

(15) *Ss.* 13, 158—*Dismissal of suit for want of heirship certificate*—Res judicata—In a suit to recover principal and interest due on a bond executed by the defendants in favour of the plaintiff's father (deceased), it appeared that the plaintiff had previously brought a similar suit which was dismissed for the reason that the plaintiff produced no succession certificate —*Held,* that the previous proceedings did not bar the present suit PETHAPERUMAL CHETTY v MURUGANDI SERVAIGARAN, 18 M 466=5 M. L J 189 675

(16) *Ss* 13, 244, 312—*Powers of a Hindu son to question the alienation of an impartible estate by his father—Limitation—Suit to recover immoveable family property unlawfully alienated during plaintiff's minority—Limitation Act, s* 7, *illus* (*b*), *and sch* II, *arts* 12, 44, 45, 120, 144—*Hindu Law—Succession, whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem —Where a suit is brought to set aside a sale of immoveable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under sch II, art 12 of the Limitation Act Section 7 of that Act must be read together with each article in sch II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years But when the period of limitation prescribed is less than three years, as in art 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years. In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law Nearness of blood is no ground of preference under the Mitakshara law in case on disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible Where, therefore, the family property belongs to a co-parcenary family consisting of all the brothers of the deceased *propositus,* whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years Representation by a Collector of all minor sons of a deceased Zemindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zemindari as their proper ward Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zemindari property attached in execution of the decree given in the former suit, is barred by ss 13, 244 and 312 of the Code of Civil Procedure SUBRAMANIA PANDYA CHOKKA TALAVAR v. SIVA SUBRAMANYA PILLAI, 17 M 316=4 M.L J. 152 .. 219

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Civil Procedure Code (Act XIV of 1882)—(*Continued*).

(17) *S.* 17—*Jurisdiction—Provincial Small Cause Courts Act—Act* IX *of* 1887, *s.* 16.—When a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the *forum* in which to bring the suit. Where a plaintiff sued in a District Munsif's Court having jurisdiction, at the place where the money due under a contract was to be paid, there being no Small Cause Court having jurisdiction at such place:—*Held,* that the jurisdiction of the District Munsif was not ousted by the fact that there was in existence at the date of suit a Small Cause Court having jurisdiction at the place where the contract was made. RATNAGIRI PILLAI v. SYED VAVA RAVUTHAN, 19 M. 477 .. 1037

(18) Ss. 25, 223—Madras Civil Courts Act, s. 12—Jurisdiction of Munsif's Court—Execution of decree of superior Court—See ACT III OF 1873 (CIVIL COURT, MADRAS), 17 M. 309.

(19) *S.* 28—*Suit for specific performance of agreement for partition—Alienation of the management of a public charity—Illegal—Effect of partial illegality.*—In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangement:—*Held,* that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement, it might be enforced as to the rest of the property:—*Held* further, with reference to s. 28 of the Civ. Pro. Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement ALAGAPPA MUDALIAR v. SIVARAMASUNDARA MUDALIAR, 19 M. 211 .. 852

(20) *S.* 32—*A party to a contract joined as defendant and subsequently made a plaintiff—Limitation Act*—XV *of* 1877, *s.* 22—*Joint contractors.*—Limitation Act, s. 22, is not applicable to cases where the Court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civ. Pro. Code, s. 32. KHADIR MOIDEEN v. RAMA NAIK, 17 M. 12=3 M.L.J. 176 .. 8

(21) *Ss.* 32, 559, 587—*Addition of parties on appeal—Transfer of Property Act—Act* IV *of* 1882, *s.* 91—*Right to redeem.*—A verumpattom tenant in Malabar claiming under a lease from the ottidar is entitled to redeem the prior kanom. The Court on Second Appeal is competent to bring on to the record persons who had been originally joined in the suit but were not joined in the Lower Appellate Court. PAYA MATATHIL APPU v. KOVAMEL AMINA, 19 M 151=5 M L.J. 279 .. 810

(22) *Ss.* 43, 244—*Hindu Law—Liability of son for father's debts—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act* XV *of* 1877, *sch.* II, *arts.* 120, 122.—A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877 The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia,* on the ground that the plaintiff had an undivided

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brother —*Held,* (1) that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was merely a formal error, and was not fatal to the suit; (2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civ Pro Code, s 43 or s 244, (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor, (4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to subsequent instalments RAMAYYA v. VENKATARATNAM, 17 M 122=4 M.L J 52 . 84

(23) *Ss* 53, 245, 647—*Amendment of execution petition—Appeal—Limitation*—One, being entitled under a decree of 1809 to a share in the income of a zemindari, obtained a decree in a suit of 1877 against certain recent purchasers of the zemindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation This application was refused by the Court of first instance —*Held,* that under the circumstances of the case the amendment should have been allowed to be made SATTAPPA CHETTI v JOGI SOORAPPA, 17 M 67 46

(24) *S* 54—*Rejection of plaint already registered—Specific Relief Act—Act* I *of* 1877, *s* 56—*Injunction to restrain proceedings—Multiplicity of proceedings*—Certain traders having failed in business, and being indebted to the defendant under a decree of the District Court of Trichinopoly entered into a composition with their creditors, and a deed was executed to which the defendant became a party in respect of his judgment-debt The defendant subsequently applied for execution of this decree The trustees, to whom the debtors' assets were made over under the deed, together with the debtors now brought a suit in the same Court for an injunction restraining the defendant from executing or proceeding to execute his decree The plaint was rejected by the District Judge after it had been registered and numbered and a written statement had been filed —*Held,* (1) that the Court had jurisdiction to reject the plaint under Civ Pro Code, s 54, (2) that the injunction sought for was not necessary to prevent a multiplicity of proceedings within the meaning of Specific Relief Act, s 56, cl (*a*) *Semble*—The suit for the injunction prayed for was not maintainable with reference to Specific Relief Act, s 56, cl (*b*) VENKATESA TAWKER v RAMASAMI CHETTIAR, 18 M 338 585

(25) *S* 158—*Act* VI *of* 1892, *s* 4—*Proceedings in execution—Dismissal of petition for default*—The dismissal of a petition for execution for default does not bar a fresh application, s. 158 of the Code of Civil Procedure being inapplicable, since by reason of s 4 of Act VI of 1892, it does not apply to proceedings in execution TIRTHASAMI v ANNAPPAYYA, 18 M 131 441

(26) *Ss* 171, 568, 582—*Remand—Direction by Appellate Court for the taking of further evidence*—In a suit on a hypothecation bond the plaintiff relied in bar of limitation on endorsements of part-payments appearing on the bond The Court of First Instance held that the endorsements were genuine The Court of First Appeal remanded the suit for further evidence to be taken with regard to the endorsements and directed the Court to record an opinion on the question of the hand-writing of the endorsements; and held upon the return of the evidence that the endorsements were forgeries and dismissed the suit:—

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Held, that the evidence taken on the remand was legally admitted. SRINIVASACHARIAR v. RANGAMMAL, 18 M. 94 .. 415

(27) *S. 206—Amendment of decree—Power of Court of First Instance after appeal*—In a suit for land with mesne profits the District Munsif delivered judgment for the plaintiff and recorded therein a finding that he was entitled to mesne profits as from a certain date, it having previously been arranged that the amount, if any, awarded for mesne profits should be determined in execution. In the decree no mention was made of the date from which the mesne profits were to be calculated, but it was stated merely that the amount was to be determined in execution. The case went on appeal before the District Judge who modified the decree in certain particulars unconnected with mesne profits. With a view to execution the plaintiff applied to the Court of First Instance to bring the decree into conformity with the judgment. The Court having made an order accordingly, it was objected in the High Court on revision that the order was made without jurisdiction:—*Held,* that the jurisdiction of the Court of First Instance to amend the decree under s. 206 was ousted by the confirmation of his decree on appeal. PICHUVAYYANGAR v. SESHAYYANGAR, 18 M. 214 (**F.B.**)=5 M. L.J. 39 .. 498

28) *S. 206—Decree in accordance with judgment—Duration of receivership—Discretion of Court.*—It is within the discretition of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so. A decree of the High Court declared it to be necessary that a permanent appointment should be made of a receiver and manager of the estate allotted by the Government to the family of the deceased Maharaja of Tanjore, and directed that fresh appointments to the receivership should be made from time to time as occasion might require during the life of the senior widow under whose management the estate had been originally placed and the lives of the co-widows surviving her, or for so long as the Court might consider necessary:—*Held,* that the decree directing the permanent receivership was not in variation of the judgment which it purported to follow, that the Court had a discretion to make such an order when necessary for the preservation of the estate; and that so doing was in accordance with the practice; there being nothing to prevent the Court from giving the management to the senior widow living at the time, if she should be fit to manage the estate on behalf of all interested in it. MATHUSRI UMAMBA BOYI SAIBA v. MATHUSRI DIPAMBA BOYI SAIBA, 19 M. 120 (**P.C.**)=23 I A. 28=6 Sar. P.C.J. 684 .. 789

(29) *S. 231—Application for partial execution of a decree.*—A decree provided that the plaintiff should pay Rs. 304 for the costs of thirteen out of eighteen defendants. Two of the defendants now sought to execute the decree in respect of their proportionate share of the sum so awarded. Besides the plaintiff, two only of the other defendants were joined as parties to these proceedings:—*Held,* that the application was not maintainable and should be dismissed. MUTHUSAMI AYYAR v. NATESA AYYAR, 18 M. 464 .. 673

(30) *Ss. 231, 244—Order of a Court on application for execution by one or more joint decree-holders—Appeal therefrom.*—An appeal lies from an order under s. 231 of the Code of Civil Procedure, such an order being one relating to the execution of a decree within the meaning of s. 244. LAKSHMI AMMAH v. PONNASSA MENON, 17 M. 394 .. 273

(31) *S. 232—Assignment of decree by one of two decree-holders valid.*—There is no prohibition in law against one of several decree-holders assigning his interest under the decree:—*Held,* that the assignee is entitled to execute under s. 232, unless the judgment-debtor can show that such a proceeding is prejudicial to his interest. MUTHUNARAYANA REDDI v. BALAKRISHNA REDDI, 19 M. 306=6 M.L.J. 172 .. 919

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(32) *Ss*· 232, 235, 244—"*Judgment-debtor*"—T's predecessor in interest had a mortgage on certain land and was made a party to a partition suit, in which a share in the land was allotted to a member of the family subject to a proportionate share of T's mortgage and also subject to a proportionate share of a certain decree debt The then plaintiff got his share of the property made over to him After the date of the decree, *i e*, the decree in the partition suit, T purchased the equity of redemption in the mortgaged property from certain members of the family In a subsequent execution of the partition decree, part of the land was sold for money due as costs and mesne profits by T's vendors of the equity of redemption and T was ejected T objected under s 332 of the Code, but the Court refused to order redelivery, in a suit brought by T for possession —*Held*, that T was not a judgment-debtor within the meaning of ss 232, 235, and 244, Civ Pro Code, and that the suit was not barred by the provisions of s 244 VASUDEVA UPADYAYA v VISVARAJA TIRTHASAMI, 19 M 331=6 M L J 125 . 930

(33) *S* 234—*A stranger to a decree against a deceased person in possession of his property*—'*Legal representative*'—The words 'Legal representative' in s 234 of the Code of Civil Procedure do not include any person who does not in law represent the estate of the deceased person. Consequently, a stranger in possession of property of a deceased person who was not a party to a decree against such person cannot be proceeded against in execution otherwise than by a regular suit CHATHAKELAN v GOVINDA KARUMIAR, 17 M 186=4 M.L J 59 127

(34) *S* 244, *sub-s* (*c*)—*Questions arising in execution of decree*—*Construction of a decree as to the appointment of a manager of the property of a religious institution*—A decree of the High Court declared its holder entitled as the Pandara Sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the Tambirans who had received initiation at that institution, was appointed to fill the then vacant office of Tambiran, managing certain mutts The decree directed that the Pandara should name a Tambiran of his adhinam for the office, whom, after inquiry as to his fitness, the Subordinate Court should appoint If that Court found him unfit, it was to appoint a Tambiran of that adhinam upon its own selection In execution the Pandara named a Tambiran for the office, but died before the inquiry as to his fitness His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another Tambiran The Subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first named Tambiran, appointed him to the office. The High Court, on the Pandara's appeal, decided that the first nomination had been competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first named was not fit —*Held*, on the appeal of the Tambiran first-named, that the question as to his right was one that had arisen between the parties to the suit, and related to the execution of the decree, within the meaning of s 244, sub-s (*c*), Civ Pro Code, and that he could appeal from the order made Also, that, on the construction of the decree, the first nomination could not be withdrawn and a second one substituted before the inquiry, and that the person first named was entitled to the Court's decision as to his fitness On the facts, the finding of the High Court that the first-named Tambiran was unfit, was not affirmed, and the order of the Subordinate Judge was maintained. PONNAMBALA TAMBIRAN v SIVAGNANA DESIKA GNANA SAMBANDHA PANDARA SANNADHI, 17 M 343 (P.C.)=21 I A. 71=6 Sar P C.J 434 . 238

(35) *Ss* 244, 258—On an application for execution of a decree being presented by a transferee decree-holder, the judgment-debtor opposed, alleging in his petition that he had transferred certain immoveable property to the petitioner in consideration of his paying the judgment debt to the original decree-holder and that the petitioner had discharged the debt, but subsequently having got the decree transferred to him-

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self instead of entering up satisfaction of the decree, fraudulently applied for execution. Satisfaction had not been entered up under s. 258, Civ. Pro. Code:—*Held*, that there must be an enquiry into the truth of the judgment-debtor's allegations, and if proved the petition for execution must be dismissed, and further that s. 258, Civ. Pro. Code, was inapplicable to the present case, since that section applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction. RAMA AYYAN v. SREENIVASA PATTAR, 19 M. 230=5 M.L.J. 218 .. 865

(36) *Ss* 244, 258—*Payment to decree-holder out of Court—Whether an order having been made under s.* 258, *a separate suit on the subject-matter thereof lies.*—An order under s. 258 of the Code of Civil Procedure is appealable under s. 244; no separate suit lies, since the question is *res judicata* between the parties. GURUVAYYA v. VUDAYAPPA, 18 M. 26 .. 368

(37) *Ss.* 244, 278 *to* 283—*Questions to be determined by the Court executing a decree—Grounds of objection.*—Where the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and the question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and s. 244 of the Code of Civil Procedure bars a separate suit. UPENDRA BHATTA v. RANGANATHA BHATTA, 17 M. 399=3 M.L.J. 229 .. 276

(38) *S.* 257-*A*—*Adjustment of decree out of Court—Instalment bond—Consideration*—An instalment bond, executed by a judgment-debtor in favour of the decree-holder and in consideration of the benefit of the decree being given up, is not void as an agreement falling under s. 257-A of the Civ. Pro. Code. Such an agreement is void only as far as it affects the right to execute the decree, and may be the foundation of a fresh suit. JUJI KAMTI v. ANNI BHATTA, 17 M. 382 .. 265

(39) *S.* 258—*Decree payable by instalments—Default in payment—Waiver.*—A decree was passed for the payment of a sum of money in four annual instalments, the first payment to be made on 11th October 1888; and it was further provided that if default were made in the payment of any instalment then without reference to the other instalments, the whole amount should be paid with interest. The decree-holder applied in October 1893 for execution in respect of the instalments for 1890 and 1891:—*Held*, that the application was not barred by limitation if default in respect of the instalment of 1889 had been waived, and acceptance of part payment was material as evidence of such waiver, and should be considered although payment had not been certified under Civ. Pro. Code, s. 258. RAJESWARA RAU v. HARI BABANDHU, 19 M. 162 .. 818

(40) Ss. 265, 360—See EXECUTION, 19 M. 435.

(41) *Ss.* 268, 274—*Attachment of mortgage debt—Suit by purchaser on mortgage.*—The plaintiff sued to recover principal and interest due on a mortgage. He claimed title as purchaser at a Court-sale held in execution of a decree against the mortgagee. It appeared that there had been no attachment under Civ. Pro. Code, s. 274, but under s. 268 only:—*Held*, that the purchase by the plaintiff was not invalid by reason of the last-mentioned circumstance, and that the plaintiff was entitled to recover as against the property. MUNIAPPA NAIK v. SUBRAMANIA AYYAN, 18 M. 437=5 M.L.J. 60 ..

(42) *S.* 273—*Dismissal of an application for execution—Attachment of a decree—Execution of attached decree.*—The holder of a decree, dated 1885, applied to execute it, but his application was dismissed in March 1887 on the ground that 'no further steps had been taken.' It did not appear that any notice was given to him before the order of dismissal was made. Nevertheless the decree-holder proceeded to execute a decree of the judgment-debtor attached by him and brought to sale certain property which was in question in the present suit, and it was purchased *bona fide* by the present defendant who obtained a sale certi-

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ficate from the Court The present plaintiff claimed as assignee, from the holder of the attached decree to execute it against the same land, and now sued for a declaration that it was liable to be brought to sale by him and that the defendant's purchase was void as against him —*Held,* (1) that under the circumstances of the case the attachment in execution of the decree of 1885 was subsisting at the time of the purchase by the defendant, (2) that a judgment-creditor who attaches a decree is competent to execute it. RANGASAMI CHETTI v PERIASAMI MUDALI, 17 M 58=3 M L.J 211 40

(43) *Ss* 278, 281—*Disallowance of claim to property under attachment—Subsequent suit—Limitation Act—Act* XV *of* 1877, *sch* II, *art* 11—In 1879 the plaintiff purchased at a court sale the first defendant's interest in certain land, but did not obtain possession In 1888 the same property was purchased by the fourth defendant in execution of another decree against the same judgment-debtor It appeared that the plaintiff raised an objection by petition in the course of the proceedings in execution of the last-mentioned decree, but his petition was dismissed on his vakil stating that he was not in possession The plaintiff now sued in 1891 for the property purchased by him —*Held,* that no order had been passed under Civ Pro Code, s 281, and that the suit was not barred under Limitation Act, sch II, art 11 MUNISAMI REDDI v ARUNACHALA REDDI, 18 M 265 534

(44) *Ss* 278, 283—*Declaratory decree—Termination of attachment by abandonment*—The plaintiff had an attachment against certain property Owing to his not filing a necessary affidavit, the execution petition was struck off Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff SRINIVASA SASTRIAL v SAMI ROW, 17 M 180 123

(45) *Ss* 278, 283—*Transfer of Property Act—Act* IV *of* 1882, *s* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises*—A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it No suit was brought to question this order The first mortgage was not paid off and the mortgage premises were brought to sale The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee —*Held,* (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit, (2) that the second mortgagee was estopped from now re asserting his claim KRISHNAN v CHADAYAN KUTTI HAJI, 17 M 17 12

(46) *Ss* 280 to 283—*Limitation Act—Act* XV *of* 1877, *sch* II, *art* 11—*Mortgage*—Land having been granted to several persons jointly, disputes arose among them with reference to its allotment The disputes having been settled by arbitration, one of the grantees sold his share to the plaintiff Before the arbitration, another of the grantees mortgaged seven acres of the land to A, who did not become a party to the arbitration A subsequently obtained a decree on his mortgage and proceeded to execute it by attachment The plaintiff intervened in execution, but in March 1884 the Court passed an order stating that the plaintiff's land was not attached, and in fact his possession then remained undisturbed A subsequently executed his decree and purchased the land brought to sale by the Court The plaintiff's possession was disturbed under colour of this purchase, and he now sued in 1889 to recover the land sold to him *Held,* (1) that the order of the 1st March 1884 was not an order within the meaning of Civ. Pro. Code,

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s. 283, and accordingly that the suit was not barred by the one year's rule of limitation; (2) that the plaintiff's vendor had, after the arbitration, a good title against both A and his mortgagor, and that the plaintiff was entitled to recover. PULLAMMA v. PRADOSHAM, 18 M. 316 =5 M.L.J. 148 .. 564

(47) *S. 283—Whether defendant may plead that the decree in question was collusively obtained.*—A defendant in a suit brought under s. 283 of the Civ. Pro. Code, who is connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband or as being his coparcener, may show that the decree, in execution of which the property in dispute was attached, was collusively obtained. NARANAYYAN v. NAGESWARAYYAN, 17 M. 389 .. 270

(48) *Ss. 293, 306, 588—Execution sale—Default by purchaser in paying deposit—Remedy against purchaser.*—The purchaser at an execution sale failed to make the deposit of 25 per cent. under Civ. Pro. Code, s. 306, alleging that the property was discovered by him subsequently to the sale to be subject to an incumbrance. The property was put up for sale again and knocked down for a smaller sum. The decree-holder sought in execution to recover the amount of the difference from the first purchaser. The Court of first instance made an order dismissing the application:—*Held,* that an appeal lay against the order in question. AMIR BAKSHA SAHIB v. VENKATACHALA MUDALI, 18 M. 439=5 M.L.J. 206 .. 655

(49) *S. 294—Purchase of equity of redemption by decree-holder—Execution—Sale of mortgaged land in execution of decree—Execution of decree in respect of balance—Nature of price paid by the purchaser on the purchase of the equity of redemption.*—A mortgaged certain land to B, but remained in possession thereof. Subsequently A sold a portion of the said land to C in consideration of her paying off the mortgage debt due to B. C entered into possession, but was unable to satisfy the debt. C died, and A sued C's daughter and legal representative, for damages sustained by him from the non-payment of the purchase money by C. A obtained a decree and, the money not being paid as therein decreed, applied for execution and brought to sale the equity of redemption vested in C by virtue of the sale. By leave of the Court A bid at the Court-sale and bought the right of redemption and recovered back possession of the land sold to C. Subsequently he again applied for execution of the decree in respect of the balance by attachment of certain moveable property, and contended that he was bound to give the defendant credit only for the price which he actually paid at the court-sale for the equity of redemption. The defendant contended that A was bound to give credit for the full value of the land under mortgage:—*Held,* that having obtained leave of the Court to bid under s. 294 of the Code of Civil Procedure, A's position was that of an independent purchaser, and that the price, which an independent purchaser must be taken to pay when he buys property under mortgage for a cash payment made to the mortgagor on account of his equity of redemption, is the cash payment for the equity of redemption *plus* the debt, *i.e.*, the amount undertaken to be paid to the mortgagee, and that for these amounts A was bound to give credit. KRISHNASAMI AYYAR v. JANAKIAMMAL, 18 M. 153 456

(50) *S. 295—Rateable distribution—Assets realised in execution.*—A, B and C held money decrees against the same judgment-debtor. A attached by a prohibitory order dated in December, funds of the judgment-debtor in the hands of D. In January B attached in execution the same funds. In February, they were paid into Court, and subsequently on the same day C attached them as money due in the custody of the Court:—*Held,* that the funds should be rateably distributed between A and B, and that C was not entitled to participate therein. SRINIVASA AYYANGAR v. SEETHARAMAYYAR, 19 M. 72=5 M.L.J. 151 .. 755

(51) *S. 310-A—Civ. Pro. Code, Amendment Act—Act V of 1894—Application of Act V of 1894 when proceedings in execution had commenced before its enactment.*—A house of the judgment-debtor, having long

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previously been attached in execution of a decree, was brought to sale on the 9th of March 1894, that is, shortly after the enactment of Act V of 1894 The judgment-debtor now applied under Civ Pro Code, s. 319-A, that the sale be set aside —*Held,* that the provisions of Act V of 1894 whereby the above-mentioned section was added to the Civ Pro Code were applicable to the case RANGASAMI NAIDU v VIRASAMI CHETTI, 18 M 477 . 683

(52) *S* 311—*Setting aside a sale on the ground of material irregularity—Non-disclosure amounting to fraud*—A creditor had obtained a decree on the footing of a mortgage and in execution brought the property of his judgment-debtor to sale At the time of sale the decree-holder, who had obtained leave to bid, entered into an agreement with P to the effect that if P would dissuade other persons from bidding, he (the decree-holder) would purchase the whole property for Rs 83,000 and convey it on certain terms to P. P thereupon exerted his influence and succeeded in dissuading would-be purchasers from bidding and in consequence the property was sold on 11th April 1891 for Rs 83,000 which was a little more than half its actual value The sale was confirmed on 29th June 1891 and the judgment-debtor who at the time of the sale was a minor under the Court of Wards, attained his majority on 21st April 1894 and filed this petition praying to set aside the sale on the 15th May 1894 —*Held,* that the omission on the part of the decree-holder to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment-debtor to say that in point of law no leave to bid was granted, and that the withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore the sale must be set aside JAYINLABDIN RAVUTTAN v VIJIA RAGUNADHA AYYARAPPA MAIKAN GOPALAR, 19 M 315 925

(53) *Ss* 311, 588, *cls* 16, 28, *and s* 622—Land having been sold in execution of decree, one claiming that it had been held by the judgment-debtor benami for him applied that the sale be cancelled under s 311 He was not a party to the decree, and on that ground his petition was dismissed The Appellate Court was of opinion that it had been wrongly dismissed and remanded the case to be disposed of on the merit —*Held,* on revision, (1) that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable, (2) that the fact of the petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under s 311 TIMMANNA BANTA v MAHABALA BHATTA, 19 M 167=6 M L J 24 821

(54) *Ss* 313, 315, *and* 316—*Execution sale—Portion of the property sold belonging to a stranger—Rights of a purchaser in an execution sale*—Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by s 315 of the Civ Pro. Code The effect of ss 313, 315, and 316 of the Code is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court-sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor has no saleable interest at all The implied warranty of title in respect of sales by private contract cannot be extended to Court-sales, except so far as such extension is justified by the processual law in India, *viz*, by s 315 of the Civ Pro Code SUNDARA GOPALAN v VENKATA VARADAYYANGAR, 17 M 228=3 M L J 293 158

(55) *Ss* 316, 318—*Execution of decrees—Delivery of immoveable property in possession of judgment-debtor—Suit by assignee of purchaser at Court-sale for possession—Limitation*—The purchaser at an execution sale of a house, of which the judgment-debtor was in possession, sold it, agreeing at the same time to obtain the sale certificate and to deliver possession of the house After more than three years had expired he applied for the certificate, which, however, was refused on the ground that his application was time-barred On the purchaser's death his widow made

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a second application which was granted. In a suit by the purchaser's vendee to recover possession, she set up a title thereto under a sale by the original owner (the judgment-debtor) to herself and others executed more than three years after the Court-sale:—*Held,* that, since the execution purchaser would be barred, the plaintiff was equally barred. PULLAYYA v. RAMAYYA, 18 M. 144 .. 450

(56) *S.* 317—*Effect of benami purchase, and purchase as execution-debtor's agent.*—Where the purchaser at an execution sale is the agent of the execution-debtor and buys the property as such, though he advances the purchase money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such a transaction is not mere *benami* purchase, and is not a bar to such a suit under s. 317 of the Civ. Pro. Code. SANKUNNI NAYAR v. NARAYANAN NUMBUDRI, 17 M. 282=4 M.L.J. 64 .. 195

(57) *S.* 317—*Sale under mortgage decree—Benami purchaser—Purchase on account of a subsequent usufructuary mortgagee—Suit for conveyance and possession.*—Certain land was hypothecated to A and subsequently put in the possession of B under a usufructuary mortgage. A obtained a decree upon his hypothecation for the sale of the property against B and the mortgagor. In execution the land was purchased by the agent of B with his money and he agreed to execute a conveyance to B. This agreement was not carried out and the nominal purchaser ejected B's tenant:—*Held* that B was entitled to a decree for delivery of possession and execution of a conveyance. KUMBALINGA PILLAI v. ARIAPUTRA PADIACHI, 18 M. 436=5 M.L.J. 200 .. 653

(58) *S* 319—*Specific Relief Act—Act* I *of* 1877, *s.* 42—*Possession—Constructive possession.*—In a suit for a declaration of the plaintiff's title to certain land, no prayer for possession was contained in the plaint. It appeared that the land in question had been given to the plaintiff by his father and had subsequently been attached and brought to sale in execution of a decree against the plaintiff's father and had been purchased by the defendants who were put into constructive possession under Civ. Pro. Code, s. 319, the land being in the actual possession of tenants:—*Held,* that the suit for a declaration merely was not maintainable under Specific Relief Act, s. 42. KRISHNABHUPATI DEVU v. RAMAMURTI PANTULU, 18 M. 405 .. 631

(59) *S.* 344—*Insolvent judgment-debtor—Decree passed on appeal—Jurisdiction of Original Court to make declaration of insolvency.*—A suit for money was dismissed, but on appeal the High Court passed a decree for the plaintiff. The judgment-debtor made an application to the Court of First Instance under Civ. Pro. Code, s. 344, to be declared an insolvent:—*Held,* that the Court had jurisdiction to make the declaration sought for. JAMBUVAYYAN v. VENKATARAYAR, 19 M. 65=4 M.L.J. 235 .. 750

(60) *Ss.* 365, 367—*Representation of a deceased plaintiff.*—S. 365 of the Code of Civil Procedure presupposes that the party claiming to represent a deceased plaintiff is his legal representative, but, if the representative character is denied, or when two or more persons claim it, the procedure prescribed by s 367 of the Code should be followed. OULA v. BEEPATHEE, 17 M. 209=3 M.L.J. 289 .. 144

(61) *Ss.* 366, 367—*Dispute as to right to represent a deceased plaintiff—Right of his adopted son to continue the suit—Appeal against orders rejecting claim of alleged representative of deceased plaintiff and declaring suit abated.*—The plaintiff in a partition suit in which his brother was defendant died, and an application was made on behalf of a boy alleged to have been adopted by the widow of the deceased under his authority that his name be brought on to the record as plaintiff. This application was made within six months of the death of the original plaintiff. The Court of first instance rejected the application which defendant opposed on the ground that the boy had not been adopted, and dismissed the suit on the ground that it had abated:—*Held,* that appeals lay against the rejection of the above application, and also against the dismissal of the suit. *Per curiam*: A dispute within the meaning of Civ. Pro. Code,

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s 367, need not be between persons claiming to represent the deceased plaintiff SUBBAYYA v SAMINADAYYAR, 18 M 496=5 M L J 63 . 696

(62) S 373—See SUCCESSION ACT (X OF 1865), 19 M 458

(63) *S 375—Compromise extending beyond scope of suit*—In a suit for the partition of a zamindari the parties effected a compromise in writing which provided, *inter alia*, for certain reliefs which could only have been given by the Court in a suit based upon a different cause of action The compromise was presented in Court and a decree was passed embodying the whole of its terms —*Held*, (1) that an appeal lay against the decree, (2) that the decree should have been passed in the terms of such of the provisions agreed upon as related to relief which the Court could have given in the suit, (3) that the decree should be modified accordingly VENKATAPPA NAYANIM v THIMMA NAYANIM, 18 M 410 . 634

(64) *S 375—Power of Court to frame additional issues as to an alleged compromise effected subsequent to the institution of the suit*—The Civ Pro Code, s 375, was intended to meet cases where the parties having agreed to compromise subsequently fall out The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit APPASAMI NAYAKAN v VARADACHARI, 19 M 419 997

(65) Ss 407, 409—On hearing a petition under s 409 for leave to sue *in forma pauperis*, the Court must decide whether the petitioner has at the date of the petition a subsisting cause of action capable of enforcement, and where the cause of action is barred by *res judicata* or limitation, the petition must fail VIJENDRA TIRTHA SWAMI v SUDHINDRA TIRTHA SWAMI, 19 M 197=5 M L J 193 842

(66) *Ss* 440, 568—*Hindu Law—Devadasi—Adoption by a temple dancing woman—Right of adoptive daughter—Suit by infant without a next friend—Evidence taken on remand*—Suit by the adoptive daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother The plaintiff was 17 years old at the time the suit was instituted and she did not sue by a next friend No objection was taken by the defendants, on the ground that the plaintiff could not sue without a next friend, until the case came before the Court of first appeal at which time the plaintiff had attained majority On second appeal, the High Court directed the return of a finding on the issue (previously framed but not tried) whether the plaintiff's adoption was valid Fresh evidence was taken and the finding was that the adoption was made with the intention that the girl should be prostituted while she was still a minor —*Held*, (1) that seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend, until after she had attained her majority, the irregularity was waived, (2) that the lower Court had power to take additional evidence on the issue remanded, (3) that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention KAMAIAKSHI v. RAMASAMI CHETTI, 19 M 127 794

(67) *Ss* 456, 459, 460—*Sale in execution—Insanity of judgment-debtor intervening before*—A suit was brought by V to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to decree and prior to sale he has been declared insane under Act XXXIV of 1858 The second defendant was the auction purchaser —*Held*, by *Best, J*, that objection can be taken under s 311, Civ Pro Code, on the above grounds before the sale has been confirmed and certificate granted —*Held*, by *Subramanya Ayyar, J.*, that these facts only amounted to a material irregularity within s 311, Civ Pro Code, and that the plaintiff must prove substantial injury. NARAYANA KOTHAN v KALIANASUNDARAM PILLAI, 19 M 219 . 858

(68) *S 503—Appointment of a receiver by a Court under—Misappropriation by the receiver—Whether, subject to the receiver's liability, the creditor*

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or judgment-debtor must bear the loss.—In cases in which a receiver, appointed at the instance of the judgment-creditor under s. 503 of the Code of Civil Procedure, misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner, subject to the receiver's liability. ORR v. MUTHIA CHETTI, 17 M. 501 .. 347

(69) *S.* 503—*Appointment of receivers—Waste or misappropriation of property as a ground for appointing a receiver*—The fact that the acts complained of amount to misappropriation rather than waste makes no difference for the purposes of s. 533 of the Code of Civil Procedure. HANUMAYYA v. VENKATASUBBAYYA, 18 M. 23 .. 366

(70) *Ss* 508, 516—*Arbitration—Omission to fix time for delivery of award—Signing of an award by the arbitrators in the presence of each other.*—An award is not invalid merely because no time has been fixed for the making of the award, s. 508 of the Code of Civil Procedure being directory and not mandatory. It is necessary, as provided by s. 516 of the Code, that all the arbitrators agree to the terms of the award, but there is no provision of law requiring them to sign it in the presence of each other MUTHUKUTTI NAYAKAN v. ACHA NAYAKAN, 18 M. 22 .. 305

(71) *Ss.* 510, 524—*Reference to arbitration—Refusal of person appointed arbitrator to act—Appointment of arbitrator by Judge under s.* 510—*Effect of s* 524 *on such appointment.*—The words 'so far as they are consistent with any agreement so filed' in s. 524 of the Code of Civil Procedure, do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that s 510 has otherwise no application. The reasonable construction is that the action of the Judge under s. 510 should not be inconsistent with the agreement, if it contains any special provision on the subject BALA PATTABHIRAMA CHETTI v. SEETHARAMA CHETTI, 17 M. 498 .. 345

(72) *Ss* 525, 526—*Arbitration without intervention of Court—Application for decree in terms of award—Denial of submission to arbitration and genuineness of award*—An appeal lies against a decree passed upon an award under Civ. Pro. Code, ss. 525, 526 when the cause shown against the filing of the award has denied the submission to arbitration and the genuineness of the award. HUSANANNA v. LINGANNA, 18 M 423 (F.B.) .. 644

(73) *S* 532—*Chap* XXXIX—*Suit properly brought under—Promissory note—Contemporaneous collateral agreement consistent with the terms of the promissory note*—The plaintiffs advanced money to defendant for the supply of certain goods. On defendant's failure to supply the goods, plaintiffs pressed for repayment and a promissory note payable on demand for the amount due was executed, at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly consignments, the consignment to be made within fourteen days of the date of the promissory note On defendant's failure to send the consignments as promised a suit was brought under Ch. XXXIX, Civil Procedure Code—*Held*, that the suit was rightly filed under Ch XXXIX that the agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay, that such collateral agreement was no answer to the suit on the promissory note and that the plaintiff was entitled to a decree. SIMON v. HAKIM MOHAMED SHERIFF, 19 M. 368 .. 962

(74) *S.* 539—*Whether a suit to remove a trustee to a charitable trust lies under the section.*—A suit to remove a trustee to a charitable trust does not lie under s. 539 of the Code of Civil Procedure. *Per Shephard, J.*—The language of section 539 is in part borrowed from 52 Geo. III, cap. 101 (Sir Samuel Romilly's Act) and the decisions upon that statute are in a measure reproduced in the section S. 539 should, accordingly, be construed in the light of the decisions on that statute, so far as they are applicable to the language of the section, and the statute having

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from the first been held to be inapplicable to cases in which the hostile removal of a trustee is required, s 539 is likewise inapplicable to such cases RANGASAMI NAICKAN v. VARADAPPA NAICKAN, 17 M. 462 (F.B.) 321

(75) *S. 544—'Any ground common to all the plaintiffs or to all the defendants'*—S 544 of the Civ Pro Code presupposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect. Thus a District Judge has no power under this section to reverse the decree of a lower Court, given for a plaintiff in favour of a defendant who did not appeal and, in respect to property in which the other defendants who did appeal disclaim all interest SYED HUSSAIN v MADA KHAN, 17 M 265 183

(76) *Ss 560, 584 (c)—No application for re-hearing—Power of High Court to interfere*—Where an appeal was heard *ex parte* by a Lower Appellate Court and the decree of the Court of first instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served and who was not aware of the proceedings till after the time for applying for a re-hearing under s 560 and Limitation Act, sch II, art 169, had expired —*Held,* that the High Court in second appeal had power to interfere under s 584 (*c*), Civ Pro Code BALAJI RAU v SITHABHOY, 19 M 414 994

(77) *Ss 562, 566—Order of remand when legal—Duty of Appellate Court when addition of parties and amendment of issues is necessary*—In a suit by mortgagees to redeem a prior mortgage issues were framed and tried and disposed of in favour of the plaintiffs as to the questions whether the plaintiffs' mortgage was valid, whether the mortgage sought to be redeemed had been discharged, and whether the suit was barred by limitation, the Court of first appeal was of opinion that these questions had not been properly considered, and set aside the decree for the plaintiffs and directed that a fresh trial be held, certain fresh parties being brought on the record —*Held,* (1) that the order of remand was illegal; (2) that the Lower Appellate Court should have joined the persons necessary for the suit and should have so altered or added to the issues as to raise all questions properly arising and should have referred them for trial to the Court of first instance. KELU MULOCHERI NAYAR v CHENDU, 19 M 157 815

(78) *Ss 562, 566 and 582—Order made on appeal to amend plaint*—On appeal from the decision of the District Munsif in favour of the plaintiffs, in a suit for the recovery of rent, the District Judge set aside the decree of the Lower Court, ordered a new trial, and directed the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiffs claimed the rent —*Held,* that the order for amendment of the plaint was bad under s 562 of the Code of Civil Procedure, since the original Court had not 'disposed of the suit upon a preliminary point,' and that it was likewise bad under s 582, since there had been no dispute as to the boundaries of the land before the original Court If the information was necessary, the District Judge should have sent down an issue on the point for trial under s 566 of the Code. KRISHNAYA NAVADA v PANCHU, 17 M 187 128

(79) *Ss 562, 569, 578—Order of remand—Irregularity affecting the merits*—Where a District Court reversed the District Munsif's decree and remanded the case for a revised finding on the merits —*Held,* that this procedure was *ultra vires* and illegal —*Held* further, that as the irregularity might have affected the merits of the case, s 578, Civ Pro Code, was inapplicable MALLIKARJUNA v PATHANENI, 19 M 479 1039

(80) *Ss 562, 588, 590, 591—Order of remand—Right of appeal*—On an appeal from a decree of a District Munsif, it appeared that he had decided all the issues framed in the suit, but in the opinion of the District Judge he had based his judgment upon evidence improperly taken. The District Judge remanded the case to be retried, and in the event a decree was passed dismissing the suit which was affirmed

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on appeal by the Subordinate Judge: *Held,* on second appeal, that the order of remand was illegal and, although it had not been appealed against, the subsequent proceedings should be treated as non-existent, and the appeal to the District Court should be remanded to be disposed of in accordance with law SUBBA SASTRI v. BALACHANDRA SASTRI, 18 M. 421 643

(81) *S.* 566—*Remand for trial of a new issue—Malabar law—Mapillas.*—The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad:—*Held,* that the order of remand was not one which should have been made under Civ. Pro Code, s. 566, and the proceedings taken under it were irregular Observations as to the law applicable to Mapillas ILLIKA PAKRAMAR v. KUTTI KANHAMAD, 17 M. 69=4 M L.J. 14 ..

(82) *S* 583—*Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund.*—In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one claiming title against the mortgagee was joined as second defendant The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint; and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person entitled to it, was paid over to the plaintiff The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs; this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above:—*Held,* that the applicant was not entitled to the refund claimed KASSIM SAHIB v LUIS, 17 M. 82 .. 56

(83) *S.* 584—*Landlord and tenants—Ulavadai mirasidars—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Inference to be drawn from documents, question of law.*—In 1813 the manager of a temple gave a permanent lease of one-half of certain lands to C, the ancestor of the defendants 1 to 14, and the other half to N In 1820 N transferred his share to V, the son of C In 1831 V and S, the ancestor of the other defendants, addressed a petition to the Collector, the then manager of the temple. In 1832 V and S executed a fresh lease and a security bond in favour of thte temple, in both of which documents V and S were described as Ulavadai mirasidars, that is, persons with an hereditary right to cultivate. There was no evidence adduced to prove for what purpose the lease of 1832 was executed, but the defendants held possession as tenants from 1832 to date of suit:—*Held,* that the wards 'Ulavadai mirasidars' used in the deeds of 1832 as describing the tenants denoted that they were persons with hereditary right to cultivate, and that the lease was therefore of a permanent nature:—*Held* also, that after the lapse of so great a period of time, the Court would presume under the circumstances, that the original grants were made for a necessary purpose and were binding

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on the temple—*Held* further, that the proper inference to be drawn from the terms of a document is a question of law within the meaning of s 584, Civ. Pro Code, and can be considered in second appeal CHOCKALINGAM PILLAI v MAYYANDI CHETTIAR, 19 M 485=6 M L J. 247

(84) *Ss* 586, 588 (28)—*Contract—Continuing breach—Limitation*—T, who was the uncle of the first defendant and the father of the second defendant, agreed with C to sell certain land to him for consideration received and to cause the land, then standing in the name of a third party, to be registered in C's name It was further agreed that if T failed to convey and cause the change of the revenue registry, T should return the purchase money C was put in possession, but in 1890 the second defendant conveyed the land to one M who ejected C—*Held*, that the right of appeal conferred by s 588, Civ. Pro Code, is not controlled by s 586, that the breach did not occur prior to November 1890 and that the suit was not barred CHINNATAMBI GOUNDEN v CHINNANA GOUNDEN, 19 M 391 . 978

(85) *Ss* 588 (17), 589—*Appeal from insolvency order—Act VII of 1888, s 56—Act X of 1888, s. 3, cl (a)*.—Bearing in mind that s 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, the words 'Court subordinate to that Court' in s 3 of Act X of 1888 must be construed with reference to its appellate jurisdiction Consequently a District Court has no jurisdiction to hear an appeal from an order in insolvency matters, in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject-matter of the suit is more than Rs 5,000 in value VENKATRAYER v. JAMBOO AYYAN, 17 M 377=3 M L J 97 261

(86) *S* 588, *cl* 28—*Appeal against order of remand—Finding of fact—Letters Patent, s* 15—Where an appeal is preferred against an appellate order under s 588, Civ Pro Code, the finding of fact by the Lower Appellate Court is conclusive as between the parties on the proper construction of ss 584 and 588, Civ Pro Code There is no appeal under the Letters Patent, s 15, against an order of a single Judge passed under Civ Pro Code, s 588, cl 28 VENGANAYYAN v RAMASAMI AYYAN, 19 M 422=4 M L J 263 1000

(87) *Ss* 596, 598, 599—*Limitation Act—Act XV of 1877, s 7, 12 sch II art 177—Application to admit appeal to Privy Council—Disability by reason of minority—Deduction of time*.—In 1885 the High Court in appeal passed a decree to which a minor under the Court of Wards was a party Having attained his majority in 1894, he sought to appeal to Her Majesty in Council and presented an appeal within six months of the date when he attained majority On an application under Civ Pro Code, s 598—*Held*, that the application was barred by limitation THURAI RAJAH v JAINILABDEEN ROWTHAN, 18 M 484 688

(88) *S* 608—*Order for security to be furnished by respondent in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security*—The present plaintiff purchased land brought to sale in execution of a decree and was put in possession The sale was set aside by the High Court and the purchaser was ousted He preferred an appeal to the Privy Council, and the High Court directed that security be given for the mesne profits and the due delivery of the property without waste in the event of the appeal being successful The present defendants furnished security and executed a document under which the plaintiff who had succeeded in the Privy Council, now sued to enforce his rights. It appeared that after the date of the instrument above mentioned a payment was made from the income of the property in satisfaction of a decree obtained by the Zemindar against the present plaintiff for arrears of poruppu previously accrued due—*Held*, (1) that the order of the High Court requiring security to be furnished was not *ultra vires* and that the instrument above mentioned was enforceable; (2) that the defendants who had given no personal guarantee were not competent to put an end to the security under the provisions of the Contract Act relating to revocation of a surety; (3) that on the right

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construction of the instrument the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the decision of the Privy Council; (4) that the defendants should be credited with the amount paid in satisfaction of the decree for poruppu. NARAYANAN CHETTI v. ARUNACHELLAM CHETTI, 19 M. 140 .. 802

(89 *S.* 622—*Land Acquisition Act—Act X of* 1870, *ss.* 3, 24, 25, 29 *and* 34—*'Material irregularity'—Mistake in regard to the principal of calculation of the value of the land acquired.*—If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land, acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by s. 24 of that Act, or have improperly taken into consideration any of the matters prohibited by s. 25 thereof, such procedure would amount a material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under s. 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in s. 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of works on the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction JOSEPH v THE SALT COMPANY, 17 M. 371 . 257

(90) *S.* 622—*Power to call for record of cases not appealable to High Court—When a Court can be said 'to have acted in the exercise of its jurisdiction illegally or with material irregularity'*—A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, and admitted, other appeals after they had become time barred:—*Held,* that where a Subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by s. 622 of the Code of Civil Procedure:—*Held,* further (BEST and DAVIES, JJ., *dissentiente*), that the case contemplated by the words 'act . . . illegally or with material irregularity' in s 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or procedure *Per* BEST, J. —The words in question of s. 622 of the Code are applicable to illegalities or irregularities which are the result merely to ignorance of law or carelessness, and the disposal of a suit on a point taken by the Court itself on appeal, without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure within the meaning of s. 622, and that the inadvertent admission of an appeal that is time-barred is an illegality in procedure within the meaning of that section. *Per* DAVIES, J.—The clause of s. 622 in question is applicable only to errors of procedure, and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section, interfere in revision. The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case. KRISTAMMA NAIDU v. CHAPA NAIDU, 17 M. 410 (F.B.) .. 284

(91) *S.* 623—*Review of judgment on second appeal—Alleged discovery of new and important documentary evidence*—In a suit on a mortgage it was held by the Lower Appellate Court and by the High Court on second appeal that the properties comprised therein were under attachment at the time of its execution, and that it was accordingly void under Civ. Pro. Code, s. 276, as against the claims of judgment-creditors enforceable under the attachment. The plaintiff, who was the appellant on second appeal, sought a review of the judgment pronounced therein on the ground of the discovery of new and important documentary

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evidence from which it would appear that the properties in question were not under attachment at the date of the mortgage —*Held*, that the application for review could not be entertained for the reason that the ground relied upon could not be successfully relied upon on a second appeal RARU KUTTI v MAMAD, 18 M. 480 685

(92) S 649—Provincial Small Cause Courts Act—Act IX of 1887, s 35 (1) —Withdrawal of powers—Civil Courts Act—Act III of 1873 (Madras), s 28—See ACT III OF 1873 (CIVIL COURTS, MADRAS), 19 M 445

(93) S 652—See HIGH COURT, 18 M 236

Civil Procedure Code Amendment Act (VII of 1888).

S 56—See CIV PRO CODE (ACT XIV OF 1882), 17 M 377

Civil Procedure Code Amendment Act (V of 1894)

See CIV PRO. CODE (ACT XIV OF 1882), 18 M 477

Cocoanut Trees.

See ACT I OF 1887 (MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS), 18 M 407

Common Gaming House.

See ACT III OF 1889 (MADRAS, TOWNS NUISANCES), 18 M 46

Companies Act (X of 1866)

S 4—*Unregistered association—Mortgage, illegality of—estoppel*—In 1868, the Madras Hindu Mutual Benefit Permanent Fund was created for the purpose of enabling Hindus to assist one another and invest their savings chiefly on landed property, and the doing all such other things as are incidental or conducive to the attainment of the above objects By the rules of the said fund, which was not registered under the Indian Companies Act X of 1866, it was provided that the members should pay subscriptions at the rate of Rs 2-8-0 per share per mensem for seven years from the date of admission and that the end of the seven years Rs 250 shall be paid in full discharge of each share It was further provided that subscribers shall be entitled to borrow money from the said fund at interest, that a reserve fund be formed and distributed once every five years to the subscribers and that surplus collections be distributed among the subscribers annually In 1868 defendant's father borrowed money on mortgage from the fund in accordance with the rules, and the amount was admittedly due at the time of suit The fund was wound up under an order of the High Court, dated 15th September 1877, during the lifetime of defendant's father, who, however, took no active part in those proceedings It further appeared that, on the execution of the mortgage, the defendant's father (the mortgagor) took a lease from the mortgagees of the houses mortgaged and retained possession of them as tenant —*Held*, that the association had for its object the acquisition of gain, that as the association consisted of more than twenty members and was not registered, its formation was forbidden by the Indian Companies Act X of 1866, s 4, that the suit mortgage having for its object the carrying out of the illegal purpose of the association was an illegal transaction and that the suit must fail —*Held* further, that the defendants were not estopped from setting up the plea of illegality either by the order of 1877 or by reason of their predecessor in title having attorned to the fund MADRAS HINDU MUTUAL BENEFIT PERMANENT FUND v RAGAVA CHETTI, 19 M. 200 844

Companies Act (VI of 1882).

(1) S 4—*Illegal association—Business carried on for the purpose of gain*—Persons more than twenty in number paid each a certain sum monthly to a stake-holder The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by casting lots, and he was thereupon required to execute a bond with a surety obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good—that period being as many months as there were subscribers The bonds in question were executed in favour of the stakeholder and the subscribers A suit was brought on one of such bonds to recover the amount payable for subscription on account of the period subsequent to its execution:—*Held*,

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Companies Act (VI of 1882)—(*Concluded*).
that the obligees carried on business which had for its object the acquisition of gain within the meaning of Companies Act, 1882, s. 4, and accordingly constituted an illegal association and that the suit was not maintainable. RAMASAMI BHAGAVATHAR v. NAGENDRAYYAN, 19 M. 31=5 M.L.J. 275 .. 726

(2) *S. 182—Notices—Loan Society—Liquidation—Previous withdrawal of member—Construction of rules—Distribution of assets.*—One of the articles of association of a registered Loan Society provided that a member who has received no loan may withdraw from the association, and receive the amount at his credit in calls *minus* the arrears, if any, and interest due thereon on giving one month's notice, such withdrawals to be paid from the first available funds The society went into voluntary liquidation. By an extraordinary resolution it was resolved that the assets be rateably divided among the shareholders who had already withdrawn and those who were still in the fund The liquidators applied to the Court under Companies Act, s. 182, to determine the question how the assets should be distributed with reference to the above article. *Shephard, J.*, ordered that notice of the application be given by advertisement on the notice board of the Court and in newspapers, and that a copy be posted at the society's office:—*Held, affirming the judgment of Shephard, J.*, that those members who had given notice of withdrawal under the article quoted above were entitled to be paid out of the assets of the society in priority to the other members ADIPURNAM PILLAI v D'SENA, 19 M 85 .. 764

(3) *S. 187—Power of liquidator after dissolution of company*—Suit on a promissory note of the defendant in favour of a company The note was payable to the company or order The company had gone into liquidation and a liquidator had been duly appointed. The plaintiffs had purchased, together with certain other assets of the company, the note sued on, but did not obtain the liquidator's endorsement of the note until after the dissolution of the company was completed —*Held*, that the liquidator had no power to endorse the note to the plaintiffs RAMACHANDRA RAU v. KANDASAMI CHETTI, 18 M. 498 . 698

(4) *S. 214—Application against directors for refund of money improperly distributed—Limitation Act, sch II, art 36—Misfeasance.*—An application was made in 1894 under Indian Companies Act of 1882, s 214, by an official liquidator appointed in 1891, praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders:—*Held*, that the application was not barred by limitation RAMASAMI v. STREERAMULU CHETTI, 19 M 149 . 809

Compensation.
(1) See CIV PRO CODE (ACT XIV OF 1882), 17 M 371
(2) See LIMITATION ACT (XV OF 1877), 19 M. 80

Compromise.
See LIMITATION ACT (XV OF 1877), 18 M. 38.

Confessions.
Of Co-accused—Corroboration—Material particulars—Evidence Act, s 30—Abetment—Penal Code, s. 109—Where the only evidence against two prisoners accused of murder directly implicating them in the commission of the crime consisted of confessional statements made by them before the committing Magistrate, which were subsequently retracted, and the statements in such confessions were corroborated in material particulars by other evidence on the record:—*Held*, that the evidence was sufficient to support a conviction. QUEEN-EMPRESS v RARU NAYAR, 19 M. 482=2 Weir 745 .. 1041

Consideration.
(1) See CIV. PRO. CODE (ACT XIV *of* 1882), 17 M. 382, 18 M. 189.
(2) See CONTRACT ACT (IX OF 1872), 19 M. 398.

Constructive Notice.
See PARTNERSHIP, 19 M. 471.

Contract.

(1) Continuing Breach—Limitation—Civ Pro Code, ss 586, 588 (28)—See Civ Pro Code (act XIV of 1882), 19 M 391

(2) *Executory contract involving personal considerations—Assignment—Contract consisting of distinct contracts with separate parties—Misjoinder of the parties as defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only*—Seven salt manufacturers, the defendants, contracted with A to manufacture and store in their factory in the name of and for the benefit of A such quantities of salt as he might require them to manufacture each season for seven years, in consideration of A's paying them at the rate of Rs 11-8-0 per garce of salt, four months' credit after each delivery being allowed to A, and of his paying Government taxes and dues, and executing all but petty repairs in the defendants' factory B was a party with A to the contract though he was not expressly mentioned therein A assigned his share in the contract to C B, as first plaintiff, and C, as second plaintiff, brought a suit against the defendants alleging that the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886) and praying (1) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886, (2) that defendants 2, 4 and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt The Court of first instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own pans only, decreed (1) that the seven defendants should pay damages at the rate of Rs 5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree, (2) that the defendants should pay the plaintiffs' costs On appeal the District Judge modified the decree by fixing the rate of damages at Rs. 45-10-0 for each garce of salt:—*Held*, on appeal, (1) that A was not competent to assign his interest in the contract to the second plaintiff, since the contract was based on personal considerations and that the assignment of it as an executory contract was invalid without the consent of the defendants, (2) that the suit was bad for misjoinder, since the case of each defendant, as a party to a distinct contract, should be decided on its own merits, (3) that the decrees of the Lower Courts were bad in making all the defendants jointly and severally liable for costs, and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant, (4) that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the Lower Appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty Namasivaya Gurukkal v Kadir Ammal, 17 M 168=4 M L J 31 115

(3) *Promissory note or bond executed in Foreign State—Liability determined by* lex loci contractus—*Suit upon consideration for the document*—Lex fori—Where, according to the *lex loci contractus*, a promissory note or bond cannot, in the absence of registration, be a source of legal right, no action on an unregistered note or bond can be maintained Whether a suit will lie up on the consideration for the instrument is a question of procedure, to be governed by the *lex fori*, and in British India such a claim must either be stated in the plaint as an independent ground of claim, or treated as such and an issue taken at the first hearing Palaniappa Chetti v Periakaruppan Chetti, 17 M 262 181

(4) *Undue influence—Acquiescence by conduct—Lease for one year at a rental of more than Rs* 100—*Registration—Registration Act—Act* III *of 1877, s.* 17—*Transfer of Property Act—Act* IV *of* 1882, *ss* 4 *and* 107—Where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and retains the rents of the land he has

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Contract—(*Concluded*).

acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence. The fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create an interest in land of Rs. 100 and more in value so as to necessitate registration of the lease under s. 17 of the Registration Act. Such a lease falls under s. 107 of the Transfer of Property Act, the provisions of which section are, by s. 4 of the Act, supplemental to the Registration Act. SEETHARAMA RAJU v. BAYANNA PANTULU, 17 M 275 .. 190

(5) See CIV. PRO CODE (ACT XIV OF 1882), 17 M. 12.

(6) See CONTRACT ACT (IX OF 1872), 17 M 9, 17 M 445, 17 M. 480, 17 M 496.

(7) See CONTRIBUTION, 17 M. 78.

Contract Act (IX of 1872).

(1) *Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Contracts for payment of differences only*—A having on various occasions sold certain amounts of Government promissory notes to B, aggregating on the whole to 2½ lakhs, for delivery on 30th November 1891, B on the 28th of November sold the same amount to A for delivery on the 30th November. On that day B. through his attorneys, called upon A to retain the 'paper' contracted to be sold by A to B in respect of that contracted to be sold by B to A, and to pay the differences in the prices of the two contracts to B, and subsequently sued him for the amount:—*Held*, per DAVIES, J., that B had admitted that the original contract sued on was for payment of differences only, and that it was a wagering contract, and therefore void:—*Held*, on appeal, *per* MUTTUSAMI AYYAR, J., that the above judgment should be confirmed; *per* BEST, J, that on the evidence it was not proved that at the time of entering into the original contract the intention of both parties was merely for payment of differences, and that consequently the contract was not a wagering contract, but a valid one VENKATACHELLA CHETTI v. VENKATA SUBBA RAU, 17 M. 496 . 344

(2) *S 11—Specific Relief Act—Act I of 1877, s 28—Contract relating to the property of an infant—Decree for specific performance*—The mother and guardian of a Hindu minor entered into a contract for the sale of his land. The vendee sued the minor by his mother and guardian *ad litem* for specific performance of the contract and for possession It was found that the contract was binding on the minor:—*Held*, that the suit was maintainable KRISHNASAMI v. SUNDRAPPAYYAR, 18 M. 415=5 M. L J. 164 638

(3) *S. 23—Champerty—Speculative purchase—Public policy—Limitation Act—Act XV of 1877, s 12—Delay in obtaining copies for the purpose of appeal*—Res judicata.—In a suit for land worth Rs 2,300 the plaintiff claimed title under a conveyance executed to him by defendant No. 1 shortly before suit in consideration of Rs 250 The property had previously belonged to the father, since deceased. of the first defendant's wife and her sister defendant No 2. Shortly after the father's death a suit for maintenance was brought by his sister-in-law against his widow and two daughters, in which the then defendants alleged that the property now in question had been given by him to the wife of the plaintiff's vendor, and the Court recorded a finding that the gift was valid. Defendant No. 2 now raised a plea that the gift to her sister had not been accompanied by possession any was invalid, and she asserted title in herself under the will of her mother, under which title she had been in possession for ten years. The Court of first instance passed a decree for the plaintiff, the judgment and decree bearing date the 20th of September. Defendant No. 2, being desirous of appealing *in forma pauperis* applied for copies on the following day. Stamp papers were called for on the 28th of October, but were not produced by the 31st, when the application was struck off under the copyist rules. On the

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Contract Act (IX of 1872)—(*Continued*)

6th of November a petition was put in explaining the circumstances which prevented the stamps being produced within the period of three days, and praying for restoration of the previous application —*Held,* (1) that the application of the 6th of November must be considered a continuation of the former one for the purpose of computing the time allowed by the Limitation Act within which an appeal should be preferred to the District Court, (2) that the second defendant was not precluded by the proceedings in the former suit from raising the plea above referred to, (3) that the plaintiff's purchase, which was found by the District Judge not to be a champertous transaction, was not void as being contrary to public policy RAMANUJA AYYANGAR v NARAYANA AYYANGAR, 18 M 374 669

(4) S 23—Consideration in part illegal—Stifling a prosecution—Limitation Act—Act XV of 1877, s 22, sch II, arts 91, 120—Civ Pro Code—Act XIV of 1882, s 13—*Res judicata*—Decree in suit of small cause nature—Subsequent suit for declaration See CIV PRO CODE (ACT XIV OF 1882), 18 M 189

(5) S 23—*Marriage brokage contract*—*Public policy*—*Hindu law*—An agreement to assist a Hindu for reward in procuring a wife is void as being contrary to public policy VAITHYANATHAM v GANGARAJU, 17 M 9=3 M L J 132

(6) S. 25, *cl* 3—*Regulation* V *of* 1804, *s* 17—*Powers of Agents to Court of Wards*—*Promise to pay a time-barred debt*—A Collector as agent to the Court of Wards has no authority to bind a ward of the Court of Wards by a promise under Contract Act, s 25, cl 3, pay a debt which is barred by limitation SURYANARAYANA v NARENDRA THATRAZ, 19 M 255 883

(7) S 30—*Contracts to buy and sell Government promissory notes*—*Whether wagering contracts or not*—*Admissibility of oral evidence to contradict the nature of a contract in writing*—*Evidence Act*—*Act* I *of* 1872, *s* 92—A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs for delivery on the following 30th of November On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November A did not perform his contract to sell, and B sued him for damages amounting to Rs 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell A denied that the transactions were *bona fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on the 30th of November, and that such a contract being by way of wager, was void under s 30 of the Indian Contract Act *Held, per Davies, J*, that neither party intended *bona fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract *Held on appeal* (1) *that* the burden of proof that the agreements were wagers, *i e*, that they were not in substance what they were in form, lay on A, as the party so alleging, (2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager (*See* Indian Evidence Act, s 92) (3) *Per Muttusami Ayyar J*, that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not In the former case, the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract, (4) *Per Best, J*, that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contract not to call for or give delivery from or to each other and that no such common intention having been proved the contract was a valid one ESHOOR DOSS v. VENKATASUBBA RAU, 17 M. 480 333

Contract Act (IX of 1872)—(*Continued*).

(8) *S* 30—*Wagering contract—Contract for differences*—A, on various occasions, agreed to sell to B certain amounts of Government of India promissory notes amounting in all to the nominal value of four and a quarter lakhs for delivery on the following 30th of November. On the 28th of November, B agreed to sell to A Government of India promissory notes of the nominal value of four and a quarter lakhs for delivery on the 30th of November. A did not perform his contract to sell, and B now sued to recover, by way of damages, the difference between the prices at which A had agreed to buy and sell. It appeared that it had been the intention of both plaintiff and defendant that no delivery should be made under the agreements but that the differences only should be paid:—*Held*, that the plaintiff was not entitled to recover, for the reason that the agreement sued on was void under Contract Act, s. 30, as being a gambling transaction ESHOOR DOSS v. VENKATASUBBA RAU, 18 M. 306 (**F.B.**) . 562

(9) *S*. 39—*Mortgage—Partial breach of contract by mortgagee—Rescission—Acquiescence—Suit by mortgagee for interest due under the mortgage as regards the part fulfilled*—A mortgaged certain land to B for Rs 800. Under the terms of the mortgage deed B was to pay Rs 500 of the advance to C in discharge of a previous mortgage executed by A in favour of C. Of the balance of Rs 300, B was to retain Rs. 200 in payment of a previous debt of A due to him, and the balance of Rs. 100 was to be paid to A B paid the said Rs 100, retained Rs 200, but neglected to pay the said Rs. 500 to C, who sued A and recovered the date by attachment and sale of A's moveable property After eight years from the date of the mortgage B brought a suit to recover the interest due under the mortgage on Rs. 300 only:—*Held*, that under s 39 of the Contract Act, A was entitled to cancel the contract of mortgage owing to B's conduct, but that he was bound to give up the benefit he had received, *viz*., Rs. 300 and pay interest thereon up to the date of cancellation. B was not entitled to treat the original mortgage as a mortgage in force with all its stipulations for Rs 300 instead of Rs. 800, and on that view to sue for interest alone SUBBA RAU v. DEVU SHETTI, 18 M 126 .. 437

(10) *S*. 39—*Shipment at monthly intervals*—The defendant agreed to purchase from the plaintiffs 120 cases of condensed milk which were to be shipped in London and delivered in Madras. The agreement stipulated for shipment in six lots of twenty cases each at monthly intervals, but it contained a proviso, whereby the plaintiffs were excused from monthly shipments if space in ships sailing for Madras were not available The second shipment was not made within one month from the date of the first shipment, thereupon the defendant repudiated the contract:—*Held*, (1) that the interval of time contemplated in the contract was one month more or less, regard being had to the time which it might be reasonable to allow to the plaintiffs for finding a steamer available for the required shipment; (2) that the plaintiffs having failed to make the second shipment by a steamer of which they might have availed themselves, the defendant was justified in rescinding the contract. VOLKART BROTHERS v RUTNAVELU CHETTI, 18 M. 63=4 M L.J. 179 .. 394

(11) *Ss* 45, 263—*Suit by surviving member of a firm alone—Succession Certificate Act—Act* VII *of* 1889, *s* 4—*Suit by surviving partner and heir of deceased partner.*—In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner:—*Held*, that a surviving partner can sue alone for the recovery of a partnership debt:—*Held further*, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is

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Contract Act (IX of 1872)—*(Concluded)*
a co-parcenary debt VIDYANATHA AYYAR v CHINNASAMI NAIK, 17 M 108 74

(12) S. 63—*Consideration* —An agreement, extending the time for the performance of a contract falling under s 63, Contract Act, does not require consideration to support it DAVIS v CUNDASAMI MUDALI, 19 M. 398=6 M L J 202 983

(13) S 70—*Repairs by Government to a tank in which zamindar is interested—Suit against zemindar for share of expenditure.*—The Government repaired a certain tank from which were irrigated lands in the zamindari of the defendants and adso raiyatwari villages held under Government which had been severed from the zemindari It was found that the defendants knew that the repairs, which were necessary for the preservation of the tank, were being carried out and did not wish to execute them themselves except as contractors and that they had enjoyed the benefit of the work done, and further that Goverment had carried out the repairs not intending to do them gratuitously for the defendants It was not found that there was any request, either express or implied, on the part of the defendants to the Government to execute the repairs In a suit by the Secretary of State to recover from the defendants their share of the cost incurred —*Held* that the plaintiff was entitled under Contract Act s 70, to recover part of the cost incurred, estimated with reference to the irrigable area of the villages owned by the plaintiff and defendants, respectively DAMODARA MUDALIAR v SECRETARY OF STATE FOR INDIA, 18 M 88=4 M L J 205 410

(14) S. 74—*Penal sum—Enhanced interest—Mortgage—Construction of covenant to pay*—In a suit to recover principal and interest due on a mortgage, dated 19th April 1882, it appeared that the instrument provided that the principal should be repaid with interest at 21 per cent, per annum in two instalments on 8th May 1883 and the 27th April 1884, respectively, and proceeded as follows "If the amount of each "instalment be not paid on the date of such instalment, we shall make "payment with interest at three rupees per cent, per mensem from the "date of the bond" No payment had been made on account of prinpal or interest —*Held*, that the plaintiff was entitled to recover the principal, together with interest calculated at 21 per cent up to the dates when the instalments respectively became due, and at 12 per cent, from those dates to the date of the plaint and at 6 per cent from that date until payment GOPALUDU v VENKATARATNAM, 18 M 175=4 M L J 257 471

(15) S 74—*Penal sum—Mortgage—Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale*—In March 1881 A purchased certain land and, in the same month, mortgaged it to B In June the land was attached in execution of a decree In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him C was not a party to this suit In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C C now sued A and D to enforce his hypothecation —*Held*, that C was entitled to a decree for sale. A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent on a certain date, the interest shall be at 18 per cent from the date of the bond is not unenforceable NARAYANASAMI NAIDU v NARAYANA RAU, 17 M. 62=4 M L.J. 17 43

16) Ss. 151, 152, 161—Liability of Railway Companies as bailees—Railways Act, IX of 1890, ss 72, 76—Carrier's Act—Act III of 1865 see ACT III OF 1865.(CARRIERS), 17 M 445

(17) S. 171—*Banker's lien*—The plaintiff deposited certain jewels with the defendant bank to secure certain debts Afterwards he paid the secured debts and demanded the return of the jewels being then otherwise indebted to the bank;—*Held* that the plaintiff was not entitled to recover

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Contract Act (IX of 1872) —(*Continued*)

the jewels without discharging the other debts unless he proved that the defendant had agreed to give up its general lien. KUNHAN MAYAN v. THE BANK OF MADRAS, 19 M. 234 .. 868

Contribution.

(1) *Suit for—Joint tort-feasor—Adjustment of a loss arising from an illegal contract.*—A deed of partition between A and B, members of an undivided Hindu family, provided that A, who took over all the debts due to the family, should bear the loss, if any, incurred in the appeal then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against B and satisfied by him: he now sued the son of A (deceased) to recover the amount paid by him:—*Held,* that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors. LAKSHMANA AYYAN v. RANGASAMI AYYAN, 17 M. 78=3 M.L.J. 272 .. 53

(2) See PARTNERSHIP, 18 M. 134

Costs.

(1) *Infant—Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instruction—Repudiation of the proceedings by the minor on attaining majority.*—A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them. Assuming that the legal proceedings were in the nature of necessaries, the next friend is the person responsible to the solicitor. BRANSON v. APPASAMI, 17 M. 257 .. 177

(2) *Suit against Secretary of State in Council—Dismissal of suit with costs—Review of taxation—Remuneration of the Advocate-General and Government solicitor by fixed salaries—Liability of party condemned in costs.*—Assuming that the arrangement between the Government and its Solicitor is that the latter should receive a salary and in addition the costs awarded to Government, this arrangement cannot affect a third party condemned in costs; neither is it illegal or contrary to public policy. MUHAMMED ALIM OOLLAH SAHIB v. THE SECRETARY STATE FOR INDIA, 17 M. 162 .. 111

(3) *Whether an unsuccessful plaintiff is liable for costs unnecessarily incurred by the defendant owing to his vakil's negligence.*—The costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party in the defence of the suit. Costs can not be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided. SEETA PATTA MAHADEVI v. SURYUDAMMA, 18 M. 128 .. 439

(4) See COURT FEES ACT (VII OF 1870), 19 M. 350

Court Fees.

Insufficient payment of—Procedure to be adopted on.—The plaintiff not having in the first instance paid the full Court-fees he should have been called upon to do so. As this was not done, the Court of first appeal was not in error in entertaining the appeal which was preferred by the plaintiff; but he should have passed no decree until the fees due had been paid and if they were not paid he should have dismissed the suit. KRISHNASAMI v. SUNDARAPPAYYAR, 18 M. 415=5 M.L.J. 164 .. 638

Court Fees Act (VII of 1870).

(1) *Ss.* 6, 7 (ix), 17—*Redemption suit against mortgagee in possession—Arrears of rent covenated for, to be deducted from the mortgage amount.*—In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for, and the plaintiff asks for an account in taking which the arrears of rent should be deducted from the mortgage amount:—*Held,* that the Court-fee should be computed according to the principal sum expressed to be secured by the mortgage. EACHARAN PATTER v. APPU PATTER, 19 M. 16 .. 715

(2) *S.* 17—*Suit by reversioners to declare various alienations by a Hindu widow to be invalid against them.*—When reversioners sue to have

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Court Fees Act (VII of 1870)—(*Concluded*)

declared invalid as against them alienations made by a Hindu widow, a Court-fee of Rs 10 must be paid in respect of each of the alienations in question. DAIVACHILAYA PILLAI v PONNAIHAL, 18 M 459 . 670

(3) *Sch* I—*Appeal*—*Stamp leviable for costs*—When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of the first schedule of the Court Fees Act MAKKI, *In re*, 19 M 350 . 950

Court of Wards.

See CONTRACT ACT (IX OF 1872), 19 M 255

Cremation.

See CRIM PRO CODE (ACT X OF 1882), 19 M 464

Crim Pro Code (Act X of 1882).

(1) *Ss* 488—'*Adultery*'—*Penal Code*—*Act* XLV *of* 1860, *s*. 497—A wife petitioned for maintenance for herself and child against her husband under s 488 of the Crim Pro Code The husband did not refuse to maintain his wife, but the petitioner refused to live with him as he kept a concubine —*Held*, that the word 'adultery' in s 488 of the Crim. Pro Code must, by virtue of s 4 of the Code, be construed with reference to the definition of the term in s 497 of the Indian Penal Code Consequently a husband's immorality which does not amount to 'adultery' or involve the degradation of a married woman being brought in to the society of a concubine is not sufficient ground for a wife's refusal to live with her husband An offer to maintain a wife must be an offer to maintain with the consideration due to her position as a wife *Per Best, J*—It is very doubtful if the framers of s 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in the Penal Code The wrong done to the wife is in no way affected by the circumstance of her husband's concubine being married or unmarried or, in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage In face, however, of s 4 of the Crim Pro Code, no other interpretation of the term 'adultery' is possible than the limited interpretation contained in the Penal Code QUEEN-EMPRESS v MANNATHA ACHARI, 17 M 260=2 Weir 641=4 M L J 83 179

(2) *Ss*. 16, 350—*Bench of Magistrates*—*Change in constitution of the Court during a trial*—A trial under the Towns Nuisances Act of 1889 was begun before a Bench of Magistrates and adjourned On the adjourned date the Bench was constituted differently, only one Magistrate being present of those who attended on the first occasion, but the trial was proceeded with and resulted in a conviction *Held*, that the conviction was illegal and should be set aside QUEEN-EMPRESS v BASAPPA, 18 M 394=2 Weir 17 . 623

(3) *Ss* 87, 88, 89, 439, 537—*Proclamation for person absconding*—*Attachment of his property*—*Irregularity in publication of proclamation*—*Revisional powers of High Court*—An accused person for whose arrest a warrant had been issued having absconded, a proclamation was issued and affixed to the Court-house on the 6th of November requiring him to appear on the 11th of December 1893, and his property was attached The proclamation was not published at the village where the accused resided until the 15th of November The accused surrendered on the 25th of June 1894 and applied for restoration of the property under Crim Pro Code, s 89 and an order was made by which the restoration of his property was refused The accused preferred a petition to the High Court for the revision of that order —*Held*, that there was no legal proclamation under Crim Pro Code, s 87, and that the order should be set aside and the attachment declared void QUEEN-EMPRESS v. SUBBARAYAR, 19 M. 3=1 Weir 86=2 Weir 40 .. 706

Crim. Pro. Code (Act X of 1882)—(*Continued*).

(4) *S.* 143—*Illegal order—Penal Code, ss* 188, 290—*Public nuisance—Cremation—Disobedience to an order duly promulgated by a public servant.*—On the 11th August 1894 the District Magistrate promulgated an order prohibiting the people of the village of Thirukodikaval from using their buring grounds situated on the southern bank of the Cauvery and directing them to use other burning grounds which had been provided. On the 11th May 1895 certain persons, in defiance of this order, cremated a corpse at the spot interdicted, and were convicted under ss. 188, 290, Indian Penal Code, but the conviction under s. 188 was reversed on appeal:—*Held*, that when persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to:—*Held* further, that the order of the District Magistrate was not warranted by s 143, Crim. Pro. Code, or by any other law and must, therefore, be set aside QUEEN-EMPRESS v. SAMINADHA PILLAI, 19 M 646=6 M.L.J. 181=1 Weir 144 & 127=Weir 65 .. 1029

(5) *Ss.* 144, 435—*Disputed possession—Revision by High Court.*—The District Temple Committee dismissed the trustees of certain temple and appointed others. The dismissed trustees retained possession. A breach of the peace having become imminent in the opinion of a Deputy Magistrate, he made an order under Crim Pro Code, s. 144, directing the newly-appointed trustees not to interfere with the temple or its management:—*Held*, that the High Court had no power to interfere in revision under Crim Pro. Code, s 435. PALANIAPPA CHETTI v DORASAMI AYYAR, 18 M. 402=2 Weir 91 .. 629

(6) *Ss.* 144, 435, 476—*Enquiry before issue of an order under s* 144—*Judicial proceeding—False evidence*—A Magistrate, making an enquiry before issue of an order under Crim. Pro. Code, s. 144, is acting in a stage of judicial proceeding and has, therefore, jurisdiction to take action under s 476, if he is of opinion that false evidence has been given before him. QUEEN-EMPRESS v TIRUNARASIMHA CHARI, 19 M. 18=5 M.L.J. 249=2 Weir 94 & 591 .. 717

(7) *S.* 145—*Parties bound by order.*—Orders passed under Crim. Pro. Code, s 145, are binding only on the actual parties to the cases in which they are made. QUEEN-EMPRESS v. KUPPAYYAR, 18 M 51=2 Weir 105 386

(8) *Ss* 145, 146.—A Magistrate, in making an order under Crim Pro. Code, ss. 145 and 146, must inquire into the question which party was in actual possession at the time of the institution of the proceedings and not at the time when the order is made. In making this enquiry the Magistrate may presume that when a vendor sells part of a property he retains all that he does not sell. AGRA BANK v LEISHMAN, 18 M 41=2 Weir 100 .. 378

(9) *Ss.* 161, 172—At the beginning of a trial in the Court of a Presidency Magistrate, an application was made, on behalf of the accused, for a copy of the Police charge-sheet which contained the whole of the prosecution evidence as set forth by the Police, and the extracts from if not copies of the Police diary The application was rejected by the Magistrate:—*Held*, that the High Court should not on revision interfere with the order of the Magistrate. QUEEN-EMPRESS v. VENKATARATNAM PANTULU, 19 M. 14=2 Weir 143 (144) .. 713

(10) *Ss.* 195, 407, 476—*Application for sanction to prosecute—Offence committed before Second-class Magistrate—Court to which appeals ordinarily lie—Application by letter for sanction to prosecute—District Magistrate's order sanctioning prosecution and prescribing the Court in which the prosecution should take place*—The District Forest officer applied by letter to the District Magistrate to take such action as he deemed fit against one Subbaraya Pillai, who, for reasons stated by the District Forest officer, was suspected of having abetted the offence of

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Crim. Pro. Code (Act X of 1882)—(*Continued*).

giving false evidence in the course of proceedings instituted on behalf of the Forest Department in the Court of a Second-class Magistrate The District Magistrate had previously directed that all appeals from the Second-class Magistrate should be heard by the Deputy Magistrate, but he passed an order himself whereby he (1) sanctioned the prosecution of Subbaraya Pillai, and (2) directed that it should take place in the Court of the Head Assistant Magistrate —*Held*, (1) that the District Magistrate had no jurisdiction to sanction the prosecution for the reason that he was not the ordinary appellate authority, (2) that the second part of his order was irregular for the reasons that it was not authorized by Crim Pro Code, s 195, and he had no jurisdiction to act under s 476, since the alleged offence was not brought to his notice in the course of a judicial proceeding. QUEEN-EMPRESS v SUBBARAYA PILLAI, 18 M 487=2 Weir 165 (597) 590

(11) *Ss* 260 (*d*), 355, 537—*Record in summons case*—A Native sub-Magistrate who had not been authorized to take down evidence in English, recorded the memorandum of the substance of the evidence taken under s 355 in that language —*Held*, that there was no provision in the Code prohibiting this procedure, and that, at any rate, it was merely an irregularity which would not vitiate the trial QUEEN-EMPRESS v GOPAL GOUNDAN, 19 M 269=6 M L J 134=2 Weir 433 892

(12) *Ss* 282, 428, 477, 526—*A witness committed for trial for offence under s.* 193, *Penal Code—Incompetence of juror—New trial—Application for transfer*—On the trial of certain prisoners on a charge of dacoity, a witness gave false evidence and was committed under s 477, Crim Pro Code, for trial on a charge under s 193, Penal Code After such committal, it was discovered that one of the jurors empannelled in the dacoity case was deaf and partly blind, and thereupon under s 282, Crim Pro Code, the case was tried *de novo* before a competent jury The trial of the charge under s. 193, Penal Code, was fixed for the November sessions, but on the 17th October 1895 on prisoner's application the trial was adjourned to 2nd December 1895 On 20th November the prisoner's vakil put in a petition, alleging that he had moved the High Court for a transfer of the case On this petition coming on for disposal, the prisoner's vakil moved, *orally* for an adjournment under s 526-A, Crim Pro Code which was refused On the 30th November the prisoner's vakil put in a petition in which he prayed for an adjournment under s 526-A This petition was refused and the trial began on 2nd December and judgment was written and pronounced on 5th December In the meantime application had been made to the High Court for a transfer and that petition was disposed of on 4th December granting the transfer prayed, the High Court apparently being not aware that the trial was at that time proceeding before the Sessions Court On 5th December after the trial in the Sessions Court was concluded and before judgment was delivered, a fresh petition was presented for an adjournment on the ground that a telegram had been received from the High Court transferring the case, but the Sessions Judge refused to act upon it in the absence of orders from the High Court and delivered judgment convicting the prisoner. During the trial before the Sessions Court the prisoner applied for an adjournment on the ground that two witnesses for the defence were absent, one being too ill to attend, the other not having been served with the summons, but the Sessions Judge considering the application was made merely for purposes of delay and to defeat the ends of justice and that their evidence would not be material refused to adjourn for their evidence to be recorded:—*Held*, first that the fact that the trial for dacoity had to be commenced *de novo* did not exonerate the prisoner from the obligation to speak the truth, imposed by s 14 of the Indian Oaths Act X of 1873 in the first trial, which became abortive owing to the incompetency of one of the jurors. *Secondly*, that s. 526-A, Crim Pro. Code, is imperative, but that the object of ss 344 and 526 when read together is merely to give a party reasonable time to move the High Court and obtain its

Crim. Pro. Code (Act X of 1882)—(*Continued*).

orders and that in the present case there was sufficient time for such application to have been made, if due diligence had been observed. *Thirdly,* that the order for transfer made on 4th December which, in fact, did not reach the Judge till after judgment was pronounced did not vitiate the proceedings; and that the Sessions Judge was not wrong in refusing to adjourn the case on the strength of a telegram said to have been received by prisoner's vakil stating that the High Court has ordered a transfer. *Fourthly,* that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of the two absent witnesses and that their evidence was material and must be recorded and certified to the High Court under s. 428, Crim. Pro. Code. QUEEN-EMPRESS v. VIRASAMI, 19 M. 375=6 M L. J. 195=2 Weir 680 .. 967

(13) S. 404—See ACT I OF 1871 (CATTLE TRESPASS), 19 M. 238

(14) S. 419—'*Presented*'—The Crim Pro. Code, s. 419 requires that a criminal appeal shall be delivered to the proper officer of the Court either by the appellant or his pleader. Where a petition of appeal was not presented to the Court, but was deposited in a petition box kept for the convenience of parties within the Court precincts and intended for the deposit of papers for the Court:—*Held,* that it had not been presented and was rightly returned for legal presentation. QUEEN-EMPRESS v VASUDEVAYYA, 19 M. 354 ..

(15) *S* 433—*Madras District Municipalities Act—Act* V *of* 1884, *s.* 179.—By s. 179, Madras District Municipalities Act IV of 1884, it is provided "the external roofs, verandahs, pandals, and walls of buildings erected or "renewed after the coming into operation of this Act shall not be made "of grass, leaves, mats or other such inflammable materials except with "the written permission of the Municipal Council":—*Held,* that the word 'renewed' includes repairing. QUEEN-EMPRESS v. SUBBANNA, 19 M. 241=1 Weir 732 .. 873

(16) *S.* 488—*Maintenance of children—Moplahs—Personal law.*—The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties. If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance. If the children are legitimate, the question of the mother's right to their custody would depend on the question whether the parties are governed by Muhammadan or Marumakkatayam law; because (1) if they are governed by Muhammadan law the mother may have the right to custody until the children attain the age of seven years; (2) if by the Marumakkatayam law, it is doubtful if the father could be held to have neglected his duty to maintain his children if they were actually maintained by the karanavan of their mother's tarwad who is bound by law to maintain them. KARIYADAN POKKAR v. KAYAT BEERAN KUTTI, 19 M. 461=2 Weir 621 .. 1027

(17) S. 514—See ACT I OF 1886 (ABKARI), 18 M. 48

(18) *Ss.* 531, 532 and 537—*Commitment to Sessions Court by Magistrate having no jurisdiction over place where alleged offence was committed—Exercise of powers duly conferred.*—A Magistrate who commits a case for trial by a Sessions Court, does so in the exercise of powers duly conferred upon him and the fact that he had no territorial jurisdiction over the place where the alleged offence was committed, and that an objection to the committal on this ground was taken before the commitment, is no ground for the Court to which the commitment is made quashing it under s. 532 of the Crim. Pro. Code. QUEEN-EMPRESS v. ABBI REDDI, 17 M. 402=2 4 M.L.J. 196=2 Weir 704 .. 279

(19) *S.* 555—*Magistrate personally interested—Magistrate giving evidence before himself.*—Where a Magistrate, in whose Court a complaint of rioting and mischief had been filed, made a personal inspection of the *locus in quo*:—*Held,* that by so doing he had made himself a witness in the case and had thereby rendered himself incompetent to try it:—*Held,* further that where a Judge is the sole Judge of law and fact in a case tried before himself, he cannot give evidence before himself or import

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Crim. Pro. Code (Act X of 1882)—(*Concluded*)
matters into his judgment not stated on oath before the Court in the presence of the accused QUEEN-EMPRESS v MANIKAM, 19 M 263=6 M.L.J 143=2 Weir 725 888

Customary Contribution.
To a temple—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 17 M 43

Customary Fees.
See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 17 M 73

Cutch.
Native Court in—See ACT V OF 1881 (PROBATE), 17 M 14

Damages.
(1) See BILL OF LADING, 19 M 169.
(2) See CONTRACT, 17 M 168
(3) See REGISTRATION ACT (III OF 1877), 17 M 456

Darkhast Rules.
Application to Government for waste land—Irregular publication of application—The plaintiff, having obtained an assignment from Government of waste land, was obstructed by the defendants in his attempt to enter into occupation, and he sued for a declaration of his title and possession It appeared that his application for the land had not been duly published, and certain other formalities had not been observed, as provided by the darkhast rules, but the land had been assigned to him and a patta granted by Government —*Held*, that the plaintiff's title was not invalidated by reason of the non-compliance with the darkhast rules PERIAROYALU REDDI v ROYALU REDDI, 18 M 434 651

Declaration
See REGULATION XXV OF 1802, 19 M 308

Declaratory Decree.
See CIV PRO CODE (ACT XIV OF 1882), 17 M. 180

Decree.
(1) *Construction of—Application for execution by defendant—Previous orders as applied for by defendant—Present objection by plaintiff to continued execution on behalf of defendant*—'Res judicata'—Although a decree does not in terms give a certain relief yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent applications to treat those orders as erroneous and put another construction on the decree VENKATANARASIMHA NAIDU v PAPAMMA, 19 M 54 742
(2) Payable by instalments—Default in payment—Waiver—Civ Pro Code, s 258—See CIV PRO CODE (ACT XIV OF 1882), 19 M 162
(3) See CIV PRO CODE (ACT XIV OF 1882), 17 M 343, 18 M 214

Defamation.
(1) *Imputation on a wife—Suit by husband*—In a suit for damages for defamation, it appeared that the words complained of were spoken by the defendant to the plaintiff in the presence of a third party and were to the effect that the plaintiff's wife had committed adultery with a pariah and that her children had been born to the pariah —*Held*, that the suit was not maintainable by the plaintff BRAHMANNA v RAMAKRISHNAMA, 18 M 250=5 M.L.J 89 524
(2) *Privilege of Judge*—An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious and without reasonable cause RAMAN NAYAR v SUBBAMANYA AYYAR, 17 M 87 60

Devastanam Committee.
See ARBITRATORS, 19 M 498

Dharamkarta.
(1) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 17 M 143.
(2) See ROMAN CATHOLIC CHURCH, 17 M 447.

Divorce.
Caste custom—Whether immoral and therefore invalid or not—There is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage (*parisam*), SANKARALINGAM CHETTI v. SUBBAN CHETTI, 17 M. 479 .. 382

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Divorce Act (IV of 1869).

S. 7—*Nature of the marriages contemplated by the Act—Monogamous marriage.*—The petitioner and his wife married according to the rites of the Hindu religion. The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage:—*Held,* that, having regard to s. 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. THAPITA PETER v. THAPETA LAKSHMI, 17 M. 235 (F.B.) .. 162

Easement.

By Custom—Water rights—Landlord and tenant.—The plaintiffs were lessees from a zamindar of his entire zamindari and were in occupation of lands depending for irrigation on a tank into which a natural stream emptied itself. The defendants were tenants in the zamindari, holding (under a lease prior to that of the plaintiffs) land supplied with water by an irrigation channel from the stream The defendants erected a dam across the stream when it was low, and this had the effect of diverting all the water into the irrigation channel supplying their land. In a suit for an injunction that the dam be removed, the Lower Appellate Court upheld a plea by the defendants that the dam had been erected in exercise of an established customary right of easement:—*Held,* that the customary easement asserted by the defendants was not unreasonable, and was enforceable by them against the lessees of the zamindar. ORR v. RAMAN CHETTI, 18 M. 320=4 M.L.J. 248 .. 572

Suit for injunction—Privacy, invasion of.—The invasion of privacy by opening windows is not a wrong for which an action will lie SAYYAD ARZF v. AMEERUBIBI, 18 M. 163=5 M.L.J. 26 .. 463

Encroachment.

See LIMITATION ACT (XV OF 1877), 19 M. 154.

Estoppel.

(1) Civ Pro. Code, ss. 278, 283—Transfer of Property Act—Act IV of 1882, s 85—Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises.—See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 17.

(2) *Evidence—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of 1879, s. 39—Whether secondary evidence of a lost document can be admitted on payment of penalty*—Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person. In the case of a lost document no penalty can be levied and secondary evidence admitted, for s. 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. RANGA RAU v. BHAVAYAMMI, 17 M. 473=4 M.L.J. 192 .. 328

(3) *Execution—Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition.*—The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made mention of the irregularities now relied on does not create an estoppel. RAMAN v. KUNHAYAN, 17 M. 304 .. 211

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 17, 214.

(5) See COMPANIES ACT (X OF 1866), 19 M. 200.

(6) See HINDU LAW (ADOPTION), 18 M. 145, 397, 53.

Evidence.

(1) *Religious endowments—Gosami mutt—Grant by the head of the mutt to his brother for his maintenance—Suit by a successor to recover the land—Limitation Act—Act XV of 1877, s. 10—Yadasts from revenue*

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Evidence—(*Concluded*)

officials—In 1544 a village was granted to the head of a Gosami mutt to be enjoyed from generation to generation, and the deed of grant provided that the grantee was "to improve the mutt, maintain the charity and be happy" The office of head of the mutt was hereditary in the grantee's family In 1866 an inam title-deed was issued to the then head of the mutt, whereby the village was confirmed to him and his successors tax-free, to be held without interference so long as the conditions of the grant are duly fulfiled Yadasts addressed by Tahsildars to the then head of the mutt in 1872 and 1882 were put in evidence to show what the object of the grant was It was found regard being had to usage, that the trusts of the institution were the upkeep of the mutt, the feeding of pilgrims, the performance of worship, the maintenance of a watershed and the support of the descendants of the grantee From before 1840 it had been usual for the head of the mutt for the time being to make grants to his brothers or younger sons for their maintenance. In 1842 the father of the present plaintiff, being then the head of the mutt, granted certain lands in the village above referred to to his younger brother, the deed of grant being in terms absolute The grantee died about thirty years before the suit and the lands in question came into the possession of his widow (defendant No 1) and a mortgagee from her (defendant No 2) respectively In 1863 the plaintiff's father placed certain other lands in possession of defendant No. 3 who paid rent therefor and received pattas for some years from the plaintiff In a suit by the plaintiff for possession of the lands in the possession of the defendants it was pleaded, *inter alia,* that the grant of 1843 was binding on him and that defendant No 3 had a right of permanent occupancy —*Held,* (1) that the suit was not barred by limitation, (2) that the yadasts above referred to were admissible as indicating the general consciousness as to the nature of the grant of the village, (3) that the grant was an endowment in trust for the mutt and the charities connected therewith and not merely a grant of property to the original grantee, on which certain trusts were engrafted so as to impose on him an obligation to apply a portion of the income of the village to those trusts, (4) that the grant of 1843 was valid for the life-time of defendant No 1 (who had become by marriage part of the family of a descendant of the original grantee) but that the property comprised therein was liable to revert to the representative of the mutt on her death, (5) that the plaintiff, although he had issued pattas, was entitled to recover possession of the lands occupied by defendant No 3 and not to receive rent from him merely SATHIANAMA BHARATI v SARAVANABAGI AMMAL, 18 M 266=4 M L J 223 . 535

(2) See CIV PRO CODE ACT XIV OF 1882), 18 M 94, 19 M 127

Evidence (Secondary).

(1) Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of 1879, s 39—Whether secondary evidence of a lost document can be admitted on payment of penalty—See ESTOPPEL, 17 M 473

(2) See MORTGAGE (CONSOLIDATION), 19 M 160

Evidence Act (I of 1872).

(1) *Ss* 17, 18—*Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Revenue Recovery Act (Madras)—Act* II *of* 1864, *ss* 38, 59—*Limitation*—The plaintiff was the owner of a share in a mittah which was sold on 15th February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale, in the form prescribed under Madras Act II of 1864 The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890—*Held,* (1) that the sale of 16th June 1886 was not a sale under s. 38 of Act II of 1864, although the notification of the sale was in

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Evidence Act (I of 1872)—(*Concluded*).

the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 15th February; (2) that even assuming the sale of 16th June 1886 to have been a sale under s. 38 of Act II of 1864, the suit was time-barred under s. 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, *viz*, 29th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, ss. 17 and 18, (3) that the limitation prescribed by s. 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. RAJA GOUNDAN v. RAJA GOUNDAN, 17 M. 134=4 M. L. J. 85 .. 92

(2) S. 30—Confessions of co-accused—Corroboration—Material particulars—Abetment—Penal Code, s. 109—See CONFESSION, 19 M 482.

(3) S 35—Hindu law—Sale of a co-parcener's share—Claim of co-parceners on proceeds—Remuneration for management—Judgments and private documents—Civ Pro Code—Act XIV of 1882, ss 2, 215, 540—Provisional decree—Admission made *arguendo*—See CIV. PRO. CODE (ACT XIV OF 1882), 18 M. 73.

(4) S. 92—Contract Act—Act IX of 1872, s. 30—Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing—See CONTRACT ACT (IX OF 1872), 17 M. 480

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 18 M. 29

Execution.

(1) Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition.—See ESTOPPEL, 17 M. 304.

(2) *Malabar Law—Partition of toward—Decree against karnavan on tarwad debt before partition—Execution after partition.*—The karnavan of a Malabar tarwad borrowed money for purposes which rendered the debt binding on the tarwad. The creditor obtained a decree against the karnavan in 1879. In 1882 a partition of the tarwad property took place. In 1871 property which had fallen on partition to the present plaintiff's share was attached and brought to sale in execution of the decree of 1879. He was not joined as a party in the execution proceedings.—*Held*, that the Court-sale did not bind the plaintiff KUNHAPPA NAMBIAR v SHRIDEVI KETTILAMMA, 18 M 451 . 664

(3) *Partition by Collector—Civ Pro. Code, ss 265, 360—Jurisdiction of Court to hear objections of the divisions ordered by Collector.*—Where a decree for partition of an estate has been transmitted by the District Court to the Collector for execution under s. 265, Civ. Pro. Code, the Court that made the decree is, not deprived of its judicial power to hear and decide objections to the division of the estate made by the Collector. CHINNA SEETAYYA v. KRISHNAVANAMMA, 19 M. 435 .. 1009

(4) *Widow in possession of her late husband's land—Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser.*—A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinamah, one of the terms of which was that the widow should remain in possession of and enjoy the property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land being sold in execution, was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband:—*Held*, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the

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Execution—(*Concluded*)

property NARANA MAIYA v. VASUDEVA KARANIA, 17 M 208=4 M L.J. 62 . 143

(5) See ACT III OF 1873 (MADRAS CIVIL COURTS), 17 M 309

(6) See CIV PRO CODE (ACT XIV OF 1882), 17 M 58, 82, 228, 343, 18 M 477, 144, 153, 464, 482

(7) See FRAUDULENT CONVEYANCE, 18 M. 378.

Execution Sale.

(1) Insanity of judgment-debtor intervening before—Civ Pro Code, ss 456, 459, 460—Act XXXV of 1858—See CIV PRO. CODE (ACT XIV OF 1882), 19 M 219

(2) Portion of the property sold belonging to a stranger—Civ Pro Code—Act XIV of 1882, ss. 313, 315 and 316—Rights of a purchaser in an execution sale—See CIV PRO CODE (ACT XIV OF 1882), 17 M 228

(3) See CIV PRO CODE (ACT XIV OF 1882), 18 M 439

Foreign Court.

See MORTGAGE (FORECLOSURE), 19 M. 257

Foreign Judgment.

Decree "in absentem"—Submission to jurisdiction.—The plaintiff brought a suit in the French Court at Karikal against the defendant, a British subject, resident in British India The defendant employed a Vakil to defend the suit, but on the case coming on for hearing the Vakil stated he had no instructions, and an *ex-parte* decree was passed An application by the defendant to have the decree set aside was held to be time barred The plaintiff now brought a suit on the judgment of the French Court to recover the amount decreed to him —*Held*, that the suit was not maintainable for the reason that the decree had been passed against the defendant *in absentem* by a foreign Court, to which he had not submitted himself. *Semble*: Even if the foreign judgment had not been entirely invalid as against the defendant, the British Court would have had jurisdiction to disallow an item of claim allowed by the foreign Court on account of prospective damage which was unsupported by evidence SIVARAMAN CHETTI v IBURAM SAHEB, 18 M 327 . 577

Foreign State.

See CONTRACT, 17 M 262

Fraudulent Conveyance

Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree—A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration, and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to B a house in part satisfaction of the decree and it appeared that certain of A's creditors were consequently induced to remit parts of their claims A having died, his widow and legal representative under Hindu law, now sued B to have the promissory note and the conveyance set aside and to have the defendant restrained by injunction from executing the decree —*Held*, (1) that the plaintiff was not entitled to relief in respect of the promissory note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through A by whose contrivance and collusion the defendant was enabled to obtain the decree, (2) that the plaintiff was not entitled to have the sale set aside inasmuch as there had been at least a partial carrying into effect of the illegal purpose in a substantial manner RANGAMMAL v VENKATACHARI, 18 M. 378 . 612

Full Bench of Presidency Small Cause Court.

See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURT), 19 M. 96

Grant

Of portion of impartible Zamindari—Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession—In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion

Grant—(*Concluded*).

of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immoveable property of the grantee, should be put in possession of the grantor's line. On the death of the first grantee, the property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death without male issue, the estate passed into the possession of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not cease to be coparceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant:—*Held,* that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family and that the provision in that instrument purporting to create a special right of reversion in case of failure of male issue contravened the principle laid down in the Tagore case and was inoperative. SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU v. SRI RAJA RAU CHELLAYAMMIA GARU, 17 M. 150 .. 103

Guardian ad-litem.

See CIV PRO CODE (ACT XIV OF 1882), 17 M. 316

Guardian and Ward.

(1) *Guardians's power to acknowledge a debt due by the minor, when not barred by limitation at the date of the acknowledgment*—A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment. SOBHANADRI APPA RAU v. SRIRAMULU, 17 M. 221 .. 152

(2) See CONTRACT ACT (IX OF 1872), 18 M. 415.

(3) See COSTS, 17 M. 257.

(4) See LIMITATION ACT (XV OF 1877), 18 M. 456.

Hereditary Office.

(1) *Reg* VI *of* 1831 (*Madras*), *s.* 3—*Jurisdiction of Revenue Courts*—A suit for 'Maniam' lands attached to the hereditary office of village carpenter is barred by the operation of s. 3 of Reg. VI of 1831 PALAMALAI PADIYACHI v. SHANMUGA AUSARI, 17 M. 302 (**F.B.**)=4 M.L.J. 99 .. 209

(2) See CIV PRO. CODE (ACT XIV OF 1882), 19 M. 62

(3) See REGULATION XXIX OF 1802) 18 M. 420.

Hereditary Trustee.

See LIMITATION, 19 M. 243.

High Court.

(1) *Powers of, to make rules as to Small Cause Court*—24 *and* 25 *Vict, cap* 104, *s* 15—*Civ Pro Code*—*Act* XIV *of* 1882, *s.* 652—*Presidency Small Cause Courts Act*—*Act* XV *of* 1882, *ss* 6, 18, *cls.* (*a*) *and* (*c*), 33—In 1885 the High Court made a rule under Presidency Small Cause Courts Act, s. 33, whereby it was declared that the granting leave to sue a defendant out of the jurisdiction under s. 18, cls. (*a*) and (*c*) of that Act, was a non-judicial or *quasi*-judicial act within the meaning of that section and might be done by the Registrar of the Court of Small Causes, Madras:—*Held,* that the rule was *ultra* vires and void. RAJAM CHETTI v. SESHAYYA, 18 M. 236 (**F.B.**)=5 M.L.J. 114 .. 514

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 414.

(3) See CRIM PRO. CODE (ACT X OF 1882), 19 M. 3, 14.

(4) See LETTERS PATENT, 19 M. 448.

Hindu Law.

1.—ADOPTION

2.—ALIENATION.

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3 —CUSTOM
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———**1.—Adoption.**

(1) *Adoptive mother under pollution—Subsequent datta homam—Absence of natural father at datta homam—Natural father and adoptive mother, members of the same gotram—Saraswati Brahmans—Estoppel*—In a suit to recover possession of certain land to which the plaintiff claimed title as the adopted son of a deceased Saraswati Brahman, it appeared that he had been taken in adoption by the widow of the deceased acting on the authority of her late husband, that datta homam was performed subsequently, and that the plaintiff had since been recognized as the adoptive son of the deceased, and had acted accordingly during a period of a twenty-five years. The defendant was in possession under a claim of title as a reversionary heir, the widow having died shortly before suit. It appeared further (1) that the widow was under pollution at the time of the plaintiff's adoption, but the pollution had ceased at the time of the data homam, (2) that the natural father was not present at the time of the datta homam, but his wife took part in the ceremony with his consent *Semble* neither of the last mentioned circumstances invalidated the adoption, but *quære* whether the adoption was not invalid for the reason that the plaintiff's adoptive mother was by birth a member of the same gotram as his natural father —*Held on the evidence*, that the defendant was estopped from denying the validity of the adoption SANTAPAYYA v RANGPPAYYA, 18 M. 397=5 M L J 66 625

(2) *An only son given in adoption by his widowed mother—Estoppel—Specific Relief Act—Act I of 1877, s 42—Suit for declaration by a remote reversioner—Parties*—The plaintiff, claiming a remote reversionary interest in the estates of a deceased Hindu, sued for a declaration of the invalidity of an adoption made by the widow It appeared that the nearer reversioners (who were in the first instance joined as defendants in the suit) refused to call in question the validity of the adoption and that the plaintiff himself had concurred in it at the time when it took place It appeared further that the alleged adopted son had been given in adoption by his widowed mother, and also that he was an only son —*Held*, (1) that the plaintiff was entitled to bring the suit without proof of fraud on the part of the nearer reversioners (2) that the nearer reversioners were rightly impleaded in the suit, (3) that the plaintiff was not estopped from impugning the adoption by reason of his conduct at the time when it took place, (4) that the adoption was not invalid under Hindu law *Semble* A Hindu widow can give her son in adoption without special authority from her husband GURULINGASWAMI v. RAMALAKSHMAMMA, 18 M 83=4 M L J 237 . 387

(3) Devadasi—Adoption by temple dancing woman—Right of adoptive daughter—Civ Pro Code, ss 440, 568—Suit by infant without a next friend—Evidence taken on remand—See CIV. PRO CODE (ACT XIV OF 1882), 19 M. 127

(4) *Estoppel by conduct*—A childless Hindu widow, aged 19, agreed with the plaintiff's father to adopt the plaintiff, stating that her husband, who died at the age of 12, had given her authority to adopt Subsequently

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Hindu Law—1.—Adoption—(*Concluded*).
she adopted the plaintiff and had his upanayanam performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about 18 months, when she repudiated the adoption and refused to maintain the plaintiff. *Held,* that the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of 18 months. In order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must then become so altered that it would be impossible to restore him to it. PARVATIBAYAMMA v. RAMAKRISHNA RAU, 18 M. 145=5 M.L J. 44 .. 450
(5) See CIV PRO CODE (ACT XIV OF 1882), 18 M. 496.
(6) See HINDU LAW (INHERITANCE), 17 M. 48, 287; 18 M. 277

——**2.—Alienation.**
(1) *Mortgage of zamindari lands by zamindar's widow to secure her husband's debts—Appropriation of the assets of deceased towards payment of his debts.*—In a suit on a mortgage of lands forming part of a zamindari, it appeared that the zamindar died without issue, being indebted to the plaintiff, and that his widow subsequently borrowed money from the plaintiff for her own purposes, including litigation successfully prosecuted by her to make good her claim to the estate. The widow being pressed for payment executed the mortgage sued on and afterwards paid to the plaintiff two sums, being the proceeds of the sale of her husband's jewels and of the execution of a decree in his favour realized after his death. These sums were appropriated to the payment of the widow's debt by the mortgagee who, after her death, brought the present suit against the deceased zemindar's mother then come into possession of the estate, his undivided half-brothers being joined also as defendants:—*Held,* (1) that the widow was entitled to mortgage the estate for the payment of her husband's debts, and was not bound to discharge them out of income; (2) that the two payments by the widow of money belonging to the estate of the deceased zamindar should have been applied in liquidation of his debt RAMASAMI CHETTI v MANGAIKARASU NACHIAR, 18 M. 113 .. 428
(2) *Mortgage—Pendency of maintenance suit—*'Lis pendens'*—Transfer of Property Act—Act* IV *of* 1882, *s* 52—Where a member of a Hindu family during the pendency of a suit for maintenance, which resulted in a decree charging the plaint house together with other property with the maintenance claimed, mortgaged the plaint house to the plaintiff:—*Held,* that he was entitled so to do and that the validity of the mortgage was not affected by the doctrine of *lis pendens* MANIKA GRAMANI v. ELLAPPA CHETTI, 19 M. 271 .. 894
(3) *Of part of family property by one brother—Suit by another brother for partition of his share of the property alienated*—The plaintiff sued for partition and delivery to him of his share of a plot of land sold by defendant No. 1 his undivided brother to defendant No 3. The land in question formed only part of the property of the family of the plaintiff and defendant No. 1:—*Held,* that the plaintiff was entitled to maintain the suit. SUBBAMANYA CHETTYAR v. PADMANABHA CHETTYAR, 19 M. 267 .. 891
(4) See CIV PRO CODE (ACT XIV OF 1882), 17 M. 366, 18 M. 73; 19 M. 211.
(5) See HINDU LAW (INHERITANCE), 18 M. 193.
(6) See LIMITATION, 19 N. 243.

——**3.—Custom.**
(1) *Powers of the head of a caste in respect of caste customs—Jurisdiction of the Civil Courts.*—In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere. A guru, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of caste according to recognised caste customs GANAPATI BHATTA v BHARATI SWAMI, 17 M. 222=4 M.L.J. 101 .. 153

Hindu Law—3.—Custom—(*Concluded*)

(2) See DIVORCE, 17 M 479

(3) See HINDU LAW (IMPARTIBLE ESTATES), 18 M 287

(4) See HINDU LAW (RELIGIOUS ENDOWMENTS), 17 M. 199

——4.—Debts.

(1) Liability of son for father's debts—Civ Pro. Code—Act XIV of 1882, ss 43, 244—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of 1877, sch II, arts, 120, 122—See CIV PRO CODE, (ACT XIV OF 1882), 17 M 122

(2) See GUARDIAN AND WARD, 17 M. 221

(3) HINDU LAW (ALTERATION), 18 M. 113

——5—Gift.

See HINDU LAW (STRIDHANAM), 18 M 252

——6.—Impartible Estates.

(1) *Custom of inalienability, evidence of—Dayadi pattam.*—The holder of the impartible palayam of Ammayanyakanur transferred his estate to his wife by a deed of gift The Transferor had besides a son numerous dayadis, and some of the latter now sued for a declaration that the gift was not binding on them. The law of succession admittedly applicable to this palayam was the rule of dayadi pattam, according to which the person entitled to succeed on the death of a palayagar is the senior in age of his dayadis, descended from one of three brothers, who originally formed a joint family together and were the founders of three lines in the family The person entitled under this rule to inherit on the death of the transferor was one of the plaintiffs in the suit. It was contended that the palayagar had no proprietary right in the estate, but held the office of manager merely, but *this contention was overruled* It was further contended that the estate admittedly impartible was by custom inalienable also —*Held* on the oral and other evidence adduced in the case, and with reference to admissions made by the transferor and to his conduct, and on its appearing that eight out of the nine predecessors of the transferor had left either sons or widows, but nevertheless that for three centuries there had been no sale or gift, that the custom of inalienability was established, and that the gift in question was accordingly invalid as against the plaintiffs SIVASUBRAMANIA NAICKER v KRISNAMMAL, 18 M 287=5 M L J 168 549

(2) Grant of portion of impartible zemindari—Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession—See GRANT, 17 M 150

(3) *Limitation—Adverse possession*—The holder of an impartible zemindari died in 1822, leaving two widows and a daughter The widows entered on the estate and having successfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great-grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest than surviving sapinda of the last male holder The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zemindari from him —*Held,* that the suit was barred by limitation KOOLAPPA NAIK v KOOLAPPA NAIK, 17 M 34=23 M L J 250 23

(4) *Mitakshara Law of inheritance—Impartible zemindari*—Heritage to an impartible zemindari is to be traced according to the ordinary rules of the Hindu law of inheritance, unless some further family custom exists, beyond the custom of impartibility, although the estate will be in the possession of only one heir at a time. It was contended for the appellant that, in tracing the right heir to the proper stock entitled to the inheritance, a rule was applicable to an impartible estate, different from that applied to a partible one; and that when once the heritage to

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Hindu Law—6.—Impartible Estates—(*Concluded*).

an impartible estate had become obstructed, on the death of each successive owner the true successor was the heir of the last owner of the originally unobstructed estate, though this did not apply to a partible estate. But for such a distinction no authority was cited, nor any principle suggested; and it was not upheld. The parties to this suit, first cousins once removed, contested the right to inherit an impartible zemindari, which had been acquired by their common ancestor, who had left two daughters by two different wives. The plaintiff was the son of the younger daughter, the defendant's father was the son of the elder The younger half-sister survived the elder, and in 1863 was judicially declared to have inherited alone the impartible zemindari. On her death the elder daughter's son in litigation ending in 1881, made good his title to the impartible zemindari, being the descendant in the elder line:—*Held*, that this son of the elder daughter became, as the last male owner, the stock from which descent had now to be traced, and that the ancestor was no longer that stock. And *held*, that the son of this last male owner had a title to the zemindari on his father's death in consequence of the full and complete ownership of the latter, who had himself become a fresh root of title. This decision disposed of the only question that was argued on this appeal. But the decision of the Courts below that the plaintiff could not claim the inheritance in virtue of survivorship was also affirmed. The judgment below, on this part of the case, was based on this that no family co-parcenary had existed to give rise to survivorship, as the sons of daughters could not form a family co-parcenary, which could only consist of the descendants of a paternal ancestor. MUTTUVADUGANADHA TEVAR v PERIASAMI TEVAR 19 M. 451 (**P.C.**)=23 I. A. 128=6 M L.J. 149=7 Sar P.C.J. 83 .. 1020

(5) See CIV PRO CODE (ACT XIV OF 1882), 17 M. 316

(6) See HINDU LAW (INHERITANCE), 18 M. 277.

————**7.—Inheritance.**

(1) *According to the Mitakshara, Chap.* II, *s.* 6—*Succession of bhandu—Priority of mother's half-brother over sons of father's paternal aunt*—The statement of bhandus entitled to inherit given in the Mitakshara, Ch. II, s. 6, is not an exhaustive one. The maternal uncle of the deceased is omitted, but the sons of that uncle are specified. The omission to mention a maternal uncle does not signify that he is excluded from the first class of bhandus The grounds of the judgment in 12 M I.A. 448 apply not only to the heirship of a maternal uncle as against the claim in default of heirs, but also apply equally to questions between nearer and more remote bhandus. A maternal uncle is, accordingly, an heir, though not specified in the Mitakshara list, and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than he is. A mother's brother by the half-blood stands on the same footing as her whole brother in regard to priority over the more remote bhandus A half-brother may be postponed to a whole brother, but there is no ground for his postponement to more distant kinsmen. MUTHUSAMI MUDALIAR v SUNAMBEDU MUTHUKUMARASWAMI MUDALIAR, 19 M. 405=(**P.C.**)=23 I.A. 83=6 M.L.J. 113=7 Sar. P.C.J. 45 .. 987

(2) *Bandhu* ex-parte paterna—*Bhandu* ex-parte materna—*Limitation—Adverse possession—Alienation of an infant's property by his mother and guardian*—Suit filed in 1891 to recover possession of certain land, the property of a Hindu, who died an infant, leaving him surviving his adoptive mother, who entered into possession and enjoyed the property till her death in 1890. It appeared (1) that in 1861 the deceased and his adoptive mother had conveyed absolutely certain of the properties to the widow of one of his first cousins on his adoptive father's side for her maintenance and that of her daughter, and that it had been assigned by her to A, B and C; (2) that other portions of the property had been conveyed in 1889 by the same persons, with the concurrence of D, as a gift to the daughters of the adoptive sisters of the deceased;

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Hindu Law—7.—Inheritance—(*Concluded*)

(3) that D was the son of a sister of the adoptive mother The plaintiffs were grandsons of the brother of the deceased's adoptive father, being respectively the sons of his daughters —*Held,* (1) that the plaintiffs, being bandhus *ex-parte paterna* were preferential heirs to D who was a bandhu *ex-parte materna*, (2) that the sister s daughters had no title whether by the law of inheritance or under the gift asserted by them; (3) that the plaintiffs' claim to the lands in the possessions of A, B and C was barred by limitation SUNDRAMMAI v RANGASAMY MUDALIAR, 18 M 193=4 M L J. 275 . 484

(3) *Deed containing restrictions on inheritance invalid*—A deed which attempts to create a new line of inheritance by excluding all heirs other than direct male heirs is contrary to Hindu Law and invalid LAKSHMAKKA v BOGGARAMANNA, 19 M 501 1054

(4) *Illatom adoption—Sapratibandha property*—There is no evidence that the custom of *illatom* adoption exists among the Kondarajn caste of the Vizagapatam district *Sapratibandha* (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir NARASMHA RAZU v VEERABHADRA RAZU, 17 M 287 199

(5) *Illatom son-in-law—Inheritance—Survivorship*—The father since deceased of the second defendant took into his family an illatom son-in-law, who died, leaving a son. After the death of the son, one of his two daughters (who were his only children) sued to recover a one-fourth share of the property left by the second defendant's father —*Held,* that the plaintiff was entitled to recover, in the absence of proof of a custom by which the rights of the plaintiff's father should have passed by survivorship to the second defendant M'ALLA REDDI v PADMAMMA, 17 M 48 33

(6) *Impartible estate—Adoption by a zemindar in conjunction with one of his two wives—Right to succeed to adoptive son*—The holder of the impartible Zemindari of Uthumalai, who married two wives, subsequently made an adoption in conjunction with his junior wife The zemindar died in August 1891, and the adopted son died an infant without issue in December of the same year —*Held,* that the junior wife, having taken part in the adoption, was entitled to the impartible estate in preference to her co-wife ANNAPURNI NACHIAR v COLLECTOR OF TINNEVELLY, 18 M 277=5 M L J 121 542

(7) *Obstructed heritage—Succession per capital—Succession on extinction of a divided branch of a family*—On the death, without issue, of a Hindu who was divided from the rest of his family, his property passed in succession to his widow and mother On the death of the latter, the nearest surviving reversioners were the plaintiff's husband and the first defendant's father, both since deceased, and their first cousin The plaintiff now claimed a one-third share of the property abovementioned as the heiress of her husband who left no issue It appeared that the plaintiff's husband and his co-reversioners were divided *Held,* that the plaintiff was entitled to recover *Semble* that she would have been entitled to recover even if her husband had not been divided from his co-reversioners SAMINADHA PILLAI v THANGATHANNI, 19 M 70 . 754

(8) *Widow's rights as heiress—Female gotraja sapinda*—In a suit on a mortgage executed by a Hindu, since deceased to the plaintiff, it appeared that the mortgage premises had been the property of A, whose daughter, since deceased, was the mortgagor's wife and had executed a will purporting to devise the property to him The suit was defended by B, who was the widow of a great-grandson of A's great-grandfather, and she claimed title to the property against the plaintiff under the law of inheritance:—*Held* that B had no title to the mortgage premises BALAMMA v. PULLAYYA, 18 M 168=5 M L J 22 466

(9) See HINDU LAW (IMPARTIBLE ESTATES), 19 M 451.

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Hindu Law—8.—Joint Family.

(1) Attachment before judgment—Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship —See ATTACHMENT, 17 M. 144.

(2) *Insolvency of managing member of a family—Insolvent Act—11 and 12, Vic., cap. 21, s. 7—Vesting order—Official Assignee's power to convey land*—The managing member of a Hindu family was adjudicated an insolvent and a vesting order was made. The Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who now sued for possession. The second defendant, who was a leper, was the younger brother of the insolvent, the other defendants were the insolvent's sons. The plaintiff did not prove that the debts which led to the adjudication were incurred for the necessary purposes of the family, and the insolvent's sons did not prove that they were incurred for immoral purposes:—*Held* (1) that the second defendant's disease, which was not of a virulent type, did not affect his co-parcenary rights; (2) that the Official Assignee could only convey the shares of those persons upon whom the debts of the insolvent were binding, and accordingly that the plaintiff was entitled to a moiety of the house and that the house should be sold and half the sale-proceeds paid to him. RANGAYYA CHETTI v THANIKACHALA MUDALI, 19 M 74 .. 757

(3) Letters of administration—Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters—See LETTERS OF ADMINISTRATION, 17 M. 147.

(4) See ARBITRATORS, 19 M. 290.

(5) See HINDU LAW (MAINTENANCE), 17 M. 268.

(6) See PARTIES, 18 M 33.

————9.—**Maintenance.**

(1) *Forfeiture of widow's right to maintenance by reason of unchastity*—The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference NAGAMMA v. VIRABHADRA, 17 M. 392 .. 272

(2) *Illegitimate son—Maintenance*—Under the Mitakshara law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The maintenance decreed to an illegitimate son may be secured on the family property. ANANTHAYA v. VISHNU, 17 M. 160 .. 110

(3) *Suit to recover arrears of maintenance due under a personal decree, and to establish a charge for future maintenance on the family property*—A Hindu widow obtained a personal decree against her father-in-law for maintenance. Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due, and the widow instituted the present suit, in which she asked for a decree establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property:—*Held* (1) that the maintenance not having been declared a charge upon the portion of the property which had been alienated, this property was free of any charge for her maintenance; (2) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandsons (the defendants) incurred his liability on his deceased and were bound to discharge the same out of the family property; (3) that the right to maintenance being enforceble against the defendants, the right to have it made a charge on the family property were enforceable along with it. BHAGIRATHI v. ANANTHA CHARIA, 17 M. 268 .. 185

(4) *Wife's right of maintenance among Sudras—Continued unchastity and misconduct.*—In 1887 a suit was instituted against a Sudra by his wife

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Hindu Law—9.—Maintenance— (*Concluded*).

and a decree was passed for her maintenance The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child The wife denied the adultery and stated that her husband had become reconciled to her and that her child was legitimate It was sound that the plaintiff's case was established and that the defendant's misconduct had been recent, open and continuous —*Held,* that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance —*Quære*—Whether apart from the other circumstances in the case, the fact of having given birth to an illegitimate child would have constituted a bar to the wife's claim to bare maintenance KANDASAMI PILLAI v MURUGAMMAL, 19 M 6 — 504

(5) See CIV PRO CODE (ACT XIV OF 1882), 18 M 482

(6) See HINDU LAW (PARTITION), 17 M 362

(7) See HINDU LAW (WIDOW), 18 M 403

————**10.—Marriage**

Contract Act—Act IX of 1872, s 23—Marriage brokage contract—Public policy—See CONTRACT ACT (IX OF 1872), 17 M 9

————**11.—Partition.**

(1) *Death of plaintiff subsequent to decree—Right of survivorship vested in defendant—Vested right of plaintiff's representative not affected*—M, a minor and only son by his next friend, sued his father and certain alienees of the family property for partition and obtained a decree Subsequent to decree and pending appeal, the plaintiff died and M's mother was brought on the record as deceased plaintiff's legal representative —*Held,* that as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased plaintiff, and that a decree for partition operates as a severence of the joint ownership SUBBARAYA MUDALI v MANIKA MUDALI, 19 M 345 — 946

(2) *Maintenance—Arrears of maintenance—Wrongful withholding.*—Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled MALLIKARJUNA PRASADA NAIDU v DURGA PRASADA NAIDU, 17 M 362 — 251

(3) *Of family property—Suit by plaintiffs against their father and uncles*—In a suit for partition of family property, the plaintiffs were the sons of one and nephews of others of the defendants who defended the suit —*Held,* that the suit was maintainable SUBBA AYYAR v GANASA AYYAR, 18 M 179 — 474

(4) Prior arbitration and award, effect of—See ARBITRATORS, 19 M 290

(5) *Property excluded from partition—Limitation—Suits' Valuation Act—Act* VII *of* 1889, *s* 11 —The members of a joint Hindu family made a partition of family property in 1877, reserving undivided, however, certain land and the capital and assets of their family business which remained under the control and in the possession of one of them, *viz.* the present first defendant. The plaintiff, who was a member of the family, demanded his share in the undivided property on the 4th of March 1882, and the defendants refused to give effect to his claim The plaintiff now in 1892 sued for his share in the Court of the District Munsif, valuing his claim at Rs 2,000 —*Held,* that the property in question was co-parcenary property notwithstanding the transaction of 1877, and that the plaintiff's suit was not barred by limitation, and that the High Court in second appeal was not at liberty to entertain an objection that the suit was not within the pecuniary limits of the District Munsif's jurisdiction, as it appeared that the appellant had not been prejudiced MUTHUSAMI MUDALIAR v NALLAKULANTHA MUDALIAR, 18 M. 418 — 640

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Hindu Law—11.—Partition—(*Concluded*).

(6) Sale of a co-parcener's share—Claim of co-parceners on proceeds—Remuneration for management—Evidence Act—Act I of 1872, s. 35—Judgments and private documents—Civ. Pro. Code—Act XIV of 1882, ss 2, 215, 540—Provisional decree—Admission made *arguendo*—See Civ. Pro. Code (Act XIV of 1882), 18 M. 73.

(7) See Civ. Pro. Code (Act XIV of 1882), 19 M. 211.

(8) See Hindu Law (Alienation), 19 M. 267.

(9) See Mortgage (General), 18 M. 500.

(10) See Stamp Act (I of 1879), 18 M. 233.

——**12.—Religious Endowments.**

(1) *De facto* manager—Debt binding on the institution—See Manager, 18 M. 359.

(2) Gosami mutt—Grant by the head of the mutt to his brother for his maintenance—Suit by a successor to recover the land—Limitation Act—Act XV of 1877, s. 10—Evidence—Yadasts from revenue officials—See Evidence, 18 M. 266.

(3) *Temple repairs 'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds*—The 'panchayatdars' or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent Rs. 10-8-0 in so doing from the funds of a 'katlai' or endowment of which they were managers. They then sued the trustees of two other 'katlais' for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendants' income, and asked for a declaration that the duty of executing repairs fell upon the defendants' 'katlais':—*Held*, that, in the absence of any endowment or trust-deed regarding the 'katlais' the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their 'katlais' should permit. Vythilinga Pandara Sannadhi v. Somasundara Mudaliar, 17 M. 199 137

(4) See Civ. Pro. Code (Act XIV of 1882), 17 M. 343.

(5) See Limitation, 19 M. 243.

——**13.—Reversioner.**

(1) *Suit by reversioner to set aside alienations by widow—Fraudulent consent given by nearest reversioner.*—In a suit brought by the nearest reversioner of a Hindu widow who had alienated portions of her husband's estate with the consent of the nearest reversioner alive at the date of the alienation (since deceased), it was found that the alienations were colourable transactions fraudulently got up for the purpose of defeating the plaintiff's claim:—*Held*, that the consent of the nearest reversioner, who must have been aware of the fraud, was of no avail to validate the transactions impeached, and that they were therefore invalid as against the plaintiff. Kolandaya Sholagan v. Vedamuthu Sholagan, 19 M. 337=6 M.L.J. 14 .. 941

(2) See Court Fees Act (Act VII of 1870), 18 M. 459.

(3) See Hindu Law (Adoption), 18 M. 53.

——**14.—Stridhanam.**

(1) *Estate of married daughter in stridhanam property of mother.*—Under the Hindu Law in force in Southern India, a married daughter, who succeeds to her mother's immoveable stridhanam property, takes a life interest only and after her death it passes to her mother's heir. Venkataramakrishna Rau v. Bhujanga Rau, 19 M. 107=6 M.L.J. 16 .. 780

(2) *Gift, construction of—Provincial Small Causes Courts Act—Act IX of 1887, sch II, art. 18—Suit relating to a trust.*—A Hindu executed in favour of his daughter an instrument in the following terms:—"I have "hereby given to you to be enjoyed as stridhanam after my death 2,320 "fanams out of 6,000 fanams which remain as kanom on the land T. . . "The proportionate rent on 2,320 fanams is 365 paras. This quantity of "paddy . . . shall be enjoyed by you and your sons and grandsons heredi-

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Hindu Law—14.—Stridhanam—(*Concluded*).

"tarily by receiving the same from my sons" After certain clauses restricting the mode of enjoyment and the power of alienation the instrument proceeded, "in the event of the said kanom being paid, "that money shall be received by my sons and shall be invested on some "other property, which may be approved of by you and your sons and by "my sons, and from that property you may receive income yearly and "enjoy the same." In a suit by a grandson of the donee to recover his share of the income:—*Held,* (1) that the suit 'related to a trust' within the meaning of Provincial Small Cause Courts Act, sch. II, art 18, (2) that the instrument was not invalid under Hindu Law and that the plaintiff was entitled to a decree. KRISHNA AYYAN v VYTHIANATHA AYYAN, 18 M. 252 ... 525

(3) *Inheritance by a granddaughter for a limited estate—Succession by heir of last full owner*—A Sudra (Lingayat) died in 1826 leaving his property to A, B and C, his daughters, who enjoyed it for some time jointly In 1860 a settlement was made by (1) A, the sole surviving daughter, (ii) D, who was the daughter of B, and (iii) the present plaintiff, who was the only son of C, and also the stepson of D. Under the settlement two-thirds of the property was given to the present plaintiff and the rest was divided between A on the one hand and D and E on the other. E was the daughter of D Subsequently D and E acquired A's share under a deed of gift dated 5th June 1863 D died in 1883, E had died previously, leaving the present defendant (her husband) and a daughter F, who died an infant without issue in 1891 The plaintiff now sued to recover the property which had passed to the line of B.—*Held,* (1) that the settlement of 1860 on its true construction gave to D and E a life interest only in the event of their having no descendants, but an estate of inheritance otherwise, and that that disposition was valid, and accordingly that in the event which happened they took a heritable estate; (2) that under the settlement of 1860 and the deed of gift of 1863, D and E took as joint tenants with benefit of survivorship, and not as tenants in common, and accordingly that D became sole full owner of the property on the death of E, whose husband thus acquired no title as her heir; (3) that F inherited the property, but only for a limited estate, and that the plaintiff was entitled to succeed as heir to D, the last full owner VIRASANGAPPA CHETTI v RUDRAPPA CHETTI, 19 M. 110=6 M L J 3 ... 782

(4) *Sister-in-law.*—A childless Hindu widow, who had been predeceased by her parents, died, leaving stridhanam property Her brother's widow claimed to be entitled to inherit that property and sued to enforce her claim:—*Held,* that, whether the marriages of the deceased and her mother respectively had taken place in a superior or an inferior form, the plaintiff was not entitled to inherit the stridhanam property in question THAYAMMAL v ANNAMALI MUDALI, 19 M 35 .. 729

————15.—Succession.

(1) Inheritance according to the Mitakshara, chap II, s. 6, Succession of bhandu—Priority of mother's half-brother over sons of father's paternal aunt—See HINDU LAW (INHERITANCE), 19 M. 405

(2) *Manu, Chap* IX, *slokas* 122 *and* 125—*Rule of selection as between an elder son by a wife of an inferior class of caste and a junior son by a wife equal in caste—Dagger wife—Meaning of the term* bhoga strees—*Custom showing preference in succession for the sons by a senior wife to those by a junior wife—Nearness of blood as a ground of preference between brothers of the half and full blood, respectively*—In case of disputed succession to indivisible property between sons who are born of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder son of a wife of lower class Thus, when a Sudra marries a woman of his caste but of an inferior class, as a dagger wife, in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of the mother being of a higher class. A valid custom prevails among the Kambla

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Hindu Law—15.—Succession—(*Concluded*).

zemindars whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of the marriage and not the age of the wife. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible. When, therefore, family property belongs to a co-parcenary family consisting of two brothers of a deceased *propositus* —one of the whole blood and one of the half-blood—in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. RAMASAMI KAMAYA NAIK v. SUNDARALINGASAMI KAMAYA NAIK, 17 M. 422 .. 293

(3) *Of a daughter's daughter to her grandfather's estate.*—On the principle laid down in 14 M. 149, a daughter's daughter is, in the absence of preferential male heirs, entitled to succeed to her grandfather as a bhandu. RAMAPPA UDAYAN v. ARUMUGATH UDAYAN, 17 M. 182=4 M.L.J. 30 .. 125

(4) Whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible co-parcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian *ad litem*—Code of Civil Procedure—Act XIV of 1882, ss. 13, 244, 312—Powers of a Hindu son to question the alienation of an impartible estate by his father—Limitation—Suit to recover immoveable family property unlawfully alienated during plaintiff's minority—Limitation Act, s. 7, illus. (*b*), and sched. II, arts. 12, 44, 45, 120 and 144—See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 316.

(5) See GRANT, 17 M. 150.

(6) See HINDU LAW (INHERITANCE), 19 M. 70.

——16.—Widow.

(1) In possession of her late husband's land—Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser—*See* EXECUTION, 17 M. 208.

(2) *Suit for maintenance—Previous demand—Right to arrears.*—A Hindu widow brought a suit against her husband's brother to establish her right to maintenance, and to recover arrears for six years; she had made no demand before suit:—*Held,* that she was not entitled to a decree for the arrears. SESHAMMA v. SUBBARAYADU, 18 M. 403 630

(3) *See* HINDU LAW (ADOPTION), 18 M. 53.

(4) *See* HINDU LAW (ALIENATION), 18 M. 113.

(5) *See* HINDU LAW (INHERITANCE), 18 M. 168.

(6) *See* HINDU LAW (MAINTENANCE), 17 M. 392.

——17.—Will.

(1) *Construction of will—Condition—Bequest to daughters—Meaning of the words " have issue ".*—A testator, after providing that his two daughters should, after their marriage, remain in his family taking the income of his property without dividing it, and that, if they should disagree, the income only should be shared between them, added the following:—"If both the said daughters shall have issue, they shall divide the said properties "equally. These who have no issue shall, as aforesaid, enjoy the income "for their lives, and those who have issue shall enjoy the whole property":—*Held,* to be the applicable principle, that, where the language of a will is clear and consistent, it shall receive its literal construction, unless there is something in the will itself to suggest a departure from it. Accordingly, the true construction was that the birth of issue was the event on which the absolute gift of a half share to either daughter was to take effect; and that there was no reason for construing the words "have issue" to mean "leave issue." Therefore, under the will, one of the daughters, whose only issue died before her, took a heritable share, and that share did not go over, on her death, to

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her surviving sister, who had children. GURUSAMY PILLAI v. SIVAKAMI AMMAL, 18 M 347 (P C)=23 I.A 119=5 M L J 106=6 Sar P.C.J 610 .. 591

(2) *Devise of one kani out of an estate—Selection by the devisee.*—The owner of land, measuring one kani and three-quarters, died, leaving a will by which he devised one kani thereof to the plaintiff, who now sued to recover one kani selected by him out of the land in question:—*Held*, that plaintiff had the right to make his selection and was entitled to a decree NARAYANASAMI GRAMANI v PERIATHAMBI GRAMANI, 18 M. 460 671

Infant.

Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority—See COSTS, 17 M. 257

Injunction.

(1) See CIV PRO CODE (ACT XIV OF 1882), 18 M 338
(2) See EASEMENT, 18 M 163
(3) See TENANTS-IN-COMMON, 19 M 38

Insanity.

(1) See CIV PRO CODE (ACT XIV OF 1882), 19 M 210
(2) See LUNATIC, 18 M 472

Insolvency.

(1) *Deceased insolvent debtor—After-acquired property—Whether it vests in his administrator or in the Official Assignee*—The Official Assignee sold a policy of insurance on the life of an insolvent, who, after obtaining his personal discharge, died The purchaser having bought the policy mainly for the benefit of the insolvent, paid most of the sum realised by him upon it to the Administrator-General, who was about to take out letters of administration to the estate of the insolvent—*Held*, that the Administrator-General was entitled to the proceeds of the policy in preference to the Official Assignee *In re* ACKRILL, 18 M 24 367

(2) See CIV PRO CODE (ACT XIV OF 1882), 19 M 65
(3) See HINDU LAW (JOINT FAMILY), 19 M 74.
(4) See INSOLVENT ACT, 11 AND 12, VIC, CAP 21, 18 M 10

Insolvency Order.

See CIV PRO CODE (ACT XIV OF 1882), 17 M 377

Insolvent Act, 11 & 12, Vic., Cap. 21.

(1) S 7—Hindu Law—Insolvency of managing member of a family—Vesting order—Official Assignee's power to convey land—See HINDU LAW (JOINT FAMILY), 19 M 74

(2) *S 7—Uncertificated insolvent—After-acquired landed property—Mortgage by insolvent—Rights of Official Assignee*—The Official Assignee applied under Insolvent Act, s. 36, for the delivery up to him of a house and furniture of which the occupants were in possession under a mortgage from an insolvent, dated December 1891. It appeared that the insolvent had been adjudicated in 1888 and had received her personal discharge in 1890 and had obtained the house in question under a deed of gift in April 1891, and had died intestate in May 1892, having never obtained a discharge under s 59 The mortgagees took their mortgage with notice of the insolvency of the mortgagor. The Official Assignee did not become aware that the insolvent had acquired the property in question till September 1892 when he intervened and claimed the property free from the mortgage:—*Held*, that the Official Assignee was entitled to the mortgaged property free from the mortgage ROWLANDSON v CHAMPION, 17 M 21 14

(3) *S 63—Insolvency of married woman—Property settled on her for separate use without power of anticipation—Whether comprised in the vesting order or not—Married Women's Property Act—Act* III *of* 1874, *s.* 8.—A creditor's right to be satisfied out of the separate property of a married woman is, in the case of post-nuptial debts, restricted to the property as to which there is no restraint on application. S. 8 of

Insolvent Act, 11 & 12 Vic., Cap. 21—(*Concluded*).

Act III of 1874 was not intended to give married women the power of evading such restraint. *In re* NANTEL AND MANTEL, 18 M. 19 63

Instalment Bond.

See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 382.

Interest.

(1) Civ. Pro. Code—Act XIV of 1882, ss. 13, 43—*Res judicata*—Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principal—Second suit for principal and interest subsequently accrued—Limitation Act—Act XV of 1877, sch. II, art 116—Mortgage—Interest *post diem* in absence of covenant—Muhammadan Law—Shares of males and females in subject of *altumga* grant—Hypothecation by gosha women—Rule as to proof of *bona fides*.—See BURDEN OF PROOF, 18 M. 257.

(2) *Mortgage—Limitation Act—Act* XV *of* 1877, *sch.* II, *art* 116.—The plaintiff sued in 1893 to recover principal together with interest due up to date on a mortgage which provided for the repayment of principal and interest in December 1882, but contained no covenant for the payment of interest *post diem*:—*Held,* that the claim for interest *post diem* was barred by limitation. THAYAR AMMAL v. LAKSHMI AMMAL, 18 M. 331 .. 579

(3) '*Post diem*'—Interest Act—Act XXXII of 1839—Transfer of Property Act—Act IV of 1882, s. 88—Mortgage.—See ACT XXXII OF 1839 (INTEREST) 18 M. 248.

(4) See BURDEN OF PROOF, 18 M. 257.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 419.

(6) See CONTRACT ACT (IX OF 1882), 18 M. 126, 175.

Joinder.

Of plaintiffs—Wrongful act affecting the rights of the several plaintiffs.—Where certain persons were alleged to have committed a wrongful act by evicting the plaintiffs from certain land in which the first plaintiff claimed to be entitled to the melvaram and the other plaintiffs to the kudivaram:—*Held,* that a suit brought by the plaintiffs jointly was not bad for mis-joinder. MUTHUVIJAYA RAGHUNADHA RAJU TEVAR v. CHOCKALINGAM CHETTI, 19 M. 335 939

Joint Fort Teasor.

See CONTRIBUTION, 17 M. 78.

Judge.

See DEFAMATION, 17 M. 87.

Jurisdiction.

(1) Civ. Pro. Code, s. 17—Provincial Small Cause Court's Act—Act IX of 1887, s. 16.—See CIV. PRO. Code (ACT XIV OF 1882), 19 M. 477.

(2) See ACT III OF 1873 (MADRAS, CIVIL COURTS), 17 M. 309.

(3) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURT), 19 M 304.

(4) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 18 M. 28.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 65.

(6) See CRIM. PRO. CODE (ACT X OF 1882), 17 M. 402.

(7) See EXECUTION, 19 M. 435.

(8) See FOREIGN JUDGMENT, 18 M. 327.

(9) See HEREDITARY OFFICE, 17 M. 302.

(10) See HINDU LAW (CUSTOM), 17 M. 222.

(11) See LETTERS PATENT, 19 M. 448.

Karnam.

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 18 M. 395.

(2) See LIMITATION ACT (XV OF 1877), 17 M. 395.

Kattubadi.

See LIMITATION ACT (XV OF 1877), 19 M. 100.

Land Acquisition Act (X of 1870).

Ss. 3, 24, 25, 29 and 34—'Material irregularity'—Mistake in regard to the principle of calculation of the value of the land acquired—Code of Civil Procedure—Act XIV of 1882, s. 622.—See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 371.

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Landlord and Tenant.

(1)—Easement by custom—Water rights—See EASEMENT, 18 M 320

(2)—*Notice to quit—Assertion of Mulgeni (permanent) tenure—Entitlement to notice*—The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to notice to quit in determination of the tenure UNHAMMA DEVI v. VAIKUNTA HEGDE, 17 M 218=3 M L J 287 150

(3)—*Perpetual lease granted for consideration—Clause providing for forfeiture on rent being in arrears—Whether repayment of the consideration is a condition precedent to the surrender of the lands*—Consideration paid for a lease is exhausted by the grant of the lease, and a tenant's forfeiture of the lease cannot, in the absence of a provision to that effect, operate so as to convert the original consideration into a debt, which must be paid before the forfeiture can be enforced KAMMARAN NAMBIAR v CHINDAN NAMBIAR, 18 M 32 372

(4) Ulavadai Mirasidars—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Civ Pro Code, s 584—Inference to be drawn from documents, question of law—See CIV PRO CODE, (ACT XIV OF 1882), 19 M 485

Lease.

(1) See CONTRACT, 17 M 275.

(2) See LANDLORD AND TENANT, 18 M 32

Leave to sue in forma pauperis.

See CIV PRO CODE (ACT XIV OF 1882), 19 M 197

Legacy.

See LIMITATION ACT (XV OF 1877), 19 M 425

Letters of Administration.

(1) *Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters*—Two brothers, members of an undivided Hindu family, who traded as 'T Iyavier and Brother,' became the holders of a promissory note given to the firm The elder brother having died, his son joined the firm in his place, and he and his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend The plaintiffs had not taken out letters of administration to their respective fathers' estates —*Held*, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided; (2) that,, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs CHOCKALINGA PILLAI v NATESA AYYAR, 17 M 17 . 101

(2) See SUCCESSION ACT (X OF 1865), 19 M 458

Letters Patent.

(1) *Cl 12—Jurisdiction of High Court—Immoveable property situated outside—Moveable property situated within the jurisdiction—Leave granted by Registrar*—Where the plaintiffs brought a suit for their share of family property consisting of land situated outside the jurisdiction of the High Court and for moveables situated within, leave having been granted by the Registrar —*Held*, that the High Court had no jurisdiction as to the lands, and that the suit must be dismissed as to them —*Held* further, that leave to sue had been wrongly granted by the Registrar. SESHAGIRI RAU v RAMA RAU, 19 M 448=6 M L J. 19 . 1018

(2) *Cl 12—Whether an order under this clause may form the subject of an issue for trial in the suit*—The legality of an order granting permission to institute a suit under cl 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted. NAGAMONEY MUDALIAR v. JANAKIRAM MUDALIAR, 18 M 142=5 M. L. J. 34 .. 448

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Letters Patent—(*Concluded*).

(3) S. 15—Appeal—District Municipalities Act (Madras)—Act IV of 1884, ss. 53, 59, 60—Profession tax—trader—Provincial Small Cause Courts Act—Act IX of 1887, ss. 25, 27—See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 17 M. 100.

(4) *S. 15—Appeal to two Judges—Sanction to prosecute granted by one Judge.*—Where one Judge exercising the revisional jurisdiction of the High Court, in reversal of an order of a First-class Magistrate, had granted sanction under Crim. Pro. Code, s. 195, for a prosecution under Penal Code, s. 182 an appeal was preferred from his judgment under Letters Patent, s. 15:—*Held*, that no appeal lay, that section of the Letters Patent being inapplicable in cases of criminal jurisdiction. SRINIVASA AYYANGAR v. QUEEN-EMPRESS, 17 M. 105=1 Weir 786 72

(5) S. 15—See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 422.

Lex Fori.

See CONTRACT, 17 M. 262.

Lex Loci Contractus.

See CONTRACT, 17 M. 262.

Limitation.

(1) Adverse possession—Alienation of an infant's property by his mother and guardian—Hindu Law—Inheritance—Bandhu ex-parte paterna—Bandhu ex-parte materna.—See HINDU LAW (INHERITANCE), 18 M. 193.

(2) Adverse Possession—Hindu Law.—See HINDU LAW (IMPARTIBLE ESTATE), 17 M. 34.

(3) *Adverse possession—Mortgage by previous owner out of possession for twelve years*—In a suit on a mortgage, dated 19th June 1888, and executed by the superintendent of a mosque, the endowments of which were comprised in the mortgage, together with defendant No. 1, therein described as his disciple, it was admitted that the first mortgagor had occupied the position of superintendent up to 1871 and that in that year he had executed an instrument authorizing defendant No. 2 to take possession of the properties on behalf of defendant No. 3 whom, as was recited, the executant had taken in adoption and appointed to be his successor. In 1874 the first mortgagor purported to cancel the instrument above referred to, but it appeared that he never actually resumed the management and that defendant No. 2 resisted various attempts then and subsequently made to interfere with his possession, and held the properties (together with defendant No. 3) up to the date of the suit:—*Held*, that defendants Nos. 2 and 3 were in adverse possession of the mortgage premises from 1871, and that the mortgage was consequently invalid whatever the purpose of the debt intended to be secured thereby. SUBBARAMAYYAR v. NIGAMADULLAH SAHEB, 18 M. 342 .. 587

(4) *Adverse possession—Non-payment of melvaram—Claim of kudivaram right by prescription.*—In a suit to recover land, of which neither the plaintiff nor his predecessor in title had been in possession within a period of forty years before the suit, the defendants pleaded that the plaintiff had been entitled to receive melvaram only, that the payment of melvaram had been discontinued fifteen years before the date of the suit, and that they themselves were entitled to the kudivaram right in the land. It was found that the non-payment of melvaram had not been accompanied by an assertion of adverse title and that the defendant's kudivaram right had not been set up twelve years before the suit:—*Held* that the suit was not barred by limitation. GOVINDA PILLAI v. RAMANUJA PILLAI, 18 M. 171 .. 468

(5) Boundary Marks Act (Madras)—Act XXVIII of 1850, s. 25—Boundary Marks Act (Madras)—Act II of 1884, s. 9—Suit to set aside decision of the survey officer—Plea of limitation abandoned—See ACT XXVII OF 1860 (BOUNDARY MARKS), MADRAS, 19 M. 416.

(6) Civ. Pro. Code, ss. 53, 245, 647—Amendment of execution petition—Appeal.—See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 67.

(7) Contract—Continuing Breach—Civ. Pro. Code, ss. 588 (28) 586.—See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 391.

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Limitation—(*Concluded*).

(8) *Purchase by conditional sale—Vendor remaining in possession as tenants holding over—Possession not shown to be adverse.*—In 1866 the plaintiff bought the plaint lands by conditional sale deed repayable in ten years from a third party who, under the same document, became his tenant of the said lands. Before the expiration of the ten years the vendor died, and his widow sold her right in the lands and gave possession to G, the transferrer of the second defendant. On the expiration of the ten years the sale to plaintiff became absolute and G continued to hold over after the expiry of the lease, but there was no evidence to show that G's possession ever became hostile to plaintiff.—*Held*, that the fact that plaintiff's title ripend into full ownership on the expiration of the ten years provided by the sale deed did not alter the character of the tenure of G, that his possession never became hostile to plaintiff, that G acknowledged the plaintiff's title in his sale deed dated 1881 to the second defendant, and that the suit was not barred. ANANTHA BHATTA v. HOLEYA DEYYU, 19 M. 437 .. 1010

(9) *Religious endowment—Hereditary trustee—Invalid alienation*—In a suit brought by a hereditary trustee to set aside certain alienations of the trust property, made by his predecessors in title and to have it declared that he was entitled to the sole management of the trust property it appeared that the property was held jointly by plaintiff's father and by the mother of the first defendant. On 17th September 1868 first defendant's mother alienated her right to the joint management to the first defendant, who however never got possession until 13th February 1869, on which date plaintiff's father alienated his right to joint management to first defendant, the plaintiff was born in 1875.—*Held*, that the hereditary right of plaintiff was a personal right accruing on the death of his predecessor, *viz*, his father, and that as limitation ran from that date, the suit was not barred. VELU PANDARAM v. GNANASAMBANADA PANDARA SANNADHI, 19 M 243=6 M L J 39 .. 874

(10) See CIV PRO. CODE (ACT XIV OF 1882), 18 M. 144; 19 M. 162, 197.

(11) See EVIDENCE ACT (I OF 1872), 17 M. 134.

Limitation Act (XV of 1877).

(1) *S. 7—Malabar Law—Compromise of doubtful claims by adult members of a tarwad—Suit by junior members to rescind the compromise*—In 1878 the senior members of Malabar tarwad, in *bona fide* compromise of certain doubtful claims, executed an instrument conveying away certain land of the tarwad In 1891 certain junior members of that tarwad, including several minors, sued to recover possession of the land in question Others of the junior members of the tarwad had attained majority more than three years before the suit and had not impugned the validity of the conveyance; these persons were joined as defendants. None of the plaintiffs had attained majority in 1878:—*Held*, that the suit was barred by limitation *Semble*: that a compromise of a doubtful claim made by the adult members of a tarwad *bona fide* and in the interest of the tarwad is binding on the minor members. MOIDIN KUTTI v BEEVI KUTTI UMMAH, 18 M. 38 .. 377

(2) *S. 7—Registration Act—Act* III *of* 1877, *s.* 77*—Suit by infant to enforce registration—Special rule of limitation*—The Registration Act, 1877, being a special Act complete in itself, the provisions of Limitation Act, s. 7, do not apply to suits instituted under s 77 for a decree directing a document to be registered:—*Held, accordingly*, that a suit by an infant to enforce the registration of a conveyance having been instituted more than thirty days after refusal on the part of a registrar to register it, is barred by limitation. VEERAMMA v. ABBIAH, 18 M. 99 (F.B.) .. 418

(3) S 7, illustration (*b*) and sch. II, arts. 12, 44, 45, 120, 144—Limitation—Suit to recover immoveable family property unlawfully alienated during plaintiff's minority—Hindu law—Succession whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representa-

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tion of minor heirs as defendants by including a Collector as a defendant, as their guardian *ad litem*—Civ. Pro. Code—Act XIV of 1882, ss. 13, 244, 312—Powers of Hindu son to question the alienation of an impartible estate by his father—See CIV. PRO. CODE, (Act XIV of 1882), 17 M. 316

(4) Ss. 7, 12, sch. II, art. 177—Civ. Pro. Code—Act XIV of 1882, ss. 596, 598, 599—Application to admit appeal to Privy Council—Disability to reason by the minority—Deduction of time:—See CIV. PRO. CODE (ACT XIV of 1832), 18 M. 484.

(5) S. 8—*Sale of land for arrears of revenue—Revenue Recovery Act (Madras),—Act* II *of* 1864, *s.* 36, *cl.* 2, *and s* 89—*Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale.*—When there are arrears of revenue so as to give jurisdiction to the Collector to sell under Madras Act II of 1864, the sale, however irregular, is a proceeding under that act, for purposes of limitation, and is valid not only as between the Collector and the defaulter, but as between the Collector and the purchaser at the sale. The mere fact that one of the plaintiffs, in a suit brought to set aside a sale under Madras Act II of 1864, is a minor is not sufficient to save the limitation bar under s. 59 of Madras Act II of 1864 when an alleged fraud affecting the sale came to the knowledge of the other plaintiffs who are majors and are jointly interested with the minor more than six months prior to the institution of the suit, s. 8 of the Limitation Act being inapplicable to such cases. NARAYANAN NAMBUDRI v. DAMODARAN NAMBUDRI, 17 M. 189=4 M.L.J. 79 .. 129

(6) S. 10—Evidence—Religious endowment—Gosami mutt—Grant by the head of the mutt to his brother for his maintenance—Suit by a successor to recover the land—Yadasts from revenue officials.—See EVIDENCE, 18 M. 266.

(7) S. 12—Delay in obtaining copies for the purpose of appeal—Res judicata—Champerty—Speculative Purchase—Public policy—Contract Act —Act IX of 1872, s. 23.—See CONTRACT ACT (IX OF 1872), 18 M. 374.

(8) *S.* 14—*Deduction of time during prosecution of suit with due diligence—Defect of jurisdiction—Other cause of a like nature.*—Where a previous suit by the same plaintiff against the same defendant has failed by reason of misjoinder of causes of action and parties, the plaintiff in a second suit is not entitled to the extra period of limitation allowed by s. 14 of the Limitation Act, since the cause of failure of the previous suit is not due to 'defect of jurisdiction' in the Court which entertained the suit, nor is it a cause 'of a like nature' thereto. TIRTHA SAMI v. SESHAGIRI PAI, 17 M. 299 .. 207

(9) *S.* 14—*Exclusion of time of former proceedings.*—In 1892 a suit was instituted in the Presidency Court of Small Causes against defendants not resident within the jurisdiction, the leave of the Registrar of the Court having been first obtained. Subsequently it was ruled that the Registrar was not empowered to give such leave, and the suit was dismissed. A similar suit was then instituted, the leave of the Court having been first obtained:—*Held*, that the time during which the first suit was pending should be deducted in the computation of the period of limitation applicable to the second suit. SUBBARAU NAYUDU v. YAGANA PANTULU, 19 M 90 .. 768

(10) S. 14, sch. II, art. 179—*Exclusion of time of proceeding* bona fide *in Court without jurisdiction—Step in aid of execution—Application for sanction to an agreement to give time to a judgment-debtor.*—On an application made in June 1892 for execution of a decree for the payment of a sum of money by instalments passed in 1883 by a Subordinate Court, it appeared that the Subordinate Court, after executing it in part, had transferred it to the Presidency Court of Small Causes, which proceeded to execute it up to 23rd February 1887, and that on a further application made on 5th March 1888, it was discovered that the transfer of the decree was a mistake, as the amount exceeded Rs. 2,000, and the decree was

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returned to the Subordinate Court on 5th July 1888 On 26th February 1889 an application was made to the Subordinate Court to sanction an agreement to give time for the satisfaction of the judgment-debt under Civ. Pro Code, s. 257 (A), but sanction was never given, and on 28th July 1891 the decree-holder applied to have the decree transferred to another Court, and in September applied for execution and realised Rs. 250 towards the debt:—*Held by Parker, J*, that the time during which the decree was in the Presidency Court of Small Causes should be deducted in the computation of the period of limitation for the present application under Limitation Act, s 14, cl 3 —*Held by Shephard and Best, J J*, that whether or not such deduction should be made, the present application was barred by limitation for the reason that the application on 26th February 1889 was not a step in aid of execution BARROW v JAVERCHUND SETT, 19 M 67

(11) *S 20—Payment of interest as such—A mere credit of interest made in accounts of defendants.*—In a suit brought by a creditor against certain persons to whom she had lent money on interest.—*Held*, that in order to save the bar of limitation, a mere credit of interest entered in the accounts of the defendants was not a sufficient payment of interest as such under s 20, Limitation Act, to save the bar. KOLLIPARA PALLAMMA v. MADDALA TATAYYA, 19 M 340=6 M L J 177 942

(12) *S. 20—Payment of interest on a debt—Authority of a previous guardian of a debtor remaining in management after the debtor's majority*—The mother and guardian of an infant borrowed money for his expenses and executed a bond in 1886 to secure the repayment In a suit by the obligee in 1892 it appeared that the mother had remained in management of her son's affairs and had paid interest on the debt, after he had attained majority and less than three years before the institution of the suit —*Held*, that the suit was not barred by limitation KAILASA PADIACHI v. PONNUKANNU ACHI, 18 M. 456 667

(13) *S 20—Suit for money—Payment on account of principal within the period of limitation—Evidence of such payment by writing made after period expired.*—The obligee of a registered mortgage bond, dated 30th January 1875, sued in February 1891 to recover from the obligor the principal and interest remaining due thereunder In bar of limitation the plaintiff relied on entries of part-payment from time to time in an account written by the defendant These part-payments were made at such times as to keep alive the obligee's right of suit up to the date of the last of them. The last of these payments was made on a date which was less than six years (the period of limitation for the suit) before the date of institution of the suit, but it was not entered in the defendant's accounts until after the date when the claim would otherwise have been barred by limitation —*Held*, that the provisions of Limitation Act, s 20 were satisfied, and that the suit was not barred by limitation VENKATASUBBU v APPUSUNDRAM, 17 M 92 63

(14) *S. 22*—Joint contractors—Civ Pro Code—Act XIV of 1882, s 32—A party to a contract joined as defendant and subsequently made a plaintiff—See CIV PRO CODE (ACT XIV OF 1882), 17 M 12

(15) *S. 22*, sch. II, arts 91, 120—Civ Pro Code—Act XIV of 1882, s 13—*Res judicata*—Decree in suit of small cause nature—Subsequent suit for declaration—Contract Act—Act IX of 1872, s 23—Consideration in part illegal—Stifling a prosecution—See CIV PRO CODE (ACT XIV OF 1882), 18 M 189.

(16) *S 23, sch. II, arts* 144 and 149—*Encroachment on public highway—Once a highway always a highway—Suit by municipality to remove encroachment—Prescriptive right*—The Municipality of Madras sued to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than forty-five years before the suit—*Held*, assuming that the land in question was originally included in the street, that the defendant had acquired a title by adverse possession against the municipality, which was not entitled to call in aid of the provisions of Limitation Act,

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Limitation Act (XV of 1877)—(*Continued*).

sch. II, art. 149. MUNICIPAL COMMISSIONERS v. SARANGAPANI MUDALIAR, 19 M. 154 .. 812

(17) *S.* 25—Date from which time runs.—A registered lease provided that the rent should be paid on 30th Masi, Tharana. The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885. A suit to recover the rent was filed on 12th March 1892:—*Held* that the suit was not barred by limitation. GNANASAMMANDA PANDARAM v. PALANIYANDI PILLAI, 17 M. 61 .. 42

(18) *S.* 28—*Limitation—Limitation in relation to persons in undisturbed possession.*—The law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. S. 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession. ORR v SUNDRA PANDIA, 17 M. 255 .. 176

(19) Sch. ii, art. 11—Civ. Pro. Code—Act XIV of 1882, ss. 278, 281—Disallowance of claim to property under attachment—Subsequent suit—See CIV. PRO. CODE (ACT XIV OF 1882), 18 M. 265.

(20) Sch. II, art. 11—Civ. Pro. Code—Act XIV of 1882, ss. 280 to 283—Mortgage—See CIV. PRO. CODE (ACT XIV OF 1882), 18 M. 316.

(21) *Sch.* II, *art.* 12—*Suit to set aside Court sale—Suit for land sold in execution as property of third parties.*—The plaintiffs sued in 1893 to recover possession of land of which their family had been in possession till 1884. The land had been sold to the defendant in 1881 in execution of a decree against the plaintiffs' cousins, but the sale had not been confirmed. A decree was passed as prayed in respect of a moiety of the land which represented the plaintiffs' share:—*Held*, that the decree was right. *Quære*: Whether the suit would have been barred under the one year's rule of limitation if the sale had been confirmed. NARASIMHA NAIDU v. RAMASAMI, 18 M. 478. . 684

(22) Sch. II, art. 36—Misfeasance—Indian Companies Act—Act VI of 1882, s. 214—Application against directors for refund of money improperly distributed—See COMPANIES ACT (VI OF 1882), 19 M. 149.

(23) *Sch.* II, *arts.* 36, 49—*Suit for compensation for attachment before judgment.*—In a suit by A against B, property of B was attached before judgment in November 1888. The suit was dismissed in October 1889, and an appeal by the plaintiff was dismissed in July 1890. B now sued A in September 1892 for damages occasioned by the attachment before judgment:—*Held*, that the suit was barred by limitation. MANAVIKRAMAN v. AVISILAM KOYA, 19 M. 80=3 M. L. J. 11 .. 761

(24) *Sch.* II, *arts.* 59, 60—*Money deposited—Banker and customer—Money lent—Deposit—Cause of action—Demand.*—A, at the suggestion of B, a shopkeeper, deposited with him certain sums of money on the terms that the money should be repaid with interest on demand. It appeared that B was in the habit of receiving deposits from his customers on such terms. A having died, his widow and administratrix sued more than three years after the date of the deposit to recover the amount deposited, the money having been demanded within three years of the date of the suit:—*Held*, that the suit was governed by Limitation Act, sch. II, art. 60 and not by art. 59 and accordingly was not barred by limitation. PERUNDEVITAYAR AMMAL v. NAMMALVAR CHETTI, 18 M. 390=5 M. L. J. 203 .. 620

(25) *Sch.* II, *arts.* 62, 97—*Suit to recover price paid on a void sale.*—In 1885 the plaintiff obtained from the defendant a sale-deed of a certain land and paid part of the purchase money. Subsequently a judgment-creditor of the defendant's husband sought to execute his decree against the land in question, and eventually, in October 1889, obtained a decree in the High Court under which the plaintiff was ejected. The plaintiff now sued in 1892, less than three years from the date of the last-mentioned decree, to recover the sum paid by him to the defendant as above mentioned:—*Held* that the suit was not barred by limitation. VENKATANARASIMHULU v. PERAMMA, 18 M. 173=5 M.L.J. 32 .. 470

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Limitation Act (XV of 1877)—(*Continued*).

(26) *Sch.* II, *art* 85—*Limitation—Mutual account*—To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations Thus an account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same purpose is not a mutual account within the meaning of art 85 sch. II of the Limitation Act A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality VELU PILLAI v GHOSE MAHOMED, 17 M 293=4 M L J 140 203

(27) *Sch* II, *art* 110—*Rent Recovery Act* (*Madras*)—*Act* VIII *of* 1865, ss 7, 9, 10—*Suit to recover arrears of rent—Proceedings in Revenue Court to enforce acceptance of patta tendered—Time from which period of limitation is computed*—In a suit for rent for a period which had expired more than three years before the date of the plaint, it appeared that proceedings had taken place in a Revenue Court under Rent Recovery Act (Madras), 1865, to enforce acceptance by the defendant of the patta tendered by the landlord These proceedings had terminated on appeal in favour of the landlord less than three years before the institution of his suit —*Held,* that the period of limitation applicable to the suit was not computable from the date of the termination of the proceedings under the Rent Recovery Act and that the suit was barred by limitation SRIRAMULU v SOBHANADRI APPA RAU, 19 M 21 719

(28) *Sch* II, *art* 110—*Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable—Rent Recovery Act* (*Madras*)—*Act* VIII *of* 1865, *s* 10—*Suit to recover arrears of rent due under a decree given under s* 10—In a suit for arrears of rent due under a decree given under s 10 of the Rent Recovery Act (Madras Act VIII of 1865) the period of limitation in art 110, sch II of the Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i e*, the date of the decree SOBHANADRI APPA RAU v CHALAMANNA, 17 M 225=4 M L J 5 155

(29) Sch II, art 116—Mortgage—Interest *post diem*—See INTEREST, 18 M 331.

(30) Sch II, art 116—Mortgage—Interest *post diem* in absence of covenant—Muhammadan Law—Shares of males and females in subject of altumga grant—Hypothecation by gosha women—Rule as to proof of *bona fides*—Civ Pro Code—Act XIV of 1882, ss 13, 43—*Res judicata*—Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principal—Second suit for principal and interest subsequently accrued—See BURDEN OF PROOF, 18 M. 257.

(31) *Sch* II, *art* 116—*Suit for rent—Registered contract signed by lessee only.*—In a suit for rent accrued due more than three years before the date of the plaint, it appeared that the contract between the landlord and tenant was comprised in a registered document which was signed only by the latter —*Held,* that the suit was not barred by limitation AMBALAVANA PANDARAM v VIGURAN, 19 M 52=5 M L J 228 741

(32) Sch II, arts 120, 122—Hindu Law—Liability of son for father's debts—Civ Pro. Code—Act XIV of 1882, ss. 43, 244—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—See CIV PRO. CODE (ACT XIV OF 1882), 17 M. 122.

(33) *Sch* II, *art.* 123—*Suit for a legacy and share in residue—Time begins to run at the expiration of one year from the death of the testator*—A suit was brought in May 1894 by a legatee claiming under the will of a testator, who died in December 1881, against the executors of the will. The plaint did not specifically ask for payment of the legacy or for ascertainment of the share in the residue due to the plaintiff, but

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Limitation Act (XV of 1877)—(*Continued*).
set forth certain alleged acts of misconduct on the part of the defendants with respect to their dealings with the property, and prayed the Court to call for an account to set aside certain sales of the property made by the defendants and for damages. The Court of First instance, without going into the merits, held that the suit was really for an account, and dismissed it as being barred. On appeal to the High Court:—*Held*, that the plaint should have been amended in order to show clearly that the plaintiff really was trying to recover his legacy from the defendants personally and that, therefore, the suit fell within art. 123, sch. II, Limitation Act, and that the same being payable one year after the testator's death on 8th December 1881, the suit was in time. CURSETJEE PESTON BOTTLIWALLA v. DADABHOY EDULJEE, 19 M. 425 .. 1001

(34) *Sch.* II, *art.* 124—*Suit for having the appointment of a karnam declared void.*—A suit by existing karnams for having the appointment of another person as a karnam jointly with themselves declared void does not fall within the provision of art. 124 of the Limitation Act. LAKSHMINARAYANAPPA v. VENKATARATNAM, 17 M. 395=3 M.L.J. 237 .. 274

(35) *Sch.* II, *art.* 132—*Suit for kattubadi—Whether kattubadi is rent merely or constitutes a charge—Resumption of service grant.*—The plaintiff sued for possession of three villages granted by his predecessor to the ancestors of the defendants on the ground that the villages had been granted on service tenure and that he was entitled to resume them. He prayed in the alternative for a decree for six years' arrears of of kattubadi:—*Held,* (1) *on the evidence* that the plaintiff was not entitled to resume the villages; (2) that the plaintiff was entitled to a decree for only three years' of kattubadi. VIZIANAGARAM MAHARAJAH v. SITARAMARAZU, 19 M. 100 .. 775

(36) *Sch.* II, *arts.* 137, 138—*Purchase at Court auction—Suit for possession of land—Date of cause of action—Construction of enactment.*—In a suit for possession of land instituted on 1st April 1891, it appeared that the land in question had been purchased by the plaintiff in a Court auction held in execution of a decree on 20th June 1878, and that the sale to the plaintiff was confirmed on 31st March 1879, which was the date upon which the certificate issued. The plaintiff failed to prove that the judgment-debtor was out of possession at or subsequently to the date of the sale:—*Held*, that the suit was governed by Limitation Act, sch. II, art. 138; that 'the date of the sale' in that article means the date of the actual sale not the date of the confirmation of the sale and that accordingly the suit was barred by limitation. VENKATALINGAM v. VEERASMI, 17 M. 89=3 M.L.J. 267 .. 61

(37) *Sch.* II, *art.* 147—*Usufructuary Mortgage—Personal Covenant to pay.*—Where a usufructuary mortgage contains a personal undertaking to pay the amount secured thereby, the limitation applicable to a suit brought on the mortgage is governed by art. 147, Limitation Act, XV of 1877. UDAYANA PILLAI v. SENTHIVELU PILLAI, 19 M. 411=6 M.L.J. 210 .. 991

(38) Art. 149—Forest Act—Act V of 1882 (Madras)—Burden of proof—Shifting of burden of proof—See ACT V OF 1882 (FOREST, MADRAS), 19 M. 165.

(39) Sch. II, art. 169—See CIV PRO CODE (ACT XIV OF 1882), 19 M. 414.

(40) *Sch.* II, *art.* 178—*Limitation—Applications for probate.*—The Limitation Act does not apply to applications for probate, and the applications referred to in art. 178 of sch. II of that Act are applications under the Code of Civil Procedure. GNANAMUTHU UPADESI v. VANA KOILPILLAI NANDAN, 17 M. 379 .. 263

(41) *Sch.* II, *art.* 179—*Step-in-aid of execution—Defect in application for execution.*—Where there has been in fact an application for execution made by the party entitled to make it, it is to be regarded as a step-in-aid of execution within the meaning of the Limitation Act, art. 179, although by misake a deceased judgment-debtor is named as the person against whom execution is sought. SAMIA PILLAI v. CHOCKALINGA CHETTIAR, 17 M. 76=4 M. L. J. 8. 52

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(42) *Sch* II, *art* 179—*Step-in-aid of execution—Request for payment of money realised in satisfaction of a decree*—A request for the payment of money realized in satisfaction of a decree is sufficient to keep the decree alive, being a step-in-aid of execution Whether a particular act is or is not an application for, or step-in-aid of execution, depends upon the nature of the act rather than the time at which it may possibly be done. KOORMAYYA v KRISHNAMMA NAIDU, 17 M 165=3 M L J 296 .. 113

(43) Sch II, art 179, cl. (6)—Application for execution of maintenance decree—Previous applications held to be barred by limitation—Civ Pro Code—Act XIV of 1882, s 13—*Res judicata*—See CIV PRO CODE (ACT XIV OF 1882), 18 M. 482

Liquidator.

See COMPANIES ACT (VI OF 1882), 18 M 498

Lunatic.

Act XXXIV *of* 1858—*Enquiry into alleged lunacy—Degree of unsoundness of mind*—A Hindu, who had acquired considerable assets without any ancestral property, lived with one of his wives and his eldest son who managed the property A younger son, who lived apart with his mother, made an application to the High Court alleging that his father was a lunatic and praying that he be declared to be so, and that a committee be appointed under Act XXXIV of 1858, and that the eldest son be directed to deliver the property to the committee It was found on the enquiry held under the above Act, that the alleged lunatic had for many years now and then been for short periods in such a state of mind as to render it right to detain him at home, and that he now had about him that which when aroused by the recollection of past losses or by the recurrence of family quarrels might produce mental derangement, but that he was of sound mind at the dates of the above application and of the enquiry —*Held*, that the application should be dismissed *Per curiam*· The eldest son should give to those who would be co-heirs with him to his father a fair opportunity of satisfying themselves that his management is open to no question and that nothing is done to their detriment Distinction between lunacy with lucid intervals, and a state of sound mind, subject to occasional unsoundness arising from accidental and temporary causes, considered *In re* NAGAPPA CHETTI, 18 M 472 679

Malabar Law.

1—ALIENATION
2—CUSTOM
3—INHERITANCE
4—KARNAVAN
5.—MAINTENANCE
6—MORTGAGE
7—PARTITION
8—RELIGIOUS ENDOWMENTS
9—SUCCESSION

———**1.—Alienation.**

Compromise of doubtful claims by adult members of a tarwad—Suit by junior members to rescind the compromise—Limitation Act—Act XV of 1877, s 7—See LIMITATION ACT (XV OF 1877), 18 M 38.

———**2.—Custom.**

See MALABAR LAW (RELIGIOUS ENDOWMENTS), 18 M 1

———**3.—Inheritance.**

Makkatayam rule of inheritance—Tiyans of South Malabar—On the death of a Tiyan of South Malabar following the Makkatayam rule of inheritance, his mother, widow and daughter are entitled to succeed to his property (acquired by himself and his father) in preference to his father's divided brothers. IMBICHI KANDAN v IMBICHI PENNU, 19 M 1 705

———**4.—Karnavan.**

(1) Civ. Pro. Code—Act XIV of 1882, s 566—Remand for trial of a new issue—Mapillas—See CIV PRO. CODE (ACT XIV OF 1882), 17 M. 69.

(2) See CIV PRO CODE (ACT XIV OF 1882), 17 M. 214

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Malabar Laws—5.—Maintenance.

See CRIM. PRO. CODE (ACT X OF 1882), 19 M. 461.

————**6.—Mortgage.**

(1) *Right of a jenmi, who is a judgment-creditor, to sell the kanom right before the expiry of twelve years.*—A jenmi, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years, such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution sale. ACHUTAN NAYAR v. KESHAVAN, 17 M. 271 .. 187

(2) Suit on a Kanom—Registration Act III of 1877, s. 17, cl. (*n*).—See REGISTRATION ACT (III OF 1877), 19 M. 288.

(3) See ACT I OF 1887 (MALABAR LAW COMPENSATION FOR TENANTS' IMPROVEMENTS), 18 M. 407, 19 M. 384.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 151.

(5) See SPECIFIC RELIEF ACT (I OF 1877), 17 M. 232.

————**7.—Partition.**

(1) *Makkatayam Rule of Inheritance—Tiyans—Whether compulsory partition can be effected.*—The ordinary rule of a Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam, no custom to the contrary having been made out. RAMAN MENON v. CHATHUNNI, 17 M. 184 .. 126

(2) Of tarwad—Decree against karnavan on tarwad debt before partition—Execution after partition—See EXECUTION, 18 M. 451.

————**8.—Religious Endowments.**

(1) *Uraiyama or rights of Uralan—Trustees and guardians of a temple in Malabar—Melkoima, or right of superintendence inherited by a family.—Usage of the temple—Effect of compromise*—The appellants who were Uralan, managing as trustees and guardians the affairs of a temple in South Malabar, claimed to exclude the respondents from the management jointly with themselves. The respondents representing the Nambidi family, the descendants of the former rulers of the locality, were entitled to rights, termed Melkoima, of superintendence over the temple. Disputes having arisen, the predecessors of the parties in 1845, and again in 1874 had compromised litigation, and had agreed, with the result that they had since then continued to act upon the agreement, that they should jointly exercise the powers of management:—*Held* that the compromise so agreed to was binding upon the appellant; that the usage, which had been followed since 1845, was the best exponent of the Melkoima right; and that the compromise could not be re-opened. NILAKANDHEN NAMBUDIRAPAD v. PADMANABHA REVI VARMA, 18 M. 1 (P.C.)=21 I.A. 128=4 M.L.J. 233=6 Sar P C J 478 .. 351

————**9.—Succession.**

Makkatayam Law—Tiyans of Calicut—Succession—Among the Tiyans of Calicut governed by the Makkatayam Law, the widow of the deceased owner is a preferential heir to his mother. KUNHI PENNU v CHIRUDAI 19 M. 440 .. 1012

Malicious Prosecution.

Prosecution by a Police Constable—Whether acting in his official capacity or not—Malice.—A Police Constable, who is in effect the prosecutor and not acting merely in his official capacity, who does not take reasonable care to inform himself of the truth of the case and who does not honestly believe in the charge preferred by him and is actuated by an indirect motive in preferring it, is liable in a suit for damage for malicious prosecution MINAKSHISUNDRUM PILLAI v. AYYATHORAI, 18 M. 136 .. 444

Manager.

Powers of de facto*—Religious endowments—Debt binding on the institution*—In a suit on a mortgage, dated April 1880, and comprising lands forming part of the endowment of a mutt, it appeared that the mortgagor had been the rightful manager of the mutt until 1876 when he was outcasted and consequently forfeited his office. The present defendant was appointed in 1877 to succeed him in the office of manager, but the mortgagor remained nevertheless in possession, and a suit by the present defendant to eject him was pending at the date of the mortgage. The

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Manager—(*Concluded*)

plaintiff now sought to enforce his rights under the mortgagee against the defendant and the property, of which the defendant had been placed in possession as the result of the suit above referred to: *Per Curiam*: the mortgagor was not disentitled to incur expenses so as to bind the rightful manager by the mere fact that the former was not *de jure* manager at the time the expenses were incurred, provided they were incurred for the preservation of the trust property of other justifiable purposes. On its appearing that the debt was incurred for the conduct of ceremonies in which the mortgagor, after his excommunication, was disqualified from taking part, and that all the circumstances of the case were known to the mortgagee—*Held*, that the plaintiff was not entitled to recover the amount of the mortgage-debt KASIM SAIBA v SUDHINDRA THIRTHA SWAMI, 18 M 359 . 599

Mapillas.
See CIV PRO CODE (ACT XIV OF 1882), 17 M. 69

Marriage.
(1) See ACT XV OF 1872 (CHRISTIAN MARRIAGE), 17 M 391, 18 M 230.
(2) See DIVORCE ACT (IV OF 1869), 17 M 235
(3) See HINDU LAW—MARRIAGES, CASES UNDER.

Marriage Brokage.
See CONTRACT ACT (IX OF 1872), 17 M 9.

Misfeasance.
See COMPANIES ACT (VI OF 1882), 19 M 149.

Misjoinder.
See CONTRACT, 17 M 168

Mortgage.
1.—GENERAL
2—BY CONDITIONAL SALE
3—CONSOLIDATION.
4—EQUITY OF REDEMPTION
5.—EXTINCTION
6—FORECLOSURE.
7.—REDEMPTION
8.—SALE
9—SIMPLE
10.—TACKING
11—USUFRUCTUARY

————1.—General.

(1)—Civ Pro. Code—Act XIV of 1882, ss 13, 43—*Res judicata*—Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principal—Second suit for principal and interest subsequently accrued—Limitation Act—Act XV of 1877, sch II, art. 116—Interest *post diem* in absence of covenant—Muhammadan Law—Shares of males and females in subject of *altumga* grant—Hypothecation by gosha women—Rule as to proof of *bona fides* —See BURDEN OF PROOF, 18 M 257.

(2) Civ. Pro Code—Act XIV of 1882, ss 280 to 283—Limitation Act—Act XV of 1877, sch. II, art 11—See CIV PRO CODE (ACT XIV OF 1882), 18 M 316.

(3) Execution—Sale in execution of decree of mortgaged land—Purchase of equity of redemption by decree-holder under s 294 of the Code of Civil Procedure—Execution of decree in respect of balance—Nature of price paid by purchaser on the purchase of the equity of redemption —See CIV PRO CODE (ACT XIV OF 1882), 18 M. 153

(4) Interest '*post diem*'—Limitation Act—Act XV of 1877 sch. II, art 116—See INTEREST, 18 M 331

(5) Limitation—Adverse possession—Mortgage by previous owner out of possession for twelve years—See LIMITATION, 18 M 342

(6) *Mortgage of joint property—Subsequent mortgage of unascertained shares—Partition—Rights of purchasers in execution of decrees on the two Mortgages*—Joint property belonging to an undivided Hindu family constituted of five branches was mortgaged to A in 1876, and the share

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Mortgage—1.—General—(*Concluded*).

of one branch was mortgaged to B in 1880. A partition took place in 1881 when the mortgagors of B had their share allotted to them. In 1888 A sued on his mortgage not joining B as a defendant and obtained a decree, in execution of which he brought to sale the property comprised in his mortgage and purchased it in September 1889. In 1889 B sued on his mortgage not joining A as a defendant and obtained a decree, in execution of which he brought his mortgagors' share to sale and purchased it and obtained possession in August 1889. A, in taking possession of the property purchased by him, was obstructed by B, but an order was made in his favour. B now sued for the cancellation of this order and for an injunction restraining A from taking possession of the property from him. The Lower Courts decreed that the plaintiff might redeem the land on payment of one-fifth of the amount of the defendant's decree. The defendant appealed against this decree, the plaintiff taking no objections to it:—*Held,* on second appeal, that the decree was wrong and that a decree as asked for by the plaintiff should be substituted for it. RAMANADHAN CHETTI v. ALKONDA PILLAY, 18 M. 500=5 M. L. J. 197 .. 699

(7) Partial breach of contract by mortgagee—Contract Act—Act IX of 1872, s. 39—Rescission—Acquiescence—Suit by mortgagee for interest due under the mortgage as regards the part fulfilled—See CONTRACT ACT (IX OF 1872), 18 M. 126.

(8) *Transfer of Property Act—Act* IV *of* 1882, *s.* 43—*Subsequently acquired interest of mortgagor—Decree against mortgagor's unascertained shares—Subsequent inheritance by the mortgagors of the share of a co-owner—Property belonging to a Muhammadan woman and her four children mortgaged by her and one of her sons to secure the repayment of a loan.*—A Muhammadan woman together with her eldest son executed a mortgage comprising the whole of an estate in which her younger children were also entitled to certain shares. The mortgagee brought his suit on the mortgage joining as defendants the younger children as well as the mortgagors and obtained a decree, whereby the mortgage amount was made payable "on the responsibility of the shares" of the co-mortgagors; the suit was otherwise dismissed and no personal decree was passed. Subsequently the shares of the co-mortgagors were increased by inheritance from one of the other defendants who died before the decree was executed:—*Held,* that the increased shares of the mortgagors were liable to be sold in execution of the decree. AJIJUDDIN SAHIB v. SHEIK BUDAN SAHIB, 18 M. 492 .. 693

(9) Transfer of Property Act—Act IV of 1882, s. 88—Interest 'post diem'—Interest Act—Act XXXII of 1889—See ACT XXXII OF 1889 (INTEREST), 18 M. 248.

————2.—By Conditional Sale.

See LIMITATION, 19 M. 437.

————3.—Consolidation.

(1) *Of prior mortgages—Want of registration—Secondary evidence—Extinction decree to redeem prior mortgages.*—In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered, it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively:—*Held,* that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid. ARUMUGAM PILLAI v. PERIASAMI, 19 M. 160 816

————4.—Equity of Redemption.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 M. 153.

————5.—Extinction.

(1) See MORTGAGE (CONSOLIDATION), 19 M. 160.

(2) See REGISTRATION ACT (III OF 1877), 19 M. 288.

————6.—Foreclosure.

Effect of foreclosure decree passed by a foreign Court—"Lis pendens"—Transfer of Property Act—Act IV *of* 1882, *s.* 52.—In 1887 K, who

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Mortgage—6.—Forclosure—(*Concluded*)

resided at Singapore, mortgaged certain lands in the Madura district to S, who sued and obtained a conditional foreclosure decree on 13th June 1892 in the Supreme Court of Singapore This decree became absolute on the 3rd October 1892 On 12th August 1892, K hypothecated the said land to P In a suit brought by S —*Held*, that the decree of a foreign Court cannot directly affect land situated in British India, that at the date of the mortgage there was no decree purporting to operate upon the land, that the doctrine of *lis pendens* was inapplicable *Quære* Whether P would have been bound if he had had notice of the existence of the conditional decree at the date of his mortgage PALANI CHETTI v SUBRAMANYA CHETTI, 19 M 257 884

————**7.—Redemption.**

(1) *Mortgage sued on not proved—Admission by defendants of mortgage right*—The plaintiff sued to redeem a kanom of 1859 The kanom was not proved, but it appeared that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. The Subordinate Judge held that the kanom to which the admissions related could not have been executed before 1823 which was less than sixty years from the date of some of the admissions and he passed a decree for redemption —*Held*, that the plaintiff having failed to establish the kanom on which the suit was based should not have been allowed to fall back upon some other as to which the defendants had made the admissions in question KRISHNA PILLAI v RUNGASAWMY PILLAI, 18 M 462=5 M L J 187 672

(2) See CIV. PRO CODE (ACT XIV OF 1882), 19 M 151

(3) See COURT FEES ACT (VII OF 1870), 19 M 16

(4) See MORTGAGE (CONSOLIDATION), 19 M 160

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 17 M 96, 19 M 40, 105

————**8.—Sale.**

(1) Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale—Contract Act—Act IX of 1872, s 74—Penal sum—*See* CONTRACT ACT (IX OF 1872), 17 M 62

(2) See CONTRACT ACT (IX OF 1872), 17 M 62

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 M 382

Mortgage—9.—Simple

Remedy of mortgage upon default made—Act IV of 1882, s 58—Construction of decree—On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, s 58) In this suit brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits —*Held*, that the decree for possession did not amount to a decree for the foreclosure or preclude redemption, the possession of the decree-holder having only been as a mortgagee, and having involved liability to account to the mortgagor SRI RAJA PAPAMMA RAO v SRI VIRA PRATAPA H V RAMACHANDRA RAZU, 19 M 249 P C=23 I A. 32=6 M L J 53=7 Sar P. C J. 10 827

————**10.—Tacking.**

Subsequent agreement—Covenant to pay an additional sum—Charge—In a suit on a mortgage, dated 1878, it appeared that the premises had been mortgaged in 1874, but the mortgagor had been left in possession under a lease; and that a suit brought by the mortgagee (on the rent reserved by the lease falling into arrears) was compromised in 1877 on the terms that Rs 3,680 should be paid together with the amount secured by the mortgage of 1874 The instrument of compromise was not registered and the amount was not paid —*Held*, that the plaintiff's mortgage was subject to the mortgage of 1874 only and not to the arrangement comprised in the compromise *Quære*, whether the com-

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Mortgage—6.—Forclosure—(*Concluded*)

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————7.—**Redemption.**

(1) *Mortgage sued on not proved—Admission by defendants of mortgage right.*—The plaintiff sued to redeem a kanom of 1859. The kanom was not proved, but it appeared that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. The Subordinate Judge held that the kanom to which the admissions related could not have been executed before 1823 which was less than sixty years from the date of some of the admissions and he passed a decree for redemption:—*Held,* that the plaintiff having failed to establish the kanom on which the suit was based should not have been allowed to fall back upon some other as to which the defendants had made the admissions in question KRISHNA PILLAI v. RUNGASAWMY PILLAI, 18 M. 462=5 M. L. J 187 .. 672

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 151

(3) See COURT FEES ACT (VII OF 1870), 19 M 16

(4) See MORTGAGE (CONSOLIDATION), 19 M 160.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 17 M 96, 19 M 40, 105.

————8.—**Sale.**

(1) Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale—Contract Act—Act IX of 1872, s. 74—Penal sum—*See* CONTRACT ACT (IX OF 1872), 17 M. 62.

(2) See CONTRACT ACT (IX OF 1872), 17 M 62.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 M. 382.

Mortgage—9.—Simple.

Remedy of mortgage upon default made—Act IV *of* 1882, *s* 58—*Construction of decree*—On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace. That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, s. 58) In this suit brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits:—*Held,* that the decree for possession did not amount to a decree for the foreclosure or preclude redemption, the possession of the decree-holder having only been as a mortgagee, and having involved liability to account to the mortgagor. SRI RAJA PAPAMMA RAO v. SRI VIRA PRATAPA H V. RAMACHANDRA RAZU, 19 M. 249 P. C =23 I. A. 32=6 M L J. 53=7 Sar. P. C. J. 10 .. 877

————10.—**Tacking.**

Subsequent agreement—Covenant to pay an additional sum—Charge—In a suit on a mortgage, dated 1878, it appeared that the premises had been mortgaged in 1874, but the mortgagor had been left in possession under a lease; and that a suit brought by the mortgagee (on the rent reserved by the lease falling into arrears) was compromised in 1877 on the terms that Rs. 3,680 should be paid together with the amount secured by the mortgage of 1874. The instrument of compromise was not registered and the amount was not paid:—*Held,* that the plaintiff's mortgage was subject to the mortgage of 1874 only and not to the arrangement comprised in the compromise. *Quœre*: whether the com-

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Native Christian.

See ACT XV OF 1872 (CHRISTIAN MARRIAGE), 17 M 391

Negotiable Instruments Act (XXVI of 1881).

(1) *S 13—Promissory note—Reference in the note to collateral security, effect of*—An instrument, signed and bearing a one anna stamp, was in the following terms, *viz.* "on deposit of title-deeds named herein below for value received "by me I promise to pay three months after date Rs 160 to A B, or order," then followed the details, of the title-deeds —*Held,* that the instrument was a negotiable instrument RAMACHANDRA v SESHA, 17 M 85 58

(2) *S. 46—Effect of an invalid endorsement of a promissory note by payee —Note recovered by, but not re-indorsed to the payee*—The defendant gave plaintiff a promissory note payable on demand The plaintiff endorsed the note to a third party, a creditor of his, who sued the defendant on the note on his refusal to pay The defendant pleaded that it had been agreed between the payee and himself that the note should not take effect until the payee had performed certain conditions which remained unperformed The suit was accordingly dismissed The plaintiff thereupon paid the endorsee and took back the note, which however, was not re-indorsed, and instituted the present suit against the defendant, who pleaded that the property in the note was not vested in the original plaintiffs so as to enable him to maintain the suit On the decease of the plaintiff before the trial his sons were substituted as plaintiffs —*Held,* that although the property in a promissory note payable to order on demand passes by endorsement and delivery, the endorsement in this case had been declared invalid in the suit referred to and must, therefore, be treated as cancelled, and consequently the property in the note was vested in the plaintiff at the date of the suit so as to enable him to maintain it MARIMUTHU PILLAI v KRISHNASAMI CHETTI, 17 M 197=4 M L J 60 135

New Trial.

See CRIM PRO CODE (ACT X OF 1882), 19 M 375

Non-joinder.

(1) See CIV PRO CODE (ACT XIV OF 1882), 17 M 122

(2) See PARTIES, 18 M 33

Notice.

See ACT I OF 1884 (CITY OF MADRAS, MUNICIPAL), 18 M 503

Notice to Quit.

Assertion of Mulgeni (permanent) tenure—Entitlement to notice—See LANDLORD AND TENANT, 17 M 218

Official Assignee

(1) See INSOLVENCY, 18 M 24

(2) S 7—See INSOLVENCY ACT, 11 AND 12 VIC, CAP 21, 17 M 21

Parties.

(1) Civ Pro Code, ss 43, 244—Hindu Law—Liability of son for father's debts—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of 1877, sch II, arts 120, 122—See CIV PRO CODE (ACT XIV OF 1882), 17 M 122

(2) Civ Pro Code, ss 278, 283—Transfer of Property Act—Act IV of 1882, s 85—Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises—See CIV PRO CODE (ACT XIV OF 1882), 17 M 17

(3) Contract—Executory contract involving personal consideration—Assignment—Contract consisting of distinct contracts with separate parties—Mis-joinder of the parties as defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only—See CONTRACT, 17 M 168

(4) Contract Act—Act IX of 1872, ss 45, 263—Suit by surviving member of a firm alone—Succession Certificate Act—Act VII of 1889, s 4—

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Parties—(*Concluded*).

Suit by surviving partner and heir of deceased partner—See CONTRACT ACT (IX OF 1872), 17 M. 108.

(5) Hindu law—Succession whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian *ad litem*—Code of Civil Procedure—Act XIV of 1882, ss. 13, 244, 312—Powers of a Hindu son to question the alienation of an impartible estate by his father—Limitation—Suit to recover immoveable family property unlawfully alienated during plaintiff's minority—Limitation Act, s. 7, illus (*b*), and sch. II, arts 12, 44, 45, 120 and 144—See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 316.

(6) Letters of administration—Promissory note given to a firm of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters—See LETTERS OF ADMINISTRATION, 17 M. 147.

(7) *Partnership—Suit by one member of an undivided Hindu family—Non-joinder of other persons interested in a family business*—In 1887 the plaintiff appointed the defendant to serve for three years as manager of a business in Moulmein, which was the business of the undivided Hindu family to which the plaintiff belonged. In 1893 the plaintiff, without joining the other members of his family, sued the defendant for damages for breach of the contract of service:—*Held*, (1) that the suit was not maintainable in the absence from the record of the other partners in the business; (2) that under the circumstances, the name of the plaintiff in the cause-title could not be taken as designating his partners also; (3) that by reason of the fact that the amendment might deprive the defendants of the defence of limitation and of the other circumstances in the case, the plaintiff should not be allowed on appeal to amend the plaint by bringing his partners on to the record. ALAGAPPA CHETTI v. VELLIAN CHETTI, 18 M. 33=4 M.L.J. 283 . 373

(8) Suit by the Dharmakarta of a temple to recover possession of temple property—See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 17 M. 143.

(9) See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 157.

(10) See HINDU LAW (ADOPTION), 18 M. 53.

Partnership.

(1) *Advance made by one partner to another in respect of the latter's share of a partnership debt—Whether a suit for contribution lies.*—A and B were partners. A decree was passed against them for the payment of a certain debt, each partner being liable for the whole sum and being bound to indemnify the other against the payment of more than his share. A paid B's share as well as his own and brought a suit against B for contribution. B contended that that A's claim, being in respect of a partnership transaction, ought to be adjusted when the partnership account was settled, and that the suit did not lie:—*Held*, that the advance made by A to B by paying his share was not an advance to the partnership, but to the other partner in respect of what he had to contribute, and that, consequently, A was entitled to contribution from B SUBBARAYUDU v. ADINARAYUDU, 18 M. 134 . 443

(2) *Payment to a partner in fraud of his co-partners not a valid discharge—Constructive notice*—The defendants, other than the first defendant styling themselves the 'agricultural association,' entered into three rental agreements, two of them dated April 23, 1891, and the 3rd dated June 21, 1891 with the plaintiffs and the first defendant for the cultivation of certain lands belonging to an undivided family of which the plaintiffs and first defendant were members and took possession of and cultivated the said lands. On the 17th June 1891 an agreement, of which the second defendant had notice, was entered into between the plaintiffs and first defendant to the effect that the first plaintiff should be the managing member of the family and should be entitled to receive the rent and give receipts for the same. Subsequently disputes

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Partnership—(*Concluded*)

arising between plaintiff and first defendant, the other defendants made payments of rent to first defendant alone —*Held,* that these payments were not a valid discharge as against the claim of the plaintiffs on its being proved that second defendant had notice of the agreement of 17th June and that notice to him must be taken to be notice to his partners, the other defendants By an agreement between the defendants any one partner was empowered to take a lease such lease to be binding on all the partners as if executed by them The leases were not signed by the 13th defendant (now represented by appellants 19, 20 and 21) who was admittedly a partner and took actual part in the management of the affairs of the firm after the leases were executed: —*Held,* that it was intended that the leases should operate as if all the members had executed them and that the representatives of 13th defendant were bound CHINNARAMANUJA AYYANGAR v PADMANABHA PILLAYAN, 19 M 471 . 1033

(3) Suit by one member of an undivided Hindu family—Non-joinder of other persons interested in a family business—See PARTIES, 18 M 33

(4) See CONTRACT ACT (IX OF 1872), 17 M 108

Party-Wall.

See TENANTS-IN-COMMON, 19 M 38

Patta.

(1) *Grant of—Effect of reversal—Appeal to Board of Revenue* —The grant of a patta by a Collector is conditional on the result of an appeal against such grant to the Board of Revenue TIRUMALASAMI AYYANGAR v TIRUMALAI GOUNDAN, 19 M 324 931

(2) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 17 M 1, 50, 54, 140, 18 M 216

Penal Code (Act XLV of 1860).

(1) *Ss* 34, 56, 302—*Murder—Sentence of penal servitude* —Where three prisoners assaulted the deceased and gave him a beating, in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death —*Held,* that in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder The punishment of penal servitude is only applicable to Europeans and Americans. QUEEN-EMPRESS v DUMA BAIDYA, 19 M 483=1 Weir 29 & 298 1042

(2) *Ss* 40, 64—*Towns Nuisances Act* (*Madras*)—*Act* III *of* 1889, *ss* 3, 11—*Imprisonment in default of payment of a fine* —Where a conviction has taken place under Towns Nuisances Act (Madras), 1889, s 3, a Magistrate has jurisdiction to impose a fine and also to pronounce a sentence of imprisonment in default of payment of the fine QUEEN-EMPRESS v RAPPEL, 18 M 490=1 Weir 31=1 Weir 909 692

(3) Ss 99, 147, 353—Abkari Act, ss 31, 36—See ACT I OF 1886 (ABKARI, MADRAS), 19 M. 349

(4) S 109—See CONFESSIONS, 19 M 482.

(5) Ss 188, 290—Public nuisance—Cremation—Disobedience to an order duly promulgated by a public servant—Criminal Procedure, s 143—Illegal order—See CRIM PRO CODE (ACT X OF 1882), 19 M 464.

(6) S. 193—See CRIM PRO CODE (ACT X OF 1882), 19 M 375.

(7) S 224—*Escape from lawful custody* —The accused, having been legally arrested, was subsequently left unguarded and he escaped He was then re-arrested, and was tried and convicted under Indian Penal Code, s 224 —*Held,* that the conviction was right. QUEEN-EMPRESS v MUPPAN, 18 M 401=1 Weir 203 628

(8) *S* 224—*Escape from custody of village officers—Reg* XI *of* 1816, s 5. —On a charge under Penal Code, s 226, it appeared that the accused had been apprehended on a hue and cry being raised as he was running away after committing robbery, and that he was handed over to the village Magistrate and was by him placed in the charge of taliyaries for detention till the next morning when he was to be taken to the police station, and that he escaped from the custody of the taliyaries.—*Held,* distinguishing (5 M. 22), that the accused was right-

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Penal Code (Act XLV of 1860)—(*Concluded*).

ly convicted of the offence charged. QUEEN-EMPRESS v FAKIRA, 17 M. 103=1 Weir 201 .. 71

(9) S. 224—Escape from lawful custody—Salt Act (Madras)—Act IV of 1889, ss. 46, 47—See ACT IV OF 1889 (SALT, MADRAS), 19 M. 310.

(10) *S. 304—Act done with the knowledge that death would be a probable result.*—Where the prisoner by gripping and squeezing the testicles of deceased reduced them to a pulpy condition thereby causing an injury which resulted in death due to the shock so inflicted on the nervous system:—*Held, per Davies, J*, that the death was an unforeseen result for which prisoner could not be held liable, and that she ought to be convicted under s. 323, Penal Code —*Held per Subramania Ayyar* and *Benson, JJ*, that death was a probable consequence of the prisoner's act, and that she was guilty under s. 304, Penal Code, of culpable homicide not amounting to murder. QUEEN-EMPRESS v. KALIYANI, 19 M. 356=1 Weir 313 .. 953

(11) *S. 378, Illus (o)—Theft—Whether a dishonest removal by a wife of her husband's property left in her custody amounts to theft*—There is no presumption of law that a wife and husband constitute one person in India for the purpose of criminal law If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft QUEEN-EMPRESS v. BUTCHI, 17 M 401=1 Weir 409 . 278

(12) *S 448—Criminal trespass—Intent*—Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent. QUEEN-EMPRESS v. RAYAPADAYACHI, 19 M 240=1 Weir 537 .. 872

(13) S. 497—Crim. Pro. Code—Act X of 1882, ss 4, 488—'Adultery.' See CRIM. PRO. CODE (ACT X OF 1882), 17 M 260.

Plaint.

See CIV PRO CODE (ACT XIV OF 1882), 18 M. 338.

Privacy.

Invasion of—Easement—Suit for injunction—See EASEMENT, 18 M. 163.

Probate.

(1) Application for—Limitation Act—Act XV of 1877, sch II, art. 178—Limitation—See LIMITATION ACT (XV OF 1877), 17 M. 379.

(2) *Will—Interest of defendant in testator's estate.*—In a suit brought to obtain probate a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate The fact of being a legatee under the will, or a creditor of the testator, does not amount to such an interest. But proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up. RAHIMTULLAH SAHIB v. RAMA RAU, 17 M 373 .. 259

Procedure.

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 17 M. 54.

Promissory Note.

(1) Contemporaneous collateral agreement consistent with the terms of the promissory note—Suit properly brought under Ch. XXXIX, Civ. Pro Code—See CIV PRO. CODE (ACT XIV OF 1882), 19 M. 368.

(2) *Negotiation—Whether an assignment by the payee of all his property including the note amounts to negotiation in the absence of endorsement*—A promissory note payable to payee or order cannot be negotiated by the mere assignment by the payee of all his property including the note. ABBOY CHETTI v. RAMACHANDRA RAU, 17 M. 461 320

(3) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 17 M. 306.

(4) See CONTRACT, 17 M. 262.

(5) See LETTERS OF ADMINISTRATION, 17 M. 147.

(6) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 17 M. 85, 197.

Public Nuisance.

See CRIM. PRO. CODE (ACT X OF 1882), 19 M. 464.

Railway Companies.

See ACT III OF 1865 (CARRIERS), 17 M. 445.

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Rateable Distribution.

See Civ Pro Code (Act XIV of 1882), 19 M. 72

Receiver.

(1) Appointment of a receiver by a Court under s 503 of the Code of Civil Procedure—Misappropriation by the receiver—Whether subject to the receiver's liability, the creditor or judgment-debtor must bear the loss—See Civ Pro Code (Act XIV of 1882), 17 M 501

(2) Civ Pro Code, s 206—Decree in accordance with judgment—Duration of receivership—Discretion of Court—See Civ Pro Code (Act XIV of 1882), 19 M 120

(3) See Civ Pro Code (Act XIV of 1882), 18 M 23.

Re-entry.

See Building Contract, 19 M 178

Registration.

(1) See Contract, 17 M 275

(2) See Sale, 17 M 146

Registration Act (III of 1877)

(1) S 17—Registration—Transfer of Property Act—Act IV of 1882, ss 4, 107—Contract—Undue influence—Acquiescence by conduct—Lease for one year at a rental of more than Rs 100—See Contract, 17 M 275

(2) S 17, cl (n)—*Suit on Kanom*—Although under the Registration Act III of 1877, s 17, cl (n), a receipt given by a mortgagee purporting to extinguish the mortgage debt does require registration —*Held*, that the language of the receipt in the present case did not indicate any intention to extinguish or limit the mortgagor's interest and that therefore registration was unnecessary Uppalakandi Kunhi Kutti Ali Haji v Kunnam Mithal Kottaparath Abdul Rahaman, 19 M 288 906

(3) *Ss* 17, 18—*Transfer of Property Act—Act* IV *of* 1882, *ss* 8, 54—*Assignment of debts secured on land—Unregistered instrument of assignment*—In 1879 the defendants executed a hypothecation deed, which was registered to secure the repayment with interest of a loan of Rs 87 In 1884 the obligee transferred his rights to the plaintiff in consideration of Rs 70 under an instrument which was not registered At the date of the transfer the debt amounted with interest to Rs 137 The plaintiff now sued to recover Rs 129 being the principal and interest due on the hypothecation bond at the date of suit —*Held*, that the plaintiff was not precluded from proving the instrument of transfer and establishing his rights thereunder to a personal decree and to a charge on the land by reason of its not having been registered Subramaniam v Perumal Reddi, 18 M 454=5 M L J 92. .. 666

(4) Ss 21, 48, 49, 51—*Defective description of property—Deed affecting land registered in book No* 4—*Purchaser for value*—In a suit for land, forming part of the self-acquired property of a deceased Hindu, it appeared that in 1885 his widow and his cousin had (on the death without issue of his son) entered into an agreement whereby the latter relinquished in the widow's favour for consideration all his rights in the self-acquired property left by her husband The agreement was registered in book No 4 under the Registration Act, 1877, and it contained no such description of the property as to satisfy the requirements of s 21 The plaintiff since purchased the land now in question from the cousin, the defendants Nos 1 and 2 having purchased it and obtained possession from the widow —*Held* that the plaintiff was entitled to recover Narasamma v Subbarayudu, 18 M 364 603

(5) S 49—*Suit for damages for breach of contract to execute a lease—Production in evidence of an unregistered kabuliat to prove contract*—Defendant entered into an agreement with the plaintiff to lease a certain property to him The plaintiff delivered the kabuliat to the defendant and was put into possession of the property The defendant did not execute the cowle and did not register the kabuliat, and subsequently improperly deprived the plaintiff of his possession Plaintiff brought a suit for damages for breach of contract:—*Held*, on a question as to

Registration Act (III of 1877)—(*Concluded*)

whether the kabuliat was admissible in evidence having regard to s. 49 of Act III of 1877, since it had not been registered, that, since the plaintiff's action was not founded on an alleged title under a lease granted by the defendant, but was an action for damages for breach of a contract to execute the lease, the kabuliat was admissible in evidence to prove the contract. RAJAH OF VENKATAGIRI v. NARAYANA REDDI, 17 M. 456 (F. B.)=4 M.L J. 198 .. 361

(6) *S. 77—Compulsory registration—Execution of document admitted—Cancellation pleaded.*—On 26th January 1892, the defendant executed a conveyance of certain land to the plaintiff. On 26th May 1892 the plaintiff presented the conveyance for registration, but registration was refused. The plaintiff now sued for a decree directing that the conveyance be registered under Registration Act, 1877, s. 77. The defendant pleaded that the conveyance had been cancelled:—*Held*, (without determining the question of cancellation) that the plaintiff was entitled to the decree prayed for BALAMBAL AMMAL v. ARUNCHALA CHETTI, 18 M. 255 .. 527

(7) S. 77—Limitation Act—Act XV of 1877, s. 7—Suit by infant to enforce registration—Special rule of limitation—See LIMITATION ACT (XV OF 1877), 18 M 99 ..

Regulation XXV of 1802.

S. 8—*Suit for declaration—Madras Act* I *of* 1876, *ss* 2, 6.—An alienee of a portion of a zamindari is entitled to separate registration and assessment under Madras Act I of 1876 A Court has power to order separate registration and assessment under s. 6, although all the parties concerned do not concur in applying within the meaning of s. 2 KAMALAMMAL v. RAJU NAICKER, 19 M. 308=6 M.L J. 179 .. 920

Regulation XXIX of 1802.

S. 7—Zamindari karnam—Order of succession to hereditary office.—A woman, who had been appointed to succeed her husband, the holder of the hereditary office of karnam in a zamindari, died leaving the defendant, her daughter's son, and the plaintiff, the son of her late husband's paternal uncle:—*Held*, that the defendant was entitled to succeed in preference to the plaintiff. SEETARAMAYYA v. VENKATARAZU, 18 M. 420 .. 642

Regulation V of 1804.

(1) See CIV. PRO CODE (ACT XIV OF 1882), 17 M. 316.

(2) S. 17—Powers of Agents to Court of Wards—Contract Act, s 25, cl. 3—Promise to pay a time-barred debt—See CONTRACT ACT (IX OF 1872), 19 M. 255.

Regulation XI of 1816.

See PENAL CODE (ACT XLV OF 1860), 17 M. 103

Regulation VII of 1817.

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 17 M. 212.

Regulation VI of 1831 (Madras).

S. 3—See HEREDITARY OFFICE, 17 M. 302.

Religious Endowment.

(1) Hereditary trustee—Invalid alienation—Limitation—See LIMITATION, 19 M. 243 ..

(2) *Powers of a Christian congregation to elect under which Bishopric the endowment should be placed in spiritual matters—Effect of a concordat placing the endowment within the territorial jurisdiction of a certain Bishop—Suit for partition of the endowment.*—In the year 1806, a fund was started by a caste of Roman Catholic boatmen in Rayapuram for the purpose of supplying the religious wants of the caste, and in 1829 the Church of St. Peter at Rayapuram was erected. The fund was under the control of the Government Marine Board which, in 1830, in consequence of disputes between the headman of the caste, suspended all payments. In 1863, a member of the caste, claiming to be sole surviving headman, brought a suit against Government for a declaration that he was sole surviving headman, and as such entitled to the sole management of the funds then in the hands of Government, which funds the Government paid into Court to the credit of the said suit. By the decree in the suit it was declared that the fund, in question, belonged to the whole

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Religious Endowment—(*Concluded*)

body of Roman Catholic boatmen in Rayapuram, that it must be devoted to the religious observances of the body, and that it rested with that body to determine whether in spiritual matters the Church should continue under the Vicar Apostolic or the Goanese Bishop of Mylapore In 1886 a concordat was executed between the Pope of Rome and the King of Portugal, the effect of which was to place St Peter's Church within the territorial jurisdiction of the Vicar Apostolic Plaintiffs, who were members of the Goanese party, complained that, having regard to the effect of the concordat of 1886, it would be impossible for their party—even if in a majority—to elect a priest of their own party, and prayed for a division of the fund —*Held*, that even if this were so, this fact would not justify the Court in taking away from St Peter's Church part of its endowment CHINNASAMI MUDALI v ADVOCATE-GENERAL, 17 M 406 281

(3) Specific performance of agreement for partition—Alienation of the management of a public charity—illegal—Effect of partial illegality—Civ Pro Code, s 28—See CIV PRO. CODE (ACT XIV OF 1882), 19 M 211

(4) See ACT XX OF 1863 RELIGIOUS ENDOWMENTS, CASES UNDER

(5) See HINDU LAW, RELIGIOUS ENDOWMENTS, CASES UNDER

(6) See MUHAMMADAN LAW—WAKF, 18 M 201

Remand.

See CIV. PRO CODE (ACT XIV OF 1882), 17 M 69, 18 M 94, 421, 19 M 157, 422, 479

Res-judicata.

(1) Decree, construction of—Application for execution by defendant—Previous order as applied for by defendant—Present objection by plaintiff to continued execution on behalf of defendant —See DECREE, 19 M 54

(2) Limitation Act—Act XV of 1877, s 12—Delay in obtaining copies for the purpose of appeal—Champerty—Speculative purchase—Public policy—Contract Act—Act IX of 1872, s 23—See CONTRACT ACT (IX OF 1872), 18 M 374

(3) See BURDEN OF PROOF, 18 M 257

(4) See CIV PRO CODE (ACT XIV OF 1882), 17 M 106, 384, 214, 18 M 13, 189, 482, 164, 257, 466, 19 M 197

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 17 M 96

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See LIMITATION ACT (XV OF 1877), 19 M 100

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See CIV PRO CODE (ACT XIV OF 1882), 18 M 480

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(1) See CIV PRO CODE (ACT XIV OF 1882), 17 M 298

(2) See CRIM PRO CODE (ACT X OF 1882), 18 M 51

Right of Survivorship.

See ATTACHMENT, 17 M 144

Riparian Owners.

Effect of an embankment erected by a superior riparian owner on the cultivation of lands lower down the stream—Cause of action—The defendants, being owners of land on the banks of a jungle stream, raised embankments which prevented their lands from being flooded, but caused the stream to overflow the land of the plaintiff situated lower down the stream. In an action by the plaintiff against the defendants for damages, it appeared that it was not reasonably practicable for the defendants to defend their lands from inundation by any means other than those adopted which would not have caused damage to the plaintiff —*Held*, that no actionable wrong had been committed by the defendants and that the suit was consequently not maintainable GOPAL REDDI v CHENNA REDDI, 18 M 158=4 M L J 244 460

Roman Catholic Church.

Dharmakartas or Headmen of a—Legal powers thereof—The appointment of a committee of headmen or dharmakartas in a Roman Catholic Church by the Bishop to assist the Vicar in the secular affairs of the

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Roman Catholic Shurch—(*Concluded*).
church gives the members of such committee no right to close the church or oust the Vicar, and still less to appoint a priest not under the discipline and obedience to the Church of Rome. MARIAN PILLAI v. BISHOP OF MYLAPORE, 17 M. 447 309

Rule against perpetuities.
See MUHAMMADAN LAW (WAKF), 18 M. 201.

Sale.
(1) *Of immoveable property—Transfer of Property Act—Act* IV *of* 1882, *s* 54—*Effect of registration of sale-deed*—Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. PONNAYYA GOUNDAN v. MUTTU GOUNDAN, 17 M. 146 100
(2) See CIV. PRO CODE (ACT XIV OF 1882), 19 M. 315

Sanction to prosecute.
(1) See CRIM PRO CODE (ACT XIV OF 1882), 18 M. 487.
(2) See LETTERS PATENT, 17 M 105.

Secretary of State in Council.
See COSTS, 17 M. 162.

Shipment.
See CONTRACT ACT (IX OF 1872), 18 M. 63.

Sivaganga Sanad of 1803.
See CIV PRO CODE (ACT XIV OF 1882), 17 M. 384

Small Cause Suit.
(1) See CIV. PRO CODE (ACT XIV OF 1882), 18 M 189
(2) See HIGH COURT, 18 M 236.

Solicitor.
See COSTS, 17 M 257, 162

Specific Performance.
(1) Suit for, of agreement for partition—Alienation of the management of a public charity—Illegal—Effect of partial illegality—Civ. Pro. Code, s. 28.—See CIV. PRO. CODE (ACT XIV OF 1882), 19 M. 211 ..
(2) See CONTRACT ACT (IX OF 1872), 18 M 415.

Specific Relief Act (I of 1877).
(1) *S* 27—*Trusts Act—Act* II *of* 1882, *s* 91—*Purchaser with notice of prior contract to sell*—In a suit for land it appeared that the plaintiff had obtained a registered sale-deed comprising the property in question from defendants Nos 1 and 2 who had already (to the plaintiff's knowledge) contracted to sell it to another, and that the plaintiff had paid no consideration for the sale-deed, which in fact represented a collusive transaction entered into to defeat the prior contract:—*Held,* that the plaintiff was not entitled to recover NAMASIVAYAM PILLI v. NELLAYAPPA PILLAI, 18 M. 43 .. 380
(2) S. 28—Contract Act—Act IX of 1872, s. 11—Contract relating to the property of an infant—Decree for specific performance—Insufficient payment of Court fees, procedure to be adopted on.—See COURT FEES, 18 M. 415 ..
(3) *S.* 42—*Consequential relief—Suit by a member of a tarwad for a decree declaratory of the invalidity of a kanom granted to other members by the karnavan of the tarwad.*—Where a kanom of tarwad property is granted by the karnavan to members of the tarwad and the property in question remains in the possession of the karnavan on behalf of the tarwad, all that is necessary for a junior member to do in order to prevent the possession becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the cause of adverse possession is invalid But if the kanom is granted to a stranger to the family, who is in possession, possession must then be sought for as relief consequent on the declaration. An attornment of tenants to the kanomdars does not operate as a transfer of possession from the tarwad to the kanomdars. PADAMMAH v. THEMANA AMMAH, 17 M. 232 .. 160
(4) S. 42—Hindu Law—An only son given in adoption by his widowed mother—Estoppel—Suit for declaration by remote reversioner—Parties. —See HINDU LAW (ADOPTION), 18 M. 53.

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Specific Relief Act (I of 1877)—(*Concluded*)

(5) S 42—Possession—Civ Pro Code—Act XIV of 1882, s 319—Constructive possession—See CIV PRO CODE (ACT XIV OF 1882), 18 M 405
(6) S 42—Suit for declaration—Act I of 1876 (Madras), s 2—"Concur in applying"—See ACT I OF 1876 (MADRAS LAND REVENUE ASSESSMENT), 19 M 292
(7) S 56—Civ. Pro Code—Act XIV of 1882, s 54—Rejection of plaint already registered—Injunction to restrain proceedings—Multiplicity of proceedings—See CIV PRO CODE (ACT XIV OF 1882), 18 M 338

Spoiled Stamp
See STAMP ACT (I OF 1879), 18 M 235, 122

Stamp.
See COURT FEES ACT (VII OF 1870), 19 M 350

Stamp Act (I of 1879).

(1) S 3, *cl* (11), *sch* I, *art* 54—*Partition-deed—Release*—A Hindu executed in favour of his father, as representing the interests of the other members of his family, an instrument by which he relinquished his rights over the general property of the family in consideration of certain lands being allotted to him for life, and certain debts incurred by him being paid The instrument further provided that the lands allotted to the executant for life should go towards the shares of his sons at any partition effected after his death —*Held*, that the instrument was not a deed of partition, but a release and should be stamped accordingly REFERENCE UNDER STAMP ACT, s 46, 18 M 223 (F B.) 51
(2) S 39—Evidence—Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Whether secondary evidence of a lost document can be admitted on payment of penalty—See ESTOPPEL, 17 M 473
(3) S 51—*Spoiled stamp—Accidental injury to stamp*—The purchaser at a Court-sale presented a stamped paper for the engrossment of the sale certificate The stamp was inadvertently punched by some officer of the Court, but the paper was used as intended and delivered to the purchaser Subsequently a Deputy Collector, treating the certificate as unstamped, levied the stamp duty together with a penalty —*Held*, that the document was duly stamped, and that the amount levied should be refunded REFERENCE UNDER STAMP ACT, S 46, 18 M 235 (F.B) 513
(4) S 51 (*a*)—*Allowance for spoiled stamps—Whether applicable to ordinary use in which a mistake has been made*—S 51 (*a*) of the Stamp Act, which permits an allowance being made for spoiled stamps, applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases of the use of the paper in an ordinary way, in which a mistake has been made NARASIMHA CHARYULU v APPA RAU, 18 M 122 434
(5) *Sch* I, *art* 4—'*Agreement to lease*'—An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment after obtaining a certificate from the Court under s 305 of the Civ Pro Code, is "an agreement to lease," under art 4, sch I of the Stamp Act REFERENCE UNDER STAMP ACT, S 46, 17 M 280 (F.B.)= 4 M.L J 104 19

Statute 52 Geo. III Cap 101, (Sir Samuel Romilly's Act).
See CIV PRO CODE (ACT XIV OF 1882), 17 M 462

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See INSOLVENT ACT, 11 & 12 VIC CAP 21, 17 M 21, 18 M 19, 19 M. 74.

Statute 24 & 25 Vic. Cap. 104.
See HIGH COURT, 18 M 236

Step-in-aid of Execution.
See LIMITATION ACT (XV OF 1877), 17 M 76, 165; 19 M 67

Succession Act (X of 1865).
Ss 246, 261—*Application for letters of administration—Caveator Propounding a will—Effect of withdrawal of previous application for probate of same will without leave to apply again—Civ Pro Code, s* 373.—Where a person applied for probate of a will but withdrew the application before the proceedings became contentious —*Held*, that he was

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Succession Act (X of 1865)—(*Concluded*).

entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased:—*Held*, further, that though the provisions of the Civ. Pro. Code, are applicable to suits under Act X of 1865, s. 261, still in the present case, the application for probate had been withdrawn before the proceedings became contentious and that, therefore, s. 373, Civ. Pro. Code, was not applicable. PAKIAM PILLAI v. INNASI FERNAND, 19 M. 458 1024

Survey Officer.

See ACT XXVIII OF 1860 (BOUNDARY MARKS, MADRAS), 19 M. 416.

Taxation.

See COSTS, 17 M. 162.

Temple Committee.

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 17 M. 212.

Temple Repairs.

'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds—See HINDU LAW (RELIGIOUS ENDOWMENTS), 17 M. 199.

Tenants-in-common.

Party-wall—Erection on the wall by one tenant-in-common—Injunction of suit of other co-tenant.—One of two tenants-in-common of a party-wall raised the height of the wall with a view to building a superstructure on his own tenement The other tenant-in-common, who had not consented to the alteration in the wall, but had suffered no inconvenience therefrom, now sued to enforce the removal of the newly-erected portion:—*Held*, that the plaintiff was entitled to the relief sought. KANAKAYYA v. NARASIMHULU, 19 M. 38 .. 731

Tort.

Injury to property—Contributory act—Test thereof—As in the case of contributory negligence, so an act of one party can only be contributory to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury. MADHAVA RAU v. P. M. FERNANDES, 17 M. 368 .. 255

Transfer of Property Act (IV of 1882).

(1) *Ss. 2, 99—Suit to set aside sale effected by a mortgagee prior to Transfer of Property Act.*—In a suit brought to set aside a sale effected by mortgagee prior to the date when Act IV of 1882 (Transfer of Property Act) came into force:—*Held*, that the Transfer of Property Act (ss. 2, 99) has no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the defendants passed before that Act came into force NARANAPPA v. SAMACHARLU, 19 M. 382 6 M.L.J. 88 .. 972

(2) Ss. 4, 107—Contract—Undue influence—Acquiescence by conduct—Lease for one year at rental of more than Rs. 100—Registration—Registration Act, III of 1877, s. 17—See CONTRACT, 17 M. 275.

(3) S. 5—Simple mortgage—Remedy of mortgage upon default made—Construction of decree—See MORTGAGE (SIMPLE), 19 M. 249

(4) Ss. 8, 54—Registration Act—Act III of 1877, ss. 17, 18—Assignment of debt secured on land—Unregistered instrument of assignment—See REGISTRATION ACT (III OF 1877), 18 M. 454.

(5) S. 43—Subsequently acquired interest of mortgagor—Mortgage—Decree against mortgagor's unascertained shares—Subsequent inheritance by the mortgagors of the share of a co-owner—Property belonging to a Muhammadan woman and her four children mortgaged by her and one of her sons to secure the repayment of a loan—See MORTGAGE (GENERAL), 18 M. 492

(6) S. 52—Hindu Law—Mortgage—Pendency of maintenance suit—'Lis pendens.'—See HINDU LAW (ALIENATION), 19 M. 271.

(7) S. 52—Mortgage—Effect of foreclosure decree passed by a foreign Court—'Lis pendens'—See MORTGAGE (FORECLOSURE), 19 M. 257.

(8) *S. 54—Execution of sale-deed without consideration—Subsequent transfer for value—Priorities.*—In a suit for land, it appeared that in 1887,

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Transfer of Property Act (IV of 1882)—(*Continued*)

A had executed in favour of B a registered conveyance of the land in question, which purported to be a sale-deed, but that no consideration was in fact paid, and that A who had retained possession sold and delivered it to C and D and that they then discharged a mortgage which was to have been paid off by B In the interval between the two transactions above referred to, the plaintiff had purchased the land from B and he now alleged that the persons in possession had executed a rent agreement, in fact found to be a forgery, under the terms of which he claimed to eject them —*Held*, that the plaintiff's claim founded on the transaction of 1887 did not prevail against C and D. SANGU AYYAR v CUMARASAMI MUDALIAR, 18 M 61 393

(9) S 54—Sale of immoveable property—Effect of registration of sale-deed—See SALE, 17 M 146

(10) S 58—See MORTGAGE—(SIMPLE), 19 M 249

(11) *S 59—Instrument unattested by any witness—Evidence Act—Act I of 1872, s 68—Inadmissibility of the instrument in evidence to prove the debt*—A mortgage for more than Rs. 100 which has been prepared and accepted, but which is not attested, is invalid, and it cannot be used in proof of a personal covenant to pay MADRAS DEPOSIT AND BENEFIT SOCIETY, LIMITED v OONNAMALAI AMMAL, 18 M. 29 370

(12) *Ss 67 (a), 68 (a)—Mortgagee's right to sue for mortgage-money and for sale—Usufructuary mortgage—Covenant to repay mortgage money*—The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband It contained a covenant to pay the mortgage money in Chittrai Kalavadi of the year 1883 This covenant was followed by these words "If I fail to pay the mortgage "amount in the said Kalavadi, then you shall receive the said mortgage "amount in the Chittrai Kalavadi of whatever year I may pay it, "deliver the said lands to my possession having cleared off the arrears "of Government revenue, and also give back the bond" The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property —*Held*, by a Full Bench, that the bond contained a covenant to pay, and that, therefore, the suit was maintainable SIVAKAMI AMMAL v GOPALA SAVUNDRAM AYYAN, 17 M. 131 (F. B.)=4 M L.J 50 90

(13) *S 68 (c)—Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct*—Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under s 68 of the Transfer of Property Act, instead of for possession of the land LINGA REDDI v SAMA RAU, 17 M. 469—4 M L.J. 143 325

(14) *S 72—Mortgagee and mortgagor—Right of mortgagee in possession to execute repairs.*—Transfer of Property Act, s. 72 (*b*), does not permit a mortgagee in possession to effect improvements Consequently in a suit for redemption the costs of such improvements cannot be legally charged against the mortgagor seeking to redeem ARUNACHELLA CHETTI v SITHAYI AMMAL, 19 M 327 933

(15) *S 74—Redemption of prior mortgage—Extinguishment of prior mortgage—Title by possession—Limitation*—The trustees of a religious institution improperly mortgaged land forming part of its endowments, and put the mortgagee into possession on 27th June 1877 as usufructuary mortgagee. The mortgagee assigned his mortgage to defendant No. 1 on 7th December 1882 On 23rd December 1889 the mortgagors executed to the plaintiff a deed of usufructuary mortgage of the same land to secure Rs 1,400, the deed stated that the money was borrowed with a view to discharge a prior mortgage and proceeded "as you have undertaken to pay Rs 1,000 to the mortgagee, I credit you with Rs. 1,000 "and receive Rs. 402 in cash." The plaintiff paid off the prior mortgage on 18th April 1890, but did not obtain possession, other persons having entered in the interests of the institution The plaintiff now sued

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Transfer of Property Act (IV of 1882)—(*Continued*).

for possession and a declaration of his mortgage right, the persons in possession and the prior mortgagee, but not the mortgagors were joined as defendants:—*Held,* that Transfer of Property Act, s. 74, was not applicable to the case, and that the plaintiff was not entitled to a decree. KOOPMIA SAHIB v. CHIDAMBARAM CHETTI, 17 M. 105=1 Weir 786 .. 72

(16) *S.* 83—*Deposit in Court by mortgagor—Full and unconditional tender.*—The fact that a certain sum of mony tendered under s. 83 of the Transfer of Property Act, and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount and that the tender is accompained by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds does not render conditional and therefore invalid. KORA NAYAR v. RAMAPPA, 17 M. 267 .. 183

(17) S. 85—Non-joinder of puisne-mortgagee in a mortgage suit—Civ. Pro. Code—Act XIV of 1882, ss. 278, 283—Mortgage decree—Claim in execution to mortgage premises. See CIV. PRO. CODE (ACT XIV OF 1882), 17 M. 17.

(18) *Ss.* 87, 89, 92, 93.—A mortgagor who has made default in payment of the mortgage money within the time limited by the decree in a suit for redemption, is not entitled to apply for execution of the decree after the time limited. VALLABHA VALIYA RAJAH v. VEDAPURATTI, 19 M. 40 (F. B.)=5 M.L.J. 282 .. 733

(19) S. 88—Mortgage—Interest 'post diem'—Interest Act—Act XXXII of 1839. See ACT XXXII OF 1839 (INTEREST), 18 M. 248

(20) S. 88—See INTEREST, 18 M. 248.

(21) S. 91—Right to redeem—Civ Pro. Code, ss. 32, 559, 587—Addition of parties on appeal—See CIV. PRO. CODE (ACT XIV OF 1882), 19 M 151.

(22) *Ss.* 92, 93—*Decree for redemption—Mortgagor's failure to pay amount due within period fixed—Subsequent suit, no order under s 93 having been made*—Res judicata —A decree under s. 92 of the Transfer of Property Act becomes a final decree on the expiry of the time limited thereby, although no order is passed under s. 93; accordingly, no subsequent suit for redemption can be maintained. RAMASAMI v. SAMI, 17 M. 96=4 M L.J. 28 .. 66

(23) *Ss* 108, *sub-s.* (*e*), 117—*Agricultural lease—Lease of a coffee garden—Destruction of plants by fire—Voidability of lease*—The plaintiff was the assignee of the right and title of the lessor and the defendant was the lessee of a coffee garden under an instrument which was held to constitute a lease of the coffee plants only. In a suit to recover the annual payment reserved under the lease, it appeared that the coffee plants had been destroyd by fire and the garden had been consequently abandoned by the defendant before the period to which the claim related—*Held,* that the plaintiff was not entitled to recover. *Per cur*—We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of the Transfer of Property Act, s 117. KUNHAYEN HAJI v. MAYAN, 17 M. 98=4 M.L.J. 21 .. 68

(24) *S* 108, *cl.* (*j*)—*Lessor's right to sue both lessee and his transferee*—The provision in s. 108 of the Transfer of Property Act that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and that the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, does not prevent the transferee being also liable to the lessor, who may at the same time sue the lessee upon his express covenant and the transferee upon the privity of estate, though he can have execution against one only. KUNHANUJAN v. ANJELU, 17 M. 296 .. 205

(25) S. 114—Presidency Small Cause Courts Act—Act XV of 1882, ss. 22, 41.—See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 17 M. 216.

(26) *S.* 123—*Registered gift of land—Natural love and affection—Donor retracts consent prior to registration—Compulsory registration—Effect of.*—Where a donor made a gift of land to the plaintiff, but prior to registration retracted his consent, upon which the District Registrar